

son ought to prove his intromissions ; in which case, he offered to prove the same was applied towards payment of other debts due by old Sir William than what was contained in Howat's adjudication, and therefore must be imputed in payment of these other debts.

DUPLIED for Mrs. Nicolson,—That the disposition being not only accepted, but effectually made use of, it is not relevant for Sir James to say, that he can be found liable to hold count for no more than for what shall be proven he did uplift, unless at the same time he produce the bonds, tickets, &c, which are disponed, and say they are yet unpaid and undischarged. *2do*, It was presumeable, that young Sir William, who was apparent heir to his uncle, but refused to represent him, and yet did accept and make use of this right, has recovered payment of all these debts, unless he produce the documents of such as are not recovered ; and this chiefly, because he accepted this right for his relief of engagements. And therefore seeing he refused to represent, he had no farther a just title to these evidents as his own, but for his relief only ; and *quoad ultra* he was but trustee for Sir William's other creditors.

The Lords found the defender must count for such of the debts in the disposition, whereof the instruction came to his father's or his own hands, to extinguish his adjudication. *Vide 17th June, 1715.*

*Act. Hay. Alt. Nasmyth. Mackenzie, Clerk. Vol. I. page 89.*

1715. *February 16.* JOHN WATSON of Saughton *against* THOMSON of Corsehill, and JOHN TOD, Merchant in Glasgow.

ROBERT HAMILTON, younger of Wishaw, having adjudged the lands of Monkland, he and Monkland at length entered into a minute, whereby Wishaw is obliged to dispone the adjudication to Monkland, and he to pay a certain sum therefore at diverse terms, declaring always that this is only a corroborative security, containing an irritancy in case of not punctual payment at the respective terms, viz. That the minute should be void. Monkland accordingly made some partial payments, but did not keep his days : and in the mean time Gabriel Thomson and John Tod, Wishaw's creditors, laid an arrestment in Monkland's hands, and obtained decreets of furthcoming, which Monkland suspended upon double poinding : and thereafter Watson of Saughton, another creditor of Wishaw, adjudges Monkland's estate, as belonging to his debtor by virtue of the foresaid adjudication, and now insists in a process of mails and duties against Monkland and his tenants. In which process Thomson and Tod compearing, and craving preference, because of the priority of their diligence ;

It was ALLEGED for the adjudger,—*Imo*, That an adjudication being an heritable subject, is only transmissible by such diligence as is capable to affect heritage, and so not by an arrestment. *2do*, No man can have right to the money due by Monkland, except he who is capable to dispone Wishaw's adjudication ;—seeing Monkland is bound to pay upon Wishaw's disponing. Now, an arrester

having no title to Wishaw's adjudication, can never dispoſe it ; and therefore he can have no claim to the ſaid money, but Wishaw's heirs, or Saughton, who hath adjudged. *3tio*, The above-mentioned minute was only a corroboration of the adjudication ; beſides, that Monkland not having paid at the terms prefixed, all the effect of the agreement is, that he muſt have allowance of his partial payments out of the ſums in the adjudication.

ANSWERED for the arreſters to the firſt and ſecond,—That there being no infertment on the adjudication, nor the ſame expired, whereby it became a right of property, the ſum for which it was led was ſtill arreſtable ; for ſo it is in the caſe of heritable bonds whereon no infertment hath followed. To the third answered,—That ſuch irritant clauses are never ſtrictly interpreted, but ſtill purgeable by payment, *cum omni cauſa*. And as to the minute's being corroborative, answered,—That a party's retaining right till he be paid, does not alter the nature of the ſums to be paid ; but the nature of the debt is innovated, though the creditor has an objection competent to him againſt diſpoſing till payment, which makes not the new ſtipulated ſum to be an heritable debt, the minute being a new bargain. Nor is it unknown in law, that an heritable right may be a ſecurity for a ſubject of its own nature moveable, as in the caſe of bygone annual-rents of heritable ſums ; as was found, *18th February, 1676, Wauch contra Dr. Jamison*. Laſtly, the ſum agreed on being in the minute declared payable to Wishaw, his heirs, executors, or aſſignees, this plainly ſhows Wishaw's deſign, that it ſhould be moveable. And there is here no difference betwixt ſucceſſors and executors : for, as whatever is an heritable debt in the perſon of the defunct, and would belong as ſuch to his heirs, may be affected with all heritable diligence ; ſo what is moveable in the debtor's perſon, ſo as it would belong to his executors, may be affected with moveable diligence.

REPLIED for the adjudger, *1mo*,—That an adjudication does not fall under the comprehension of the term bond, or obligation ; and it is only money due by bonds that the Act of Parliament declares to be either adjuſgeable or arreſtable : beſides, the ſubject of an adjudication is not properly money, but lands, which cannot be arreſted. *2do*, That it is not here pled, that the minute ſhould be ſo void, as Monkland ſhould have no allowance of what he paid, which were rigorous ; but when he gets allowance, *nihil illi deest*. And as to a ſum's being moveable, though heritably ſecured,—replied, that bygone annual-rents of an heritable ſum are moveable, becauſe they are held as uplifted, being already payable : but it is otherwiſe in the preſent caſe, where Monkland's obligation to Wishaw was expreſſly corroborative ; and now, in the event, the adjudication is the only ſubſiſting ſecurity for the money. And as to the difference betwixt ſucceſſors and creditors,—replied, that whatever a man's deſtination may be with reſpect to his own repreſentatives, or however conſtructed, yet the intereſt of creditors ſtrangers does not fall under ſuch interpretation. Nor is it a *queſtio voluntatis* with them ; ſince they lead their diligence upon the faith of what is acted and complete, and are not much concerned with what may be in the intention of their debtor.

The Lords preferred the adjudger to the arreſters.

*Act.* Arch. Hamilton. *Alt.* Boswel. Robertson, *Clerk*.

*Vol. I. page 90.*