he had the sole power of the land, and the whole commodities thereof, during that space; and it was not well compatible to seek the full profits of the lands, as he had done, by recovering of sentences therefor, and also to seek the feu to be annulled, for not payment of the feu-duties; which feu-duties the rebel could not pay, being excluded from the lands by the donatar's right, and which were so in effect, rather liable to be paid by the donatar's self, who either might recover possession of the lands by law, or if the rebel did possess, might comprise the property therefor; and therefore the LORDS found, That the donatar could not in law seek any such action of nullity, for *ubi datur et competit ordinarium remedium ex jure* as here, *non recurritur ad extraordinarium.* No 14.

Act. *Advocatus et Nicolson.* Alt. *Stuart et Craig.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 254. *Durie, p.* 700.

1634. *March* 22. OCHILTREE *against* MILLER.

A DONATAR to a bastard's gift of single escheat, pursuing for payment of a sum owing to the bastard by heritable bond; the LORDS found this heritable bond fell under the gift of single escheat, and that it needed not to be conferred by presentation, there being no sasine, nor by no other manner of gift. *Item*, a bond of L. 100 subscribed by one notary only, was sustained, because it exceeded not that sum; and the LORDS interpreted matters of importance, which require two notaries, to exceed that sum, and not those which extend thereto, and no more.

No 15.
An heritable bond, on which infeftment has not followed, falls under single escheat.

Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 253. *Durie, p.* 717.

1663. *February* 4. LAIRD PHILLORTH *against* LORD FRAZER.

SIR ALEXANDER FRAZER of Phillorth being in distress for debt, disponed his barony of Cairnbuilg to Robert Frazer of Doors; which lands of Cairnbuilg lye near to Phillorth, and the house thereof was his residence. In the alienation there is a clause conceived to this effect, that it shall not be leisom to the said Robert Frazer of Doors, to alienate the lands during the lifetime of the said Sir Alexander Frazer; and if the said Robert Frazer did in the contrary, he obliged him to pay to the said Sir Alexander the sum L. 10,000 for damage and interest, *ex pacto convento*, and if the said Robert should have ado to sell the said lands after the death of the said Sir Alexander, he obliged him to make offer thereof to the heirs and assignees of the said Sir Alexander, or any person he pleased nominate of the name of Frazer, for L. 38,000. The said Robert Frazer of Doors disponed the said lands to Stanywood, during the life of Sir Alexander

No 16.
Single escheat found to reach a sum due as the liquidation of an obligation not to alienate lands; which sum was found moveable *quoad fiscum.*

No 16. Frazer. Sir Alexander assigned the contract and the foresaid clause to this Phillorth, whereupon he raised improbation and reduction of the disposition granted by Doors to Stanywood, the Lord Frazer's grand-father, upon this reason, That he, as assignee by his father to the clause *de non alienando*, had good interest to pursue reduction of the disposition contravening the said clause; and true it is that the said disposition granted by Doors to Stanywood was null, as proceeding a *non habente potestatem*, in so far as by the foresaid clause in the said alienation granted by his grand-father to Doors, it was expressly provided it should not be leisom for Doors to sell, &c.; which being a provision in the disposition, repeated at the least generally in the procuratory of resignation, is *pactum reale*, effectual against singular successors, as was found in the case of Stormont, *voce* TAILZIE, and so must annul the right made contrary thereto; 2*dly*, Albeit it were not a real paction, yet unquestionably the obligement not to annalzie, did personally oblige Doors, and thereupon there was an inhibition raised, before my Lord Frazer's grand-father Stanywood's right; and therefore the disposition made thereafter ought to be reduced, *ex capite inhibitionis*.—It was *answered* for the Lord Frazer, to the first member of the reason, *non relevat;* for such an obligation, *de non alienando*, is reprobate in law, as being contrary to the nature of property; 2*dly*, It is not *reale pactum*, albeit it were in the charter or sasine, much less being only in the disposition, and in the narrative of the procuratory of resignation thus, 'and to the effect the said Robert Frazer may be infeft, upon 'the provisions and conditions in manner foresaid,' but no further mention thereof in the procuratory of resignation or infeftment, and so meets not with Stormont's case, where the clause was expressly resolutive, that in such case the right should be null, *ipso facto*, and return to the next person who might be heir of tailzie; which clause was not only in the disposition, but in the procuratory, charter, and sasine registrate, and thereby equivalent to a publication of an interdiction; but here there is no resolutive or irritant clause, nor any right reserved to return in case of contravening, nor is it in the infeftment at all: As to the *second*, the inhibition cannot make the clause effectual to annul the alienation, because Doors was not simply obliged not to alienate during Sir Alexander's life, but if he did in the contrary, to pay L. 10,000 for damage and interest, *ex pacto convento*, which cannot be understood of damage by delay or expense in attaining the principal obligation, seeing it bears not as in ordinary 'by and attour performance;' and the quantity thereof being so great, it must be evidently understood of the value of the principal obligation; so that it becomes an alternative or restrictive clause, whereby it was in Door's option whether to forbear to sell, or to pay the L. 10,000 if he did sell; so that the inhibition can reach no further than the L. 10,000, seeing Doors by selling, became obliged for the L. 10,000.

