

Lib. 2. Tit. 1. §. 3. in fin.

The Sum in a Bond heretable by Infeftment, becomes moveable by the Creditor's obtaining a Decree for Payment or requiring Payment by a Charge or Requisition *Stair Jhd. §. 4. Mc Kenzie Inst. Lib. 2. Tit. 2. §. 7.* For the Creditor is presumed thereby, more desirous to have up his Money than to let it lie in the Debtors Hand upon the former Security; and Payment would make it moveable. Thus a Charge to but one of the Cautioners in an heretable Bond, was found to make it intirely moveable. 24 January 1666 Colonel Montgomery contra Stewart. A Charge upon a Bond of Corroboration, accumulating the principal Sum and Annualrent in a prior heretable Bond on which Infeftment had followed and bearing without Prejudice and Derogation to the former Security; was sustained to make the whole Sum moveable, and to belong to Executors, without Necessity to instruct a Warrant from the Creditor to his Agent for giving the Charge, which was presumed, altho the Creditor had on his Deathbed declared, that the Sum belonged to his Heir, seeing he did it not legitimo modo, by cancelling or passing from the Charge: and the Provision, without Derogation to the former Security, imported only, that the Creditor might make Use of either, or both Securities according to their Nature; but not that the Charge and Infeftment which are incompatible, might be used at once. 25 June 1672. Executors of Seton contra his Heirs. To make an heretable Sum moveable by Requisition it must be used *habili modo*. Therefore Money secured by an Infeftment of Annualrent, containing a Clause of Power to a Fiar to reclaim the principal Sum with Consent of the Liferenter, was found not to be moveable by the Fiar's using Requisition without such a Consent. 10 January 1665 Stewart contra Stewarts *Stair Jhd.* Because the Requisition was null and so could have no Effect in Law to loose or take away the Infeftment. But this Decision is quite otherwise observed by President Gilmour *Decis. 129*. In like Manner the Nature of a Bond heretabily conceived, is not altered by a testamentary Decree. 16 January 1711 Gray contra Cairnrope. Nor would a Charge of Horning for an heretable Sum given on Deathbed without Necessity, but merely with a Design to defeat the Heir's Expectation of the Money. Stewart Answers to Dirlot. Doubts *Tit. 1. §. 3.*

Restraint of Action of Forthcoming 17 January 1683 Wishart contra Northesk render it moveable. But a necessary Charge of Horning for an heretable Sum on Deathbed would make it moveable, Stewart *Jhd.* The Lords once found a Charge of Horning upon a Bond excluding Executors to make it moveable: in regard the Creditor had by the Charge sufficiently declared his Mind

Mind to have up his Money from the Debtor, in which case if it had been uplifted and lying by the Decree, it would have belonged to the Executors, in case Debtors not making Payment in Obedience to the Charge, could not profit the Heir, so as to keep the Money still heretable. 1 March 1688 Wishart contra Northesk, Meln and Ballantain. But that was the first and last time it was ever so received: et una *hinc inde non est veritas*. Decisions born since (17 January 1683 inter *videm* 13 July 1676 *Carisburgh contra Christy*) since (30 Decemb. 1690 *Keir's & Executors at Reclaim contra Gray* of his or right) and the Opinion of our Lawyers (*Stair Inst. Lib. 2. Tit. 2. §. 4. Mc Kenzie Inst. Lib. 2. Tit. 2. §. 7.*) run in a contrary Stream, viz. that a Charge upon a Bond wherein Executors are expressly excluded, could not make the Bond moveable. The Reason is, because it seems that the Money were got up, it would be otherwise employed than upon Executors, who are expressly excluded; and the Creditor's Design to favour his Heir is presumed to continue, till the Money is paid, or the Bond innovated. For the same Reason, a Bond related to be heretable had no ways moveable thereafter, is not rendered moveable by a Charge of Horning. 24 July 1705 Gray contra *Randoms* tho' it may be altered in order to be heretable. It will continue heretable, notwithstanding of a Requisition or Charge *Stair Jhd.* Nor will Requisition used, or a Charge given by a Wife for an heretable Debt due to her, make it moveable. *Stair Jhd. Mc Kenzie Jhd.* Seeing it is presumed, that she had not any Design thereby to give the Money to her Husband, but only to get Payment. Nor yet are Sums for which an heretable Bond or Wadset was granted, become moveable by the Debtors consigning the same after an Execr of Redemption used, till there be a Declarator thereon, or till the Creditor accept of the Consignation, or insist to get up the consigned Money. Seeing it is not in the power of a Debtor to alter the Nature of his Creditor's Money, without his Consent, or the Authority of a Judge; and the Consigner might take up the consigned Money and pass from his Order of Redemption *re integra*. 21 January 1673 Nichol contra Laurie 10 June 1675 L. of Leys contra Forbes & Feb. 1681 Dumbair contra Mc Kenzie *Stair Jhd. Stewart Jhd. Tit. Heir and Execr. Tit. Money consigned for Redemption and Tit. Redemption* heretable and moveable. Altho a Creditor by Requisition or Charge for heretable Sums, doth for the Time pass from his heretable Security; yet when ever he pleases to depart from the Requisition or Charge, expressly, or tacitly, *optatim* thereof for Annualrent for subsequent Terms, his heretable Right revives, and is not excluded by intervening Rights *Stair Jhd.*

Taking an heretable Bond of Corroboration or adjudging for a Sum originally due by a moveable Bond, makes it heretable. *Stair Jhd. §. 3. Mc Kenzie Jhd. §. 6.* But if a Creditor take an heretable Surety for a moveable Debt, without any Intention to alter the Quality of the Debt, or to make it lie as *bonum stabili* and fixed, the Debt continues moveable notwithstanding. v. g. if a Creditor having done great Diligence, should take a Gift of Escheat or Recognition upon a Backbond, that he should be satisfied of his Debt in the first Place; or in