No 9. disponed in the same terms, and that it is not denied, that the seat possessed by the pursuer is sufficient to contain her family, assoilzied the defender; 'and decerned.' *See* KIRK.

Act. *Maclaurin.* Alt. *Scrymgeour.* Clerk, *Home*
P. M. *Fol. Dic. v. 3. p. 266. Fac. Col. No 229. p. 421.*

1761. *June* 19.

DAME ELIZABETH M'KENZIE, Widow of the deceased SIR GEORGE M'KENZIE of Granville, *against* SIR KENNETH M'KENZIE of Granville.

No 10.
Found, that a sum secured by adjudication, was rendered moveable, by a decree-arbitral, decerning the debtor to pay, and the creditor to convey the adjudication, upon which decree a charge of horning had been given by the creditor's factor.

THE following question occurred in the ranking of the creditors upon the estate of Kinminity.

Mrs Elizabeth Edwards was creditor upon the estate of Kinminity in certain sums of money by three decreets of adjudication, which she made over in favour of her second husband Sir Kenneth M'Kenzie, who was father to Sir George, Dame Elizabeth M'Kenzie's husband, and also to Sir Kenneth. Sundry payments had been made of the sums due by these adjudications; and Sir Kenneth M'Kenzie senior, and Alexander Sutherland of Kinminity, entered into a submission to Messrs James Graham and Alexander Hay, advocates; and they, by their decreet, determined what sums were still due by Kinminity to Sir Kenneth, and found, That Sir Kenneth was creditor upon the estate of Kinminity in the sum of L. 20,000 Scots, and which sum, with the due and ordinary annualrent thereof from the date of the decreet-arbitral, until payment, they decerned the said Alexander Sutherland to pay to the said Sir Kenneth M'Kenzie, at five terms, viz. L. 4000 at each term, beginning at the term of Martinmas 1729, until the whole L. 20,000 should be paid. And they decerned the said Sir Kenneth, upon receiving payment of the sums decerned for, to assign and dispone to and in favour of the said Alexander Sutherland, and his heirs, the whole sums, principal, &c. contained in the three decreets of adjudication above-mentioned, together with the decreets themselves, and bonds by which the sums were originally due.

Upon the death of the said Sir Kenneth M'Kenzie, his son Sir George made up a title by confirmation to the sums decerned for by the decreet-arbitral, and likewise was served heir in general to his said father; so that, whether the sums were heritable or moveable, they were fully vested in him.

He afterwards made over his right thereto in favour of Sir James M'Kenzie of Royston, and Sir James Campbell of Arberuchill, for relief and payment of L. 10,112 : 13 : 8 Scots; for which sum they stood bound to the Countess of Bute, as cautioners for the late Sir Kenneth M'Kenzie. And Sir George and the said assignees, for their joint and separate interests, granted a factory to

Charles M'Kenzie writer in Edinburgh, dated 2d April 1730, for uplifting the sums due by the decreet-arbitral, and for doing diligence for recovery thereof; and Mr M'Kenzie, in pursuance of the factory, in November said year, charged Alexander to make payment of the sums decerned for by the decreet-arbitral. No 10.

Accordingly, sundry partial payments were made, whereby the whole sums in which Sir James M'Kenzie and Sir James Campbell had been bound as cautioners for the deceased Sir Kenneth to the Countess of Bute, and some more, were paid, and the principal sum due to Sir George M'Kenzie reduced to a balance of L. 1541 Scots.

Sir George M'Kenzie, some time before his death, (which happened in May 1748,) nominated his lady his executrix; in virtue whereof she obtained herself to be decerned and confirmed executrix to him, and in the inventory gave up the foresaid balance.

In the ranking of the creditors upon the said estate, Sir George's widow claimed this balance as executrix to her husband, and Sir Kenneth claimed it as heir to his brother Sir George. And the Lord Ordinary, upon the 8th January 1761, pronounced the following interlocutor: 'Having considered the above debate, with the decreet-arbitral, and charge of horning given thereon for payment of the sum decerned for, sustains the title produced in the person of Dame Elizabeth M'Kenzie, and finds, That, in virtue of the confirmed testament in her favour produced, she has right to the balance of the sums claimed, contained in and due by virtue of the aforesaid decreet-arbitral, and annualrents thereof that have become due thereupon, from and since 1st day of February 1734, and in time coming, until payment.'