THE LORDS found the defence relevant, and that the clause or inhibition could extend to no further than L. 10,000.

It was further *alleged* for Frazer, absolvitor from the L. 10,000, because it being a moveable sum, fell under Sir Alexander Frazer's escheat, which was gifted to one Forbes, and declared expressly as to this L. 10,000, and assigned to the Lord Frazer.—The pursuer *answered*, That this sum was heritable, because it succeeded in the place of the principal obligation, not to alienate for such a time; and after that time, to offer the lands to Phillorth and his heirs, for L. 8000, which is clearly an heritable clause; and therefore this sum coming in lieu thereof, must belong to the heir or assignee, and so fell not to the fisk, seeing *surrogatum sapit naturam surrogati*, as sums consigned for redemption of lands before declarator are not moveable, but belong to the wadsetter's heirs or assignees; so in mutual obligations, whereby one person obliges to dispone or resign lands, and another is obliged for a price, the price would not belong to the executor or fisk, but to the heir; any sums due for damage and interest, not performing a disposition, or upon eviction, belong to the heir, not to the executor.—The defender *answered*, That this sum is not in the case of any of the former allegeances, neither is the question here, what would belong to the executor, but what would belong to the fisk; for moveable heirship belongs to the heir and not to the executor, and yet belongs to the fisk; so do sums without destination of annualrents, wherein executors are secluded; so also doth the price of lands when they are *de presenti* sold by the defunct.

No 16.

THE LORDS found this sum moveable and belonged to the fisk, and therefore assoilzied the defender from that member also.

Stair, *v.* 1. *p.* 169.

1666. *July* 31. GRAY *against* GORDON.

No 17.

A BOND being granted to Sir Robert Farquhar, and bearing the term of payment to be diverse years after the date of the same, and annualrent to be paid in the interim, termly and yearly, was found to be heritable *quoad fiscum*, though Sir Robert Farquhar had deceased before the term of payment of annualrent; and the assignee was preferred to a donatar.

Dirleton, *No* 39. *p.* 16.

1668. *June* 26. DAVID DICK *against* KER.

No 18.
Bonds bearing annualrent are moveable before the term of payment of annualrent, and fall under single escheat.

DAVID DICK, as donatar to the escheat of ——— Ker, insists in a special declarator for payment of a sum due to the rebel.—The defender *alleged* absolvitor, because it being a bond, bearing annualrent, it fell not under the single escheat.—It was *replied*, That bonds bearing annualrent are still holden moveable until the first term of payment of annualrent, and are disposeable by testament, if the defunct die before that term; but here the rebellion was before the date of the bond, and so the sum fell to the fisk the day it was subscribed.