

1683. *January 17.* BANNANTYNE *against* JAMES BONNAR's Relict.

No 128.

FOUND, that bonds secluding executors are not rendered moveable by a charge of horning, as bonds heritable by a clause to infest are. *2do*, That an heritable bond, whereupon comprising and infestment had followed, was not made moveable by a posterior moveable bond of corroboration. *3tio*, That an arrestment, and a summons to make furthcoming, did not take off the heritable quality of a clause excluding executors, which might be conceived for the security of the heir, and is only taken off by innovating the security, without excluding executors, or uplifting the sum and extinguishing the security; although it might be *pleaded*, That such a process would make a bond, containing an obligation to infest, moveable. Here it was reasoned among the Lords, but not voted, if a summons for payment was equivalent, *quoad* the effect of making moveable, to a charge of horning, *ratio dubitandi*, though a citation doth as effectually signify the creditor's desire to have his money as a charge of horning doth, yet the one proceeds upon a decret, and the other passes without any decret.

Harcarse, (EXECUTRY.) No 447. p. 123.

1683. *January 17.* WISHART *against* EARL of NORTHESK.

No 129.

FOUND that registration of a bond secluding executors, and a charge given upon it, did not make it moveable.

This interlocutor was afterwards (1st March 1683) altered, and the sum found to belong to the executors. *Fol. Dic. v. 1. p. 374. P. Falconer.*

. See this case No 109. p. 5552.

1687. *February.* YEAMAN *against* YEAMAN.

No 130.

FOUND that registration of a bond secluding executors in order to charge, did not make it moveable.

Fol. Dic. v. 1. p. 374. Harcarse.

. See this case No 54. p. 5484.

1705. *July 24.*

Mr JAMES GRAY of Balgony *against* HENRY PANTON of Hilton.

No 131.

A BOND of 8000 merks, payable to John Urquhart, he being on life, and failing of him by decease, to Thomas Menzies of Balgony his heirs and assignees, with a clause, 'That the sums should be employed upon heritable security in favours of Thomas, his heirs and assignees, (without mentioning executors)

An heritable bond was granted without a precept of sasine; yet there was a

No 131.
 clause bearing, 'the sum to be declared heritable, and no ways moveable, in any time coming.' A charge of horning was given on the bond, which *in audio* renders heritable sums moveable, yet the Lords found the bond in question continued heritable.

' and declaring the same to be heritable, and no ways moveable, thereafter,' was assigned by John Urquhart and Thomas Menzies to his brother Alexander Menzies, his heirs and assignees; who, after he had raised horning upon the bond, and charged for payment, transferred the same upon death-bed in favours of Margaret Gordon, relict of Thomas Menzies, for the behoof of their younger children, excluding the heir. Of which disposition and translation Mr James Gray of Balgony, as heir to Alexander Menzies, having raised reduction *ex capite lecti*, against Henry Panton of Hilton and his creditors, it was *alleged* for the defenders, They ought to be assoilzied from the reason of reduction, because the bond had been rendered moveable by a charge before the translation.

Answered for the pursuer; The bond assigned is of the nature of a bond secluding executors, which is not rendered moveable by a charge.

Replied, The heritable destination in the bond in favours of the heirs of Thomas Menzies, can put them in no better case than if the money had been actually employed upon heritable security, and the destination executed. But so it is, in that case, a charge, even at the instance of Thomas, would have made it simply moveable, and much rather should a charge at the instance of Alexander, the assignee, have that effect; seeing the assignation is not affected with the special destination in the bond assigned. *2dly*, A charge upon a bond, corroborating a bond heritable by infestment, which bore expressly to be granted without derogation to the bond corroborated, made the sum moveable, Executors *contra* The Heirs of Robert Seton, No 125. p. 5573. And a charge (as my Lord Newton observes, March 1. 1683, No 109. p. 5552.) was found to have the like effect upon a bond excluding executors.