Pleaded for Sir Kenneth in a reclaiming petition, 1*mo*, That the nature of the security never was altered or intended to be altered by the decreet-arbitral. It was evident, that all the arbiters had in view, was to ascertain what sum was truly due upon these adjudications, upon payment of which they should be redeemable, but by no means to weaken or enervate the security until payment; for as these adjudications were amongst the preferable incumbrances upon the estate, it would have been highly unjust, in settling the balance that was due, to have annulled the securities. But if these adjudications continued to be subsisting securities after the decreet-arbitral, it is a clear case, that they made part of Sir Kenneth's heritable estate, and that Sir George could establish no right to these, but by a general service as heir to his father; and consequently, as they were heritable in his person, they continued so at his death, and must belong to his heir, not to his executor.

2*do*, As these adjudications therefore remained the preferable real securities upon the estate of Kinminity, it would be extremely hard, if a charge of horning given by a factor should have so strong an effect as to regulate the succession of his constituent's estate.

No 10.

For though, in questions among heirs, the law pays the greatest deference to the will of the party himself in regulating his succession, providing he does so *debito modo et tempore*, it cannot pay the same deference to the act and deed of a third party.

And therefore, supposing a charge given by Sir George himself might be deemed such an indication of his *voluntas* to alter the destination of that subject from heritable to moveable, it does not appear reasonable, that the act or deed of a factor should produce the like effect; because it is not his will, but the will of his constituent, that must regulate the succession. And even if the sum had been uplifted and in the factor's hands, it might have been a question, whether it ought not to be presumed that it was intended to be re-invested in the like security.

But supposing a charge had been given by Sir George himself, it would not have evacuated the security; for an adjudication is an heritable right which is not evacuated by personal diligence for payment of those sums for which the adjudication was obtained; and this takes place even in special adjudications, until the adjudger attains possession; and if the adjudger does not operate payment by means of his personal diligence, he may again resort to his adjudication. The statute 1672, cap. 19. is express upon this point; it allows the creditor to use all manner of execution against his debtor, by horning, caption, arrestment, or otherwise, until he enter into the actual possession of the lands. The cases wherein heritable rights have been rendered moveable by requisition on charge, do not apply to the case of an adjudication, which the law considers to be a legal sale under reversion. No charge of horning can alter the nature of that right; nor can the charge proceed upon the adjudication itself, but upon the original ground of debt, or, as in this case, upon the decreet-arbitral; and upon this principle many cases have been judged; Christie *contra* Christie, 13th July 1676, Sec. 24. *h. t.*; Monro *contra* Monro, 3d July 1735, IBIDEM; Wishart *contra* Earl of Northesk, Sec. 18, 24, and 25. *h. t.*; Reids *contra* Campbell, Sec. 17. and 25. *h. t.*

Answered for the Lady; 1*mo*, The sums decerned for by the decreet-arbitral were truly moveable, notwithstanding they arose from sums which had formerly been secured by decreets of adjudication, and that these adjudications were not to be discharged until actual payment; for the decreet-arbitral clearly made a *novatio debiti*. Alexander Sutherland was decerned to pay the debt, and made personally liable for it, although he was not so formerly, the debts being originally due by, and the adjudications obtained against, his predecessors.

The debt by the decreet-arbitral, was not instantly exigible, as it had formerly been when it stood upon the footing of the adjudications; but it was payable at five different terms, and a penalty stipulated in case of failzie, which was not the case by the decreet of adjudication. And though it may be true that the real security still remained until payment; yet that is not inconsistent with the debt's being moveable; for moveable sums are often really secured; for ex-

No 10.

ample, a sum due by heritable bond or contract of wadset, after requisition or a charge given, is rendered moveable, yet remains really secured, when the bond or contract contains clauses providing that the real security shall not be thereby impaired.

2*do*, The sums in question were rendered moveable by the charge of horning given to Alexander Sutherland by Sir George's factor.

