No 141.

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.

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 disponed, 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 Kinnynmound, 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. *Corbet.* 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.

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,

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 infeftment 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.
taken heritable bonds in Scotland, payable to themselves, in trust for him, it was found that he could not dispose of the money, so secured, by a testament.

Colonel Kyde died in India many years afterwards. A few months before his death, he had executed a testament in the English form, by which his whole property, after payment of legacies, &c. was bequeathed to Major Alexander Kyde.

Mrs Dickson, the Colonel's heir at law, (to whom L. 500 were left by the will,) and her husband for his interest, with a view to attach the sums contained in the heritable bonds above mentioned, as not affectable by a testament, granted a trust-bond to John Davidson, who, after obtaining decree of constitution and adjudication against them, brought a declaratory action against the debtors in the bonds, and the executors of Colonel Kyde.

A declarator was likewise brought by Major Kyde, in order to have his right to the bonds, under the will, ascertained; and a multiplepoinding by the debtors in them.

John Davidson

Pleaded: As the bonds were taken payable to the attornies, in trust for Colonel Kyde, and with his approbation, the case is the same as if they had been made payable directly to himself. An action might have, indeed, been necessary, to force the trustees to denude, but the heritable right was substantially vested in the Colonel.

If he had died intestate, the subject would have gone, not to his executor, but to his heir, who, consequently, cannot be deprived of her right by testament; Durie against Coutts, No 140. p. 5595.

Answered; Colonel Kyde, by the instructions given to his attornies, had no view of affecting his succession. His object was to have his money properly secured. Nor does it alter the question, that he was informed of the security taken, which might have been changed by the act of the debtor, or of the attornies, who had no right to regulate his succession.

The feudal right, too, was vested in the trustees, and the Colonel had merely a personal right to call them to account, which might be exercised in a testament; 25th February 1780, Grierson against Ramsay, No 84. p. 759.

Besides, the will may be considered as a declaration of the purposes of the trust, which is effectual if executed *secundum legem loci*.

The Lord Ordinary preferred Major Kyde; but upon advising a reclaiming petition, with answers, it was

Observed; The security was taken with the approbation of Colonel Kyde. He must be presumed to have known the consequences; and as, *ex facie* of the bonds, it appeared that they were held in trust for him, the question is the same as if they had been taken payable directly to himself, and very different from that where a subject is vested in trustees, for the purposes there expressed, and others to be afterwards declared by the truster.

THE LORDS unanimously found, 'That the money in question being settled upon heritable security in Scotland, with the approbation of Colonel Kyde, cannot pass by will, but falls to be taken up by the heir-at-law.'

A reclaiming petition was refused, (25th January 1798,) without answers. No 142.

Lord Ordinary, *Stonefield.* For Davidson, *Montgomery.*
Alt. *Rolland, Geo. Fergusson.* Clerk, *Gordon.*
D. D. *Fac. Col. No 52. p. 118.*

1798. *March* 6.

LADY CHRISTIAN GRAHAM, and Others, *against* The EARL of HOPETON.

No 143.
Heritable bonds, taken by a tutor, who was heir at law, for money belonging to his ward, and adjudications led for personal debts, found to be moveable as to succession.

The price of tithes, sold by a tutor, by judicial authority, in the event of the ward's death, belong to his executors.

GEORGE, Marquis of Annandale, was cognosced insane in 1758; and the late John, Earl of Hopeton, his nephew, was appointed his tutor in law.

Earl John was succeeded in 1781, by his son, the present Earl, who was named curator-dative to the Marquis.

The Marquis died in April 1792, possessed of a valuable landed estate.

The Earl of Hopeton was his heir at law.

Lady Christian Graham and others had right to his executry; and soon after his death, they brought an action of count and reckoning against the Earl of Hopeton, both as the Marquis's curator, and as representing Earl John, the former tutor.

The defender produced his own and his father's accounts, to which a variety of objections were stated by the pursuers.

The Lord Ordinary having taken the cause to report on informations, the following points *inter alia* occurred for the determination of the Court.

I.—It did not appear that Earl John had made up tutorial inventories. The pursuers, therefore, *contended*, That in terms of the act 1672, cap. 2. the expenses disbursed by his Lordship in the management could not be sustained as an article of credit in his accounts; March 1685, Burnet against Johnston, *voce* TUTOR AND PUPIL; Jan. 1686, Murray against Gordon, IBIDEM; 11th June 1709, Riddoch against Forsyth, IBIDEM; 10th July 1788, Henderson against Duff, IBIDEM; 25th January 1793, Kilpatrick against Macalpine, IBIDEM.

Answered; The objection resolves into a claim for a penalty; and therefore, although it might have been relevant in a question with the late Earl, it cannot be stated against the present defender, in accounting for his father's intromissions.

Replied; The present action is in no respect penal. The pursuers claim nothing but the moveable funds of the Marquis in the hands of the defender. They only object to a counter claim on his part, expressly dissallowed by the act 1672. Supposing, however, the objection were penal, the special enactment of that statute would be sufficient to create an exception to the rule of common law, as to penal actions.