

HERITABLE AND MOVEABLE.

S E C T. XXIII.

Effect of a Charge of Horning.

1624. February 24. DONALDSON against DONALDSON.

IN an action of reduction pursued betwixt Donaldson and Donaldson, where-
by the heir pursues his brother for reduction of an assignation, made by their
father in his death-bed of a bond, for payment to the father of a sum, and to
his heirs, and bearing the debtor to be obliged to pay annualrent, as well not
infest as infest, and so the bond being heritable, and which by law could not
be assigned by the father to his second son the defender, upon his death-bed, in
prejudice of the heir, this reason was sustained and found relevant, albeit no
infestment followed upon the bond, and albeit the bond was not of that nature,
and tenor, whereupon the debtor might be compelled to give infestment, see-
ing he was not therein obliged thereto, but was only obliged to pay annualrent
to the creditors, and his heirs, as well not infest as infest; but the reason was
thereafter elided, by this exception, viz. that the father in his lifetime, before
the assignation controverted, had charged the debtor for payment of the prin-
cipal sum, conform to a clause of the bond, whereby the debtor was obliged to
pay the same upon a simple charge of six days, by the which charge the sum
was become moveable, and so might lawfully be assigned, as a bond moveable
after the charge, to any person whom the father pleased, and could not be
quarrelled by the heir, which exception was found relevant.

In this process, the LORDS also found, that no man upon their death-bed may
assign or dispone any thing (albeit it were of his moveables) except *in quantum*
may be found to pertain to their own part, after their decease, and no further

No 124.
A bond bear-
ing annual-
rent payable
on a simple
charge of six
days is ren-
dered, move-
able by a
charge of
horning.

No 124.

than by testament; but there being no reason libelled thereupon in this process, but only the pursuit moved here by the heir, to whom this reason was not competent, the action received no decision upon this ground.

Fol. Dic. v. 1. p. 374. Durie, p. 113.

* * Haddington reports the same case :

GORDON ANDREW being obliged to umquhile Mr James Donaldson in the sum of 4000 merks, payable at four terms, and in annualrent during the non-payment, Mr James made his second son Robert assignee to this bond. James Donaldson, eldest son to the defunct, pursued reduction of the assignation, because the bond was conceived to Mr James and the heirs of his first marriage, and *alleged*, That the assignation was made by Mr James *in lecto ægritudinis*. THE LORDS first assoilzied the defender for the annualrents received by the assignee by virtue thereof before the reduction intended. Thereafter the defender *alleged*, That before the assignation made to him by the space of six weeks, his father had made the sum moveable by charges of horning to pay it. It was *answered*, That notwithstanding thereof, Mr James had in effect passed from the charges, and acknowledged the sum immoveable by the assignation, whereby he had made his son Robert assignee to the sum and to the annualrents thereof, for terms bygone and to come, likeas, the assignee had acknowledged the bond heritable by receiving payment of the annualrent for terms after his father's decease. Notwithstanding whereof, the LORDS considering that charges for payment of the principal sum had once made it moveable, that the addition of the clause in the assignation for annualrent of terms bygone and to come altered not the effect of the charge and bond, and that the receipt of subsequent term's annualrents by the assignee altered not the nature of the bond and assignation, since it was not unlawful to him to take payment of annualrent so long as the sum was not paid, albeit the bond had been moveable, and therefore found the exception relevant.

Haddington, MS. No 3031.

1672. June 25.

THE SISTERS and EXECUTORS of SIR ROBERT SEATON *against* His BROTHER and HEIR.

No 125.

A creditor charged for a sum secured by infestment of annualrent. This was

UMQUHILE SIR ROBERT SEATON having due to him, by bond and infestment, 58,000 merks payable upon requisition, obtains a posterior bond of corroboration for the same sum, with some bygone annualrents accumulated, bearing but prejudice or derogation to the principal bond and infestment following