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ought to work against the defender, as it would have done against himself. And here it was questioned, if the whole sum would pertain to this pursuer, the sole executor surviving, the other not having executed before his decease, seeing it was alleged by this executor, that there needed no more execution thereof, he being executor, and also debtor, whereby it was in his own hands, and so the debt confounded for the equal half, as executor; but the pursuer insisted only for the one equal half thereof, and no further.

Clerk, *Gibson*.

Durie, p. 564.

1676. *February* 18. WAUCH *against* JAMIESON.

No 86.

A party having granted bond for a sum, part of which related to a back-bond granted in consequence of an heritable right, only *that* part of the sum which related to the back-bond was found to go to heirs; the residue to executors.

UMQUHILE DR BONAR being to go out of the country, granted a disposition of his lands, and an assignation to certain bonds, in favour of Mr John Smith, who granted back-bond, bearing, 'That the said disposition and assignation was in 'security of the sum of 2400 merks then due to him by the Doctor, and for 'relief of cautionry, and partly in trust to the Doctor's behoof, and therefore 'obliged himself to denude, he being paid of the said sum of 2400 merks, 'and other sums due to him, for which he was engaged, or which should be 'borrowed from him, or be engaged for.' Long thereafter, there is a bond of 5000 merks granted by the Doctor to the said Mr John, bearing annualrent, payable to heirs and executors in common form. There is now a competition betwixt Dr Jamieson, heir to Mr John Smith, and Thomas Waugh, as having right to a legacy left by him, by which he legates the said sum due to him upon the lands.—It was *alleged* for the heir, That this sum could not be legated nor fall under executry, because it was secured by infeftment, viz. by the disposition granted by the Doctor, to which disposition his heirs only can have right, and will not be obliged to denude himself till the condition of the back-bond be fulfilled, by payment of this sum to him, though contracted after the disposition.—It was *answered*, That a security in land or annualrent doth not make all that is secured thereby belong to their heirs, but that the same may belong to executors, who may have the benefit of the heritable right, as is clear in the case of infeftment of annualrent, the bygones whereof belong to executors, for which they have real action for poinding of the ground upon the infeftment; and likewise it is frequent in wadsets to adjust qualifications and provisions to the reversion, that there shall be no redemption till all sums that shall be thereafter due to the wadsetter be paid, and till the principal sum of the wadset, and all bygones be consigned. And it was never controverted, but that the annualrent belonged to the executors, who might make use of the real right to seclude any other; and though the reversion were qualified, that such moveables should be delivered before redemption, it would not change their na-

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ture, or make them heritable; and therefore, though such provisions hinder redemption till they be performed, it follows not that they must be performed to the heir, but to the heir or the executor, as they represent the contractor in the several rights heritable and moveable; and the rise of sums becoming heritable, contrary to their nature, is by the designation and mind of the proprietor to make them *jura fixa*, to belong to his heir; and therefore, when he takes an heritable security upon lands, if the lands or an annualrent be disponed to him for these sums by the way of alienation with a reversion, the sums are the price, and the land is the *merx*, which are interchanged; and there can be no pursuit for recovery of the sums, unless there be a clause of requisition, providing, that if the creditors rather chuse to have their money than retain the land, the debtor is obliged to pay the same, either upon a simple charge, or requisition on 40 days, which being used, the heritable right for the time is past from, yet so that the creditor, at any time, and in any way, passing from his requisition or charge, returns to his heritable right; and now it is frequent to adject an express provision, 'That a charge or requisition shall not import the losing of the 'infeftment, but that the creditor may make use of either, or both;' in which case, albeit the requisition make the sum moveable, because thereby the creditor showeth his purpose not to leave the money fixed to his heir, but to recover it in *specie*, by which it will be moveable, it will belong to his executor, who may make use of the infeftment as *accessorie*; and on the other part, though there be no infeftment, but only an obligement to infeft, the destination of the creditor to fix the sum by infeftment makes it heritable; so that there is a great difference between sums which are in the dispositive clause of lands or annualrents, and those which are but in the clause of reversion, as qualifications thereof impeding redemption till they be paid. The first are heritable, as being destinated to be fixed for the heir, the other remain moveable; and there is nothing intended but that they should be secure, and therefore must be paid to the executor before redemption; and if it were otherwise found, the natural interests of wives and children would be exceedingly prejudged, such general provisions being most ordinary.

THE LORDS found, That the back-bond was alike as if it had been in a contract with the disposition, and that the lands had been disponed in security of the 2400 merks, or other sums then actually due, or engaged for the disponer, and found the same to be heritable; but found, that the sums to be contracted or engaged for thereafter, were not the causes of the disposition, but provisions in the clause to denude; and therefore found, that this posterior bond being of its own nature moveable, did belong to the executor or legatar, and not to the heir, but in so far only as it was granted for the said sum of 2400 merks, or other sums due by, or engaged for the disponer at the time of the disposition; but that the remainder and whole annualrents did belong to the executor.

Fol. Dic. v. 1. p. 371. Stair, v. 2. p. 417.

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*** Dirleton in his report of this case, No 21. p. 5453. says, the LORDS came to the following resolutions, 1*mo*, That it was consistent that a sum should be moveable, and yet that it should be heritably secured, as in the case of bygone annualrents due upon infeftment of annualrents, bygone feu-duties, for which real action is competent even to executors, wadsets loosed by requisition, &c.; 2*do*, That as to these qualities of moveable or heritable, in relation to succession, the *animus* of the creditor was principally to be considered; so that if an heritable security were afterwards taken for a debt moveable *ab initio*, it is presumed the creditor intended that the sum should belong to his heirs; *secus*, if his intention appeared to be otherwise, *v. g.* if a debtor should dispone his estate in favour of a confident person, with the burden of his debts; 3*tio*, Bonds being taken after a general security, in the terms aforesaid, for debts to be advanced, may be moveable, notwithstanding such security, if it appear that the creditor intended it should be such; *v. g.* if the supervenient bond should be taken to executors, secluding heirs, &c.

1683. *March* 6. ROLLOCK *against* GRANT.

No 87.
A moveable bond, though eiked to a reversion of wadset, but not registered in the register of reversions, was found to belong to the executor.

ROLLOCK, as executor to ————, having pursued for payment of a sum due by Grant to the defunct, which bond was an ordinary bond, payable at a term, and bore this provision, That it should not be lawful to the granter, the debtor, to redeem a wadset which he had formerly granted for another sum, unless he made payment of this sum likewise, which is declared to be eiked to the reversion; it was *alleged*, That this sum, although conceived in terms of a moveable bond, yet bearing to have been eiked to the reversion of a wadset, was heritable as the sums upon wadset.—It was *answered*, That the said bond was moveable, payable at a certain term; and the same not being registrated in the register of reversions, the nature of the bond was not altered.——THE LORDS found the foresaid bond, albeit containing an eik in the terms foresaid, remained moveable, and belonged to the executor, in regard it is none of the species of heritable bonds contained in the act 1661, cap. 32. as not secluding executors, nor bearing a clause of infeftment.

Fol. Dic. v. 1. *p.* 371. *P. Falconer, No* 55. *p.* 36.