Duplied, The pursuer acknowledges, that sums heritably secured may be rendered moveable by a charge of horning; but here the sum is declared to be heritable, and that it shall be no ways moveable in all time thereafter, which is more than either a simple heritable destination, or an actual implement of it; and upon the matter a seclusion of executors, against which no charge of horning or requisition doth operate. As to the decision observed by the Lord Newton, finding a charge upon a bond secluding executors to make it moveable, that was the first and the last time the Lords ever so decided, *et una hirundo non facit ver*; for the decisions since have run in a contrary strain; particularly in the year 1692, it was found, that a charge upon a bond secluding executors did not render it moveable.* And Sir George Mackenzie, in his Institutions, holds it as a principle, that a charge upon such a bond makes not the sum moveable; for, that the creditor is presumed to continue his design in favours of the heir. *2dly*, It is altogether frivolous to say, That Thomas did alter the destination by assigning the bond to Alexander Menzies; because an heritable right assigned remains as heritable in the person of the assignee, as it was with the cedent; even though the assignation bear to heirs, executors, or assignees. For the mention of heirs and executors imports only, that the right is conveyed to the assignee, and falling of him, to any of his representatives that may

* See APPENDIX.

have right according to the nature of the subject conveyed. It doth not alter the case, that the charge of horning was at the instance of Alexander, whose assignation doth not express the speciality in the bond assigned; since the assignation gives the assignee no more power than just what the cedent had.

THE LORDS found the charge of horning did not render the bond moveable, in respect, by the conception of it, the sums were destined to be heritable, and not moveable, thereafter.

Fol. Dic. v. 1. p. 374. Forbes, p. 30.

* * * Fountainhall reports the same case :

THE MARQUIS of Huntly, in 1624, grants an heritable bond for 8000 merks to John Urquhart; and failing him, to Menzies of Balgony: And the said Menzies having disposed it to his younger children, to the exclusion of his heir; and Gray being come in the heir's place, raises a reduction of that disposition, as made on death-bed to the prejudice of the heir, being an heritable sum. *Alleged*, The same was made moveable by a charge of horning or requisition, and so might very well be conveyed *in lecto*, especially seeing it was made payable to his heirs, executors, and assignees; and heritable bonds, whereon infestment has followed, are rendered moveable by a charge of horning; and much more this bond, whereon no infestment actually followed. *Answered*, Bonds secluding executors, though bearing no clause for infestment, fall to the heir, though horning be used on them, and are still reputed heritable; even as a wife clad with a husband, charging for a sum bearing annualrent, does not make the principal sum moveable, so as to fall under her husband's *jus mariti*; and the reason of both is the intention of parties, being the only rule whereby to know whether they would have the sum belong to their heirs or executors. Here it seems clear, that it is not his mind to keep it in his hand as a moveable, but to make it a fixed right to his heir; especially seeing this bond is before the act of Parliament 1641, when, by the law then standing, all bonds bearing annualrent were heritable and fell to the heir. See Stair's Institut. lib. 2. tit. 1.; and Durie, 19th January 1637, Robertsons, No 58. p. 5489.—THE LORDS adverted to a clause in this bond, bearing the sum to be declared heritable, and nowise moveable, in any time coming; and thought this equivalent in law to the clause secluding executors; and therefore found the charge of horning did not render it moveable. Others thought this could not amount to that force, seeing an heritable bond, though perfected by infestment, may be rendered moveable by a charge of horning.

President Newton, in his decisions, 1st March 1683, Wishart, No 109. p. 5552. shews, that the Lords receded from that practice, finding a bond bearing a clause secluding executors, heritable after a charge of horning. But Stair, B. 2. T. 1. § 4. observes, that, on the 30th Dec. 1690, between Bonar and Gray*, the Lords returned to their former tract of decisions, and adhered thereto.

Fountainhall, v. 2. p. 286.

* Examine General List of Names.