

No 140. her testament; it would, therefore, be most unreasonable that her succession should be regulated by such a casualty as that mentioned. THE LORDS found the heir in heritage of the trustee had right to the sum in dispute.

Fol. Dic. v. 3. p. 268.

. See this case No 117. p. 4624.

1793. June 18. MARY MACÉWAN *against* JANET THOMSON.

No 141.
A disposition of an heritable estate to trustees, for behoof of creditors, does not always render the moveable debts, even of those who accede, heritable.

DAVID THOMSON having been incarcerated for debt, was liberated upon granting an obligation to execute a trust-deed, conveying his whole estate, real and personal, in favour of such persons as a meeting of his creditors should appoint. Meetings were accordingly held, and a plan of trust being agreed on, a deed, framed by John Macewan, writer in Edinburgh, was in consequence executed by Thomson. It stated the farther security of his creditors, and more ready payment of their debts as its inductive cause. The trustees were authorised by it to sell the lands, and, in general, to take every necessary step for 'effectually securing my said creditors, and obtaining them payment of their debts.' In case of their failure by death or non-acceptance, it was declared, that the trust-right and infestment shall stand and subsist as a security to the creditors, who may substitute other trustees in their place. It enumerated the different creditors, and the sums due to them respectively; and it provided, that this specification should not hinder any one creditor to make farther claims, nor the trustees to object to the debts admitted in the trust, or to communicate the benefit of it to creditors who might have been omitted.

The trustees took infestment. Mr Macewan as a creditor acceded to the trust, but died, and without children, before Mr Thomson's property was sold.

In a question between Macewan's heir-at-law and his relict, the former *contended*, that the debts of acceding creditors were made heritable by the trust, and

Pleaded; When a person voluntarily puts his affairs into the hands of trustees of his own chusing, they are accountable only to him, and the right of no third party is affected. But the trust-deed now in question was executed at the request of creditors, in order to prevent them from leading separate diligences, and in favour of trustees of their appointment. The infestment, therefore, which followed, put the creditors in the same situation as if they themselves had been infest, or had received heritable bonds of corroboration; Erskine, b. 2. tit. 2. § 15. 6th November 1739, Murray Kinnymound *against* Cathcart and Rothead, No 157. p. 5590.; 13th July 1748, Dunbar *against* Creditors of Brodie, No 138. p. 5591. It may be true, that Macewan, in acceding to the trust, (and indeed the same might have been said had he accepted any heritable

security), had no intention of altering his succession. But where the law has declared that subjects of a certain description descend to the heir, nothing but a settlement can be received as evidence of a contrary intention.

No 141.

Answered; It is not every supervenient right in an heritable estate that will convert a moveable into an heritable debt. By the bankrupt act the debtor is obliged to grant a general disposition to the trustee for behoof of his creditors, and the pursuer of a *cessio bonorum*, when possessed of heritable property, must do the same, yet in neither case do the debts become heritable. The material consideration in such question is, What was the object of the trust; whether to give the creditors an interest in the price of the subject disposed, or to convey to them the lands themselves in security of their debts. The former, it is evident, was intended in the present case. The debts are not made, nor meant to be made a burden upon the estate more than they were before. The creditors did not wish any new or corroborative security, the idea of a trust having been adopted merely as the readiest mode of obtaining payment, Waugh against Jamieson, No 21. p. 5453.; Grierson against Ramsay, No 84. p. 759.; 27th Jan. 1791, Ranking of the Creditors of Redcastle. See APPENDIX.

The Lord Ordinary found, that the debt continued moveable.

The Court were of opinion, that the sole object of the trust was to enable the creditors to turn the estate into money, and obtain payment out of the price, and that it neither made, nor was intended to make, the debts real burdens on the lands.

It was *observed*, That if the trust in the case of Kinnymound, reported by Kilkerran, was of the same nature with this deed, the decision of that case was questionable.

THE LORDS had formerly refused a reclaiming petition without answers; and on advising a second petition and answers, they adhered.

Lord Ordinary, *Henderland.* Act. *Rolland.* Alt. *Gorbet.* Clerk, *Sinclair.*
D. D. *Fol. Dic. v. 3. p. 268. Fac. Col. No 60. p. 131.*

1797. December 20. JOHN DAVIDSON *against* ALEXANDER KYDE, and Others.

COLONEL KYDE remitted money from the East Indies to his attornies in England, with discretionary powers as to the mode of securing it, though with a preference to landed security. The attornies lent L. 5,500, on two Scots heritable bonds, payable to themselves, 'in trust,' for Colonel Kyde, upon which infestment followed.

The attornies mentioned these bonds in the annual accounts of their management, which they transmitted to Colonel Kyde, and he approved of their conduct.

No 142.

A gentleman in the East Indies having remitted money to his attornies in Britain, with discretionary powers as to the mode of securing it, and they having, with his approbation,