rator, the yearly duties of ward lands will fall to the superior's executors; so, upon that same reason and principle, the retoured duties ought to have belonged to them; and albeit the superior's right is *jus reale*, as the vassal's right of property is, yet the effects of both being to give them right to yearly duties, the same are moveable as to all bygone years, and fall under the testament.—THE LORDS did find, after much reasoning upon this debate, being a new case, never decided, and there being no declarator, the non-entry duties did belong to the heir, or a singular successor, and not to the executor; albeit I was of a contrary judgment, conceiving the reasons for the executor to be stronger and better founded, but the case was very disputable on both sides. No 20.

Gosford, MS. No 623. *p.* 360.

1676. *February* 17. WAUGH *against* JAMIESON.

No 21.
Found in conformity with Keir against Nicolson, No 19. p. 5448. See Sect. 18. *h. t.*

DR BONAR, being to go out of the country, did dispone a right of lands, and of an annualrent, to Mr John Smith, his near relation, upon a back bond granted by the said Mr John, bearing that the said right was granted partly in trust, and partly for surety to the said Mr John for sums due for the time to him by Bonar, and of such sums as Smith should advance to Bonar, or his creditors; and that the said right should be redeemable by Bonar or his sister, if she should survive him, by payment of the foresaid sums.

Thereafter the Doctor did grant a bond of 5000 merks to the said Mr John Smith, bearing no relation as to the said surety; and bearing, as to the conception, a simple moveable bond to the said Mr John his heirs and executors. And, after the said Mr John Smith's decease, there being a competition betwixt Dr Jamieson his heir, and the executor, as to the said sum of 5000 merks, and the question being, whether it should be thought to be heritable, in respect of the said surety, or moveable, in respect of the conception of the said bond,

THE LORDS did consider the case as of great moment, as to the consequence and interest of the people; and upon debate at the bar *in præsentia*, and among themselves, they came to these resolutions, viz. that it was consistent that a sum should be moveable, and yet that it should be secured by an heritable surety, as in the case of bygone annualrents due upon infeftments of annualrent, and of bygone feu-duties or taxations, the same being unquestionably moveable *ex sua natura*; and yet there being a real surety for the same, and a real action for poinding the ground even competent to executors; and likeways in the case of wadsets loosed by requisition, and bearing a provision, that, notwithstanding of requisition, the real right should stand unprejudged until payment; in which case the sum would be moveable, though still secured by infeftment. 2*do*, That, as to these qualities of moveable or heritable, in relation to the interest of succession, and question betwixt heirs and executors, the design of the creditor *et ani-*

No 21.

mus was to be considered principally, and if debts, either by the conception, were heritable *ab initio*, or an heritable surety taken thereafter for moveable debts, as a wadset or comprising, it was to be presumed, that the creditor intended to alter the quality of the sums, and that they should belong to his heirs; but if creditors should take an heritable surety, without any intention to alter the quality of the debt, or that the same should lie as *bonum stabile* and fixt, the debt continues still moveable: As *v. g.* if a creditor, having done exact diligence, should take a gift of liferent escheat, or recognition, upon a back-bond, that he should be satisfied in the first place of his debt; or if, in a suspension, a disposition of the debtor's estate should be consigned, because he cannot find caution; or, in the case of *bonorums*, a disposition of an heritable estate should be made in favours of his creditors; or, if a debtor should dispone his estate in favours of a confident person with the burden of his debts; in these and the like cases, because the creditor does not intend that his money should lie as an heritable debt, but upon the contrary has done, and is about to do, all possible diligence for recovery of the same, the debt continues still moveable, notwithstanding of the said accessory and extrinsic surety. 3*tio*, Bonds being taken, after a general surety, in the terms foresaid, for debts to be advanced, may be moveable, notwithstanding of such surety, if it appear that the creditor intended it should be such; as if such supervenient bonds should be taken to executors, excluding heirs; especially when such general sureties for sums, as are to be after advanced, are not dispositive, but by way of provision containing back-bonds, and not of the right itself, viz. that the receiver of the right should not be liable to denude until he get payment of the sums that should be due to him at any time thereafter; in which case it appears, that he has not a positive right and surety for the said sum, but an interest and exception of retention.

THE LORDS in end, in the foresaid cause, found, that the said bond of 5000 merks, in so far as it should be made appear to be made up of the sum mentioned in the back-bond that was due to Smith at that time, should belong to the heir as an heritable sum, in respect *ab initio* the said surety was granted for the same; but as to the residue of the said sums, it should belong to the executors as moveable, seeing the defunct had exprest his intention that it should be such, by the taking the bond in the form and conception of a moveable bond.

For Waugh, *Cuninghame & Kincaid.* Alt. *Lockhart & M'Kenzie.* Clerk, *Hay.*

Fol. Dic. v. 1. *p.* 366. *Dirleton, No* 342. *p.* 163.

*** See the report of this case by Stair, Sect. 18. *h. t.*