No 75. as to the fisk; in that, 26th June 1608, Dick against Ker, No 18. p. 3629., a bond was found moveable *quoad fiscum*, which was undoubtedly so, being granted after the creditor's rebellion.

Answered; When upon the decline of the authority of the Canon law, bonds were taken for interest, these were said to be *feoda pecuniæ*, as come in place of annualrent-rights, which were proper feus, and hence were reckoned heritable; but without just ground, as having no relation to land or any tenure. However, it being settled that they were heritable, before the weakness of the foundation on which the practice rested was adverted to, the general maxim could not be changed; but the Judges receded from it as far as they could, by making them moveable before the term of payment. And it would not now import, though the reason of this distinction could not be perceived; which yet might have been, that they supposed the creditor stipulating his payment at a day, intended to have it; and so the money might be looked upon as lying by him; but after the term, if he did not call for it, it was plain he considered it as a fund profitably employed.

The case has been always so decided, Douglas against Macmichael, No 72. p. 5504.; in that, Gordon against Keith, it was found the coming of the term of payment made the sum heritable; and in that, Dick against Ker, the point litigated and decided was, that the bond was moveable before the term of payment of the annualrent. The act of Parliament made no rights heritable which were not so before; and Stair's opinion is express, Book 3. tit. 4. § 24. and tit. 8. § 47.

THE LORDS adhered. *See* HUSBAND AND WIFE.

Act. *Lockhart* & *J. Erskine*. Alt. *H. Home*. Clerk, *Gibson*.

D. Falconer, v. 2. No 14. p. 16.

1765. *July* 9. KATHARINE STEWART *against* CHARLES M'FARLANE, &c.

No 76.
A husband took a bond payable to himself, his heirs, executors, and assignees at a certain term, with interest from its date. The narrative declared the sum to be solely for the use of a third person. The husband having died before the term

JOHN M'FARLANE, husband of Katharine Stewart, Feb. 11. 1763, lent the sum of L. 100 Sterling to Hugh M'Farlane of Callichraw, for which he took a bond, in the following terms: 'I Hugh M'Farlane of Callichraw, grant me to have 'borrowed, and actually received, from John M'Farlane tacksman of the 'bridge of Mitchaell, the sum of L. 100 Sterling, money foresaid, is allenarly 'lent out for the use and behoof of Charles M'Farlane, son of Duncan M'Far-'lane in bridge of Mitchaell; and the interest of the said sum, at five *per cent.* 'is to be uplifted by the said John M'Farlane, during his own lifetime; the 'foresaid John M'Farlane still reserving the management of the foresaid sum of 'L. 100, during his own lifetime or pleasure, and to renew this bond as oft as 'needful, renouncing all exceptions and objections to the contrary. Which 'sum of L. 100 Sterling, with the due and ordinary annualrent from the term

No 76.
of payment, his relict was found entitled to the half of the sum in the bond *jure relictæ*.

'of Martinmas last bypast, at which term the same was borrowed, notwithstanding of the date hereof, to the term of payment underwritten, I bind and oblige my heirs, executors, successors and intromitters with my goods and gear whatsomever, thankfully to content, pay, and again deliver, to the said John M'Farlane, his heirs, executors, or assignees whatsomever, and that upon the term of Martinmas next to come.'

Of this date, July 5. 1763, being posterior to the date of the said bond, the said John M'Farlane made a will, by which he appointed Duncan M'Farlane his brother-german, and father to Charles the defender, his executor, burdening him with payment of certain legacies to his friends, and, among others, with 2000 merks to Charles the defender; and further, he appointed him residuary legatee, directing his father, Duncan the executor, to pay to him whatever free subject there should remain after clearing his debts and legacies in the will. It was likewise provided, that this will should not prejudge the interest of Katharine Stewart my spouse, in the subjects in communion between them.

John M'Farlane having died before the term of payment, his widow, the pursuer, brought an action against the defender for payment of one half of the sum contained in the bond, as belonging to her, *jure relictæ*.

Against this action it was *pleaded* for the defender, That, by the form of the bond, the money at John's death was not *in bonis* of him, but it belonged to the defender: That it appeared from the narrative of the bond, that the money was lent out allenarly for his use; and, though the administration of it was reserved to him, and the sum taken payable to him, his heirs, or assignees; yet that could import no more than a power to alter, if he thought proper; which, if he did not do, the contents of the bond, in virtue of the narrative clause, became his property, immediately upon his uncle's death, without being accounted part of the defunct's moveables, subject to the administration of his executor, or the legal provisions of his wife. As to the apparent contradiction between the narrative and obligatory clause in the bond, no weight can be laid upon this circumstance, when it was considered, that there could be no dubiety as to the intention of the granter. The bond was wrote in the country, by Hugh M'Farlane the debtor, a man unacquainted with business; but the inaccuracy occasioned by his ignorance will never be taken hold of to defeat the evident intention of the creditor.

It was *contended*, on the other hand, by the pursuer, That the bond was not of such a tenor as to give the defender any right thereto, exclusive of the heirs and executors of the defunct. The obligatory clause is that only by which any obligation can arise, or any right be established by a deed of this kind; and, though the narrative may contain and set forth what the creditor intended to do, yet the obligatory part was only to be regarded in determining the question to whom the contents of the bond did belong. In this case, the money is expressly taken payable to himself, his heirs, and executors whatsomever; but even the narrative provides, that it should be under his management during his

No 76. lifetime or pleasure. The pursuer always understood it as a rule, that, when there was a discrepancy between the narrative of a deed and the obligatory part, the question behoved to be decided according to the last, as the *literarum obligatio* arose from this only, and not from the narrative, whatever it might contain concerning the intention of the creditor.

But, even supposing the bond so conceived as to give the defender a right exclusive of the executor; yet the interest of the pursuer could not be affected thereby; as, by her husband's death before the term of payment, this bond, like his other moveables, remained *in bonis* of him, subject to her *jus relictæ*: That this was abundantly evident from the obligatory part of it; and the narrative, at the most, can be considered only as a destination of succession to Charles. Upon John's death, Charles could not validly discharge this bond; he could only have sued the executor to confirm it, as *in bonis* of the deceased, and then either to assign it to him, or uplift the contents, and pay them over to him. It is indisputable, that the *jus relictæ* extends to all personal bonds bearing interest from their date; if the husband dies before the term of payment, such bonds have always been considered as simply moveable, before that period arrive. Neither could the destination of this bond ever be considered in the light of a special legacy to Charles; and, therefore, not revocable by a general testament; for the obligation in the bond itself is taken to the defunct's heirs and assignees, and the subsequent disposition conveys every bond or ground of debt to Duncan, whom he had named his executor; which clearly comprehends the bond in question, amongst the other moveables belonging to him at the time of his death.

"THE COURT found, That the pursuer's husband having died before the term of payment of the bond libelled, she hath right to one half of the principal sum, interest, and penalty therein contained, *jure relictæ*, and remit to the Lord Ordinary to proceed accordingly; and, upon a reclaiming petition, adhered."

Act. *Rae & Burnet.* Alt. *Patrick Murray.*

A. C. *Fol. Dic. v. 3. p. 265. Fac. Col. No 21. p. 35.*