

S E C T. XXIV.

Bonds secluding Executors, whether rendered moveable by Diligence.

1676. July 13. CHRISTIE against CHRISTIE.

No 127.

A decree for payment taken upon a bond secluding executors, does not render it moveable.

THE deceased Laird of Pittarro and other two persons being due a sum by bond to James Christie writer, two of the three granted a bond of corroboration to Mr James Christie, son and heir to James, whereby executors are expressly excluded; but because the third debtor in the first bond did not subscribe the bond of corroboration, therefore Mr James took a decret against him upon the first bond. Mr James being dead, the compensation arises betwixt his heir and executor, who has best right to this sum. The heir *alleged*, He had the only right, because albeit the first bond was only moveable, yet the bond of corroboration had a clause excluding executors, and was for the whole sum, albeit but by two of the debtors in the first bond, yet all were bound conjunctly in both bonds. It was *answered* for the executor, That albeit the sum became heritable by the bond of corroboration excluding executors; yet it turned to be moveable by the decret obtained against one of the debtors for the whole sum, for thereby the defunct evidenced his mind, not to rest upon the bond of corroboration, but to take up his money; so that as heritable sums by infestment or destination become moveable by a requisition or charge, so must this heritable bond. It was *replied*, That the ground of heritable sums by infestment or destination, become moveable by requisition or charge, because thereby the creditor for the time passes from his real right and infestment, which therefore revives when he pleases to pass from the charge or requisition; because at once there cannot be a real right and a personal obligation for the same thing; but in this case where executors are expressly excluded, the creditors' pursuing, or charging for payment, doth no ways infer an alteration of the destination to heirs, excluding executors. But it is presumed, that if the creditor had lifted the money, he would employ it the same way, and that there is no parity with bonds heritable by destination for infestment; for in that case, if the creditor die before the first term of payment of annualrent, and without infestment, the sum is moveable without requisition or charge; because the law presumes, that the destination was to take infestment in due time, viz. 'before the first term of payment of annualrent.' But if by the bond, executors were expressly excluded, whensoever the creditor died, his executor would have no interest, but it would remain still a moveable debt.

THE LORDS found that this sum remained heritable by the clause excluding executors, and that the posterior decret at the defunct's instance, did not make it moveable.

Fol. Dic. v. 1. p. 374. Stair, v. 2. p. 447.

* * In conformity with the above was decided *Monro against Monros*, 3d July 1735. See APPENDIX.