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A charge having been given on an heritable bond, a summons of adjudication was raised, and the debt assigned. It was found still heritable.

1751. *November* 26. DOUGLAS of Dornock *against* SIR ROBERT DICKSON.

SIR ROBERT GRIERSON of Lag granted an heritable bond for 6000 merks Scots to James Douglas of Dornock, who charged him with horning, and proceeded to raise a caption, and executed a summons of adjudication; after which, for the sums due upon the bond, and expense of diligence, he assigned it to William Douglas of Bodsbeck his brother.

Bodsbeck died, leaving his brother Dornock his heir; and Dame Isabel Douglas his sister, and Sir Robert Dickson her husband his executors; who competed for the principal sum in the bond.

Pleaded for the executors, The diligence used by Dornock rendered the sum moveable.

Pleaded for the heir, The horning does not appear, and the tenor thereof cannot be made up by witnesses, act 94th, Parl. 6th, James VI.; and if the executors should produce an extract thereof, and insist that was sufficient by the sanction of act 75th of the same parliament, it would be competent to the heir to insist in an improbation, against which extracts are of no avail.

Replied, The act only statutes tenors should not be made up by witnesses solely; but not that witnesses might not be used, when the tenor was adminiculated by writing. The horning is referred to in the record; and the competition is not in any improbation. Besides, the debt, and all that followed upon it, was transferred to Bodsbeck; and it appears, by an account given in to him, and which he paid, that this diligence by horning was stated. Dornock was therefore bound to make this horning effectual to him; and the debt being moveable in his person, is also bound to his executor.

Duplied, The warrandice is from the fact and deed.

Pleaded for the heir, Of old indeed it was held, that charging on an heritable bond rendered it moveable; because it was reckoned a passing from the heritable security. But since these two rights have been considered as compatible, the contrary has been found; as that a bond being heritable by adjudication, did not become moveable by a subsequent charge, 12th November 1728, Reids against Campbell, No 98. p. 5538.; nor a bond, secluding executors, 24th July 1705, Gray against Panton, No 130. p. 5581. It was always held, that passing from the charge restored the debt to its former condition; and here the creditor executed a summons of adjudication. But indeed the question is not concerning Dornock's succession, whose intention of having the money might have been collected from using the charge; but Bodsbeck's, who cannot be said to have intended to have the money, but rather a security, which he laid out his own money to purchase.

Pleaded for the executor, The executing a summons of adjudication, which went no further, was no passing from the charge, whereby the destination was changed. This change of destination of money heritably secured, arises from

the intention of the creditor, which is thereby manifested to have it in his hand, and does not apply to an adjudication, which is heritable by the nature of the right, not intention; for the very purport of an adjudication, is to recover the the money. And as adjudications during the legal are considered as securities consistent with the personal obligations, there is no change of intention shewed by a subsequent charge; but a creditor having, by securing his money heritably, shewed his intention, shews by charging, a variation thereof. A bond secluding executors was never made to go to them by a charge, because of the express destination, which was not reckoned altered thereby, the nature of the right being still the same. Bodsbeck purchased the debt as affected by the diligence, that is moveable. No 126.

THE LORDS, 19th July, preferred the heir, and on a bill and answers, adhered.

For Dornock, *Boswel.* Alt. *J. Grant.* Clerk, *Justice.*

Fol. Dic. v. 3. *p.* 270. *D. Falconer, v. No* 234. *p.* 286.

*** Kilkerran reports the same case:

THE deceased Sir Robert Grierson of Lag, being debtor to James Douglas of Dornock in 6000 merks by bond, he in 1716 gave an heritable bond of corroboration for the same, conceived in the manner that such securities are now in use to be conceived, viz. With a personal obligation to pay at a term, an obligation to infeft the creditor in an annualrent out of the lands therein mentioned in security of the debt; and further containing a clause, allowing the creditor to use real or personal diligence, the one without prejudice of the other.

In 1724, Dornock raised horning against Sir Robert Grierson on the personal obligation, and in 1725 took out caption; and, after getting several partial payments, which reduced the debt to L. 951 Scots, he in 1729 made over that balance to William Douglas of Bodsbeck his brother.

Upon Bodsbeck's death in 1731, without issue, there arose a competition for this sum of L. 951 Scots, between the same James Douglas of Dornock his brother, who succeeded to him in his heritable estate, and the Lady Dickson his sister, and Sir Robert her husband, whom he had by his testament appointed his executors and universal legataries; and in a multiple-poinding brought by Sir William Grierson now of Lag, it was for Dornock *pleaded*, that the debt being constituted by heritable bond, fell to him as heir.