It is an established point in the law of Scotland, That compleat heritable rights become moveable by requisition or charge; and the reason assigned for this is, that it is a *quæstio voluntatis*, Whether a sum be heritable or moveable? and the will of the creditor properly expressed ought to determine, whether the sum should go to his heir or to his executor; and when he uses requisition, or gives a charge of horning, he declares his intention not to allow the sum to remain upon the heritable security, and thereby descend to his heir, but to have the sum in his own possession, and thereby to descend to his executor. Thus, if a creditor who has his money secured by an heritable bond, gives a charge of horning for the principal sum, perhaps only because the annualrents are not punctually paid, the charge will have the effect to render the principal sum moveable and descendible to the executor. Taking the matter therefore upon that footing, the charge of horning given upon the decreet-arbitral did render the sum moveable, whatever was the original cause of charging for the debt.

But there is still a better reason than that above-mentioned, why a charge of horning should render a sum moveable which formerly was heritable; and it is this, If payment had been made in obedience to the charge as it ought to have been, the money, by being in the creditor's pocket, must have gone to the executor; and it would be irrational, that the debtor should have it in his power to direct the succession of his creditor, and by his obstinacy make that go to the creditor's heir, which, had the charge been obeyed, would have gone to his executor. This reason applies to sums secured by adjudication when charged for, as well as to any others heritably secured; for, had the debtor obeyed the charge of horning as he ought, the money would have been in the creditor's pocket, and so have gone to the executor.

The statute 1672 is foreign to the present question; the intention of that act was, to obviate a doubt which might have arisen, whether or not a creditor could use personal diligence against his debtor after he had got land judicially sold to him, though under reversion, in lieu of his debt.

The decisions Christie *contra* Christie, and Monro *contra* Monro, do not apply to the present case; for in these the bonds were taken secluding executors, which being an express written declaration, that the creditors would not have the sums go to their executors, the Lords were of opinion, that a decreet for payment could not give them a right thereto.

The case Wishart *contra* the Earl of Northesk, is directly in point for the executor; for the interlocutor in that case quoted for the heir was soon thereafter, upon a hearing in presence, altered; and the Lords found that the debtor's

No 10. not making payment in obedience to the diligence, could not be profitable to the heir, so as to keep the money still heritable.

'THE LORDS adhered.'

Act. *Lockhart.* Alt. *Bruce.* Clerk, *Gibson.*

J. M. *Fol. Dic. v.* 3. *p.* 270. *Fac. Col. No* 40. *p.* 82.

1761. *June* 25.

Sir JOHN STEWART of Grandtully *against* EXECUTORS of Sir GEORGE STEWART.

No 11.
If the possessor of an entailed estate sells the woods upon the estate, and dies before the whole is cut down, the price of that part of the wood which was cut before his death goes to his executor; but the price of that part which remained uncut goes to the next heir of entail.

BY contract, dated October 1758, Sir George Stewart, proprietor of the entailed estate of Grandtully, sold to Robert Stewart, &c. the trees growing on his wood of Cransie, for the price of 4205 merks, payable to Sir George, his heirs, executors, or assignees, at Whitsunday 1760. The purchaser became bound to commence cutting the 1st of May 1759, and to finish the whole the 1st of September 1760.

Sir George having died in November 1759, after part of the wood was cut, the question occurred, Whether the price belonged to his executors, or to his heir of entail? It was agreed, that the entail could not enter into this question. A contract of sale of growing wood is none of the deeds prohibited by this entail, or by any entail; and is therefore effectual against an heir of entail as much as against any heir. This point being adjusted, it was *urged* for the executor, that the price here being a moveable subject, belongs to the executor, even where the subject sold is heritable; witness a minute of sale of land, the price goes to the vender's executor though the land goes to the purchaser's heir. 2*do*, The executor at least ought to be entitled to that proportion of the price which corresponds to the trees actually cut during Sir George's life. For these trees became moveable, and the executors ought either to be entitled to these trees, or to their price as a *surrogatum*.

It was *pleaded* for the heir, That, by the law of Scotland, no subjects can fall under confirmation, but moveables that belonged to the deceased in property, including debts payable to him during his life, which for that reason are understood to be money in his pocket. Hence it is that a conditional obligation not purified during the life of the obligee goes to his heir, and not to his executor; and hence it is that an obligation having a *tractum futuri temporis* goes the same way. In short an executor has not a permanent office: He is appointed to levy what debts were due to the predecessor when he died, and he has no commission to wait for debts that shall become due. That rents, though becoming due after the proprietor's death, accrue to his executor, is not properly an exception. For none accrue to him but what are understood by law to be due before the predecessor's death, though the term of payment be post-