1765. *February* 27. CORRIE *against* MR JAMES PHILP.

No 10.
Although a bond of provision by a father to his daughter did not fall due till after her husband's death, it was found to have been subject to the *jus mariti*, *quia dies cesserat licet nondum venisset*.

IN 1749, Mr John Philp executed a bond of provision to his daughter Margaret, for 12,000 merks.

The bond was made payable at the first term of Whitsunday or Martinmas after his death, with interest from the term preceding. And it contained a clause, 'That, if she die before she be married, she shall have right only to 'dispose of 5000 merks of the provision above mentioned, by testament or 'otherwise; but, if she be married, to have power to dispose of the whole to 'her husband, her heirs, executors, or assignees.'

By an after explanatory deed, Mr Philp declares, 'That it shall be in the 'power of his said daughter, if she die unmarried, to dispose of, and convey, 'to any person she shall think proper, for any cause, onerous or gratuitous, the 'said sum of 5000 merks.'

In 1754, Margaret Philp, married Joseph Corrie town-clerk of Dumfries, without consent of her relations, or contract of marriage.

Mr Philp, who had been struck with a palsy in 1751, died 20th December 1760. Joseph Corrie died bankrupt, in February 1761, leaving two children.

Margaret survived her husband for two years, and was supported by Mr James Philp her brother; against whom an action was brought by the trustee for Joseph Corrie's creditors, for payment of the bond of provision.

Pleaded in defence, 1*mo*; The husband having died before the term of payment, the bond could not vest in him, *jure mariti*. Had Margaret herself predeceased that term, the bond would have become ineffectual; while, therefore, her husband lived, she had but a *spes successionis*; and conditional rights fall not under the *jus mariti*, unless the condition be purified, during the subsistence of the marriage. So it was expressly found 7th Feb. 1693, and 18th Dec. 1694, Fotheringham *contra* Earl of Home, No 3. p. 5764; and Lord Bankton gives his opinion to the same purpose, I. 5. 87.

It may be true, that Margaret might have assigned the bond to her husband; but many subjects may be assigned, which are not carried by the operation of law; as bonds secluding executors, rents of lands which may become due after the dissolution of the marriage, or a future succession.

2*do*, As the bond, though not payable till Whitsunday 1761, the term after the father's death, bore interest from the Martinmas preceding, it was heritable, *quoad fiscum et relictam*, and could not fall under the *jus mariti*. And, in support of this position, the defender referred to several decisions, as Henderson's Bairns *contra* Murray, No 68. p. 5502.; Lindsay *contra* Town of Edinburgh, No 123. p. 5569.; and Gray *contra* Gordon, No 17. p. 3629.

It was *argued*, That as bonds bearing annualrent had come in place of rights of annualrent, those *feoda pecuniæ* introduced from the prohibition of interest

of the canon law, so all such bonds were originally considered as heritable, and they are still considered in that light, as to the interests of husband and wife, in consequence of the exception in the act 1661. A distinction has indeed been made in this respect, before and after the term of payment; but, whether the term of payment of the 'principal,' or of the 'interest,' be the criterion, has been variously decided, as may be seen in the cases observed in the Dict. of Decis., *voce* HERITABLE AND MOVEABLE, Sec. 12. and in several other cases. No 10.

But the bond now in question is of a peculiar nature; as, upon the existence of the condition, it draws back to the term preceding the father's death, from which period, it was a *sors* bearing interest, and therefore heritable.

3*tio*, Supposing the sum in the bond should not be found heritable, the defender must be entitled to retain the expense laid out by him in maintaining Margaret, after her husband's death; for, had she been still alive, she would have been allowed retention, in security of her legal provisions.

To prove that Margaret herself would have been entitled to retain, reference was made to the decisions upon that point, observed in the Dictionary, *voce* MUTUAL CONTRACT; and it was *argued*, that the protection of the Court could not be limited to those who had entered into marriage-contracts; but ought, *a fortiori*, to be extended to such improvident women, as having married unadvisedly, and without the concurrence of their relations, were so much more the objects of compassion.