On the other hand, it was *pleaded* for the executors, That however the debt was originally heritable, it became moveable by the charge of horning thereon at the creditor's instance in 1724, and therefore fell to the executors; and for this all our law-books, and the uniform course of decisions was referred to.

Answered for the heir, That it is true that anciently, while annualrent rights were conceived in the form of a sale of such annualrent out of lands redeem-

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But after the prohibition of the canon law to take annualrent ceased, and that in progress of time, annualrents came to be conceived in the form now in use, not as redeemable rights of property, but as securities for money lent, then the very reason ceased for which the requisition upon annualrents conceived in the ancient form rendered the same moveable, the personal obligation for the debt, and a real security for the same debt being consistent and compatible; and that the decisions referred to are either such as were given at the time when the annualrent rights were conceived in the old form, or when the form now in use was but just coming in, such as Executors of Sir Robert Seton *contra* His Heir, No 125. p. 5572; and there is not one to be found later upon the point, and some on other points rather favour what is pleaded for the heir. Thus, if we look back to the 1683, Wishart against Earl of Northesk, No 109. p. 5552., we shall find that a charge upon a bond secluding executors made it descend to executors, but now of a long while, the charge has, more agreeably to law, been found not to vary the descent of the bond; and which comes yet nearer to the present case, a bond become heritable by adjudication does not become moveable by a subsequent charge, November 12th 1728, Reids *contra* Campbell, No 98. p. 5538.

2*do*, Whatever there might be in the general point, there were two specialties observed in the present case for the heir, as severally sufficient to determine his preference: 1*st*, That by an express clause in the bond it is specially provided, 'That the creditor may use real or personal diligence thereon, the one 'without prejudice to the other,' which has been intended to obviate the very pretence the executor now makes use of: 2*dly*, That after Dornock transferred the bond to Bodsbeck, be the effect of the charge what it will, it was at an end, till it should be again renewed by Bodsbeck.

Replied for the executor, That an heritable bond, as formerly, so at present, is a feudal right, and so long as it continues there is no debt; and how soon the debt is made to revive by a charge, the right of annualrent is passed from; for one cannot at the same time be creditor in a sum of money, and proprietor of a right of annualrent.

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2*do*, *Et separatim*, We find in our law-books another ground for preferring the executor after a charge, viz. The intention of the creditor to have his money in his own possession, which, if it were, it would go to his executor, who cannot be prejudged by the *mora* of the debtor.

And to the specialities *replied*, 1*st*, That the clause in the bond that the creditor might use real or personal diligence, the one without prejudice of the other, was only intended to prevent an effect which the charge had anciently, to extinguish the real right, in so much, that though it were again revived by passing from the charge, yet an infeftment in favour of another creditor intervening, or an adjudication by another creditor intervening would be preferable to the revived infeftment, which would only rank from the time at which it was revived; to remedy this, such clauses were devised, but not to alter the nature of the securities or the rules of succession therein.

2*dly*, That the translation to Bodsbeck did not vary the case, for that all rights transmissible are of the same nature in the person to whom they are conveyed as they were in the granter; suppose it had been legated as it might have been, having become moveable by the charge, or suppose it had been gifted; and its having been bought by Bodsbeck makes no difference.

THE LORDS, upon report, 'preferred James Douglas of Dornock the heir, to the principal sum in question;' and upon advising bill and answers, 'adhered.'

Some of the Lords were of opinion, That notwithstanding the variation in the form of annualrent rights, they still become moveable by a charge; that though originally this had taken its rise from the form and nature of the ancient rights of annualrent, devised to elude the prohibition of taking annualrent in the canon law, the same still continues to be the practice, though, were it to begin, there would be no good reason for it; and that there are many such instances in the law, where a practice remains after the reason is removed, which originally gave rise to it.

Some also considered the intention of the creditor as a sufficient foundation for the practice, and took notice that there is no other reason than the intention of the creditor for rendering a bond heritable only as bearing annualrent before the 1641, and since *quoad relictam*, moveable by a charge; but others in this differed, and thought there was no foundation for such practice now, particularly the President, who, after observing that the clause in the bond was in this case sufficient to determine the preference in favour of the heir, had this expression, that it was a commentary on the decisions as against the sense of the nation.

What others of the Lords were chiefly moved by, was the circumstance above taken notice of, that the debt was transferred to Bodsbeck, whereby the effect of the charge ceased *quoad* the succession to him; as it was certain, that no use could be made by him of the charge given by his cedent, and if he meant to do diligence, he would be obliged to charge of new.

Kilkerran, (HERITABLE AND MOVEABLE.) *No 6. p.* 248.