The opinion of Lord Bankton, I. 5. 89. was appealed to, as express upon that subject; also, a decision 10th November 1687, Creditors of Ogilvy *contra* Scot, Div. 3. Sec. 2. *h. t.* with sundry English reports, as 1. Peer Williams, 382, Jacobson v. Williams; 2. Vernon 494, Lady Oxenden's case; 2. Vernon 626, Lupton *et ux. versus* Tempest; 3. Peer Williams 202, Brown *et ux. versus* Ellon.

Answered to the 1*st*; As Margaret survived her father, the bond was fully vested in her, and consequently fell to her husband *jure mariti*. And it made no difference, that it was not payable till the term after the father's death; *dies cessit, licet nondum venerit.*

The authorities therefore are misapplied; they relate to conditional obligations; but, though *dies incertus* habetur pro conditione, it is not so *in die certo*, which only delays the fulfilment, but does not suspend the constitution of the obligation.

To the 2*d*; It has always been understood to be the law of Scotland, that bonds bearing annualrent are moveable before the term of payment.

This appears from the narrative of the act 1641, c. 57. Lord Stair, II. 1. 4. and Sir George M'Kenzie, II. 2. § pen. lay down the doctrine in express terms; and it has been adopted in the decisions of the Court, as Douglas *contra* Macmichael, No 72. p. 5504.; Dick *contra* Ker, No 18. p. 3629.; and Craig *contra* Executors of Craig, No 76. p. 5506.

No 10.

These authorities afford a sufficient answer to the defender's plea; and the principle upon which the rule is founded is well known. Nor is there any thing peculiar in the present case. Every bond carries interest from the period advancing the money, unless there be some special clause to the contrary; and it makes no difference, that here the interest run from the term before the father's death, still no interest was payable till the following term; and, at any rate, it is not the term of payment of the interest, but of the principal, that is considered.

To the *3d;* The decisions referred to, were all given in the case where a marriage-contract had intervened; but, when a woman marries without a contract, she betakes herself to the legal provisions, which she can only claim out of the free effects of her husband, after his debts are paid; and the same thing applies to the claim of retention for her aliment.

The case of Ogilvy *contra* Scot was of a very singular nature, and Lord Harcarse, who collects it, *voce* CONTRACTS OF MARRIAGE, seems to think, that the doctrine can only apply to the case where the father is the party contractor. *See* Div. 3. Sec. 4. *h. t.*

THE LORDS 'found the bond moveable, but allowed retention of the interest which fell due, during Margaret Philp's life.'

Act. *Miller Advocatus, Macqueen.* Alt. *Lockhart, Sir David Dalrymple.*

G. F. *Fac. Col. No 5. p. 204.*

SECT. II.

Bonds containing Substitutions.—Bonds bearing Annualrent.—Bonds having clauses of Infeftment.—Bonds assigned before Marriage, though not intimated.—Bond to the Widow's Fund.—Arrears of taxes due by a Minister.

No 11.
A bond to a person, whom failing, by decease, to another *nominatim*, belongs solely to the substitute, and the fiar's relict can have no share of it, even though the institute die before the term of payment.

1630. *January* 15. THOMSON *against* MERKLAND.

THE relict having charged for a third of a moveable sum, appointed by the bond to be paid at a term to the creditor, her husband, and in case of his decease, to a person who was his son, therein named, specially the husband creditor having deceased before the term;—it was found, that this, and the like substitutions and provisions to bairns by bonds, in case of the creditor's decease, doing nothing in his lifetime to change the bond, should stand; and that the sum pertained to the person substitute; and that the relict had no part in such sums, nor yet the defunct's executors; and if, at any time, sums be owing by such bonds, and should be ignorantly confirmed, (as this is confirmed), yet the confirmation thereof, where nothing was altered by the defunct, nor nothing mentioned by the defunct's self in testament to declare the change of his mind,