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does not fall. By this reservation, the pursuer's father still remained infeft in the lands to the extent reserved; and the pursuer must therefore expede a special service; Halkerston against Drummond, No. 22. p. 14436; Robson against Lawrie and Corrie, 22d January 1799, No. 94. p. 16139.

2*d*, This is an attempt upon the part of tutors to convert an heritable into a moveable debt, which they are not entitled to do, except in cases of necessity; Erskine, B. i. Tit. 7. § 17.

Answered: 1*st*, There are two classes of real rights, which pass by general service; those which do not require infeftment, and those which are secured by an infeftment not standing in the person of the ancestor as creditor, but in the person of another, as debtor in the obligation. This latter class comprehends all real liens, by which infeftments are incumbered, but which are not themselves feudalized in the person of the creditor; Stair, B. 2. Tit. 10. § 1.; Ersk. B. 2. Tit. 3. § 49. In practice, it has always been held by men of business, that a general service is sufficient to carry these.

2*d*, Tutors may be obliged at any time to receive payment of an heritable debt, because the debtor may insist for his discharge. There is a great difference, therefore, between uplifting an heritable debt, and selling an heritable property.

The Lord Ordinary found, 'That the title to the debt in question is quite 'sufficient for his enabling tutors to discharge the same;' and the Court adhered to his Lordship's interlocutor, upon advising a petition with answers.

Lord Ordinary, *Methven.*	Act. *Cranstoun.*	Agent, *W. Patrick*, W. S.
Alt. *Copland.*	Agent, *H. J. Wylie*	Clerk, *Home.*

J. *Fac. Coll. p.* 243. *No.* 547.

1808. *January* 14.

ATKINSON, MURE, and BOGLE, *against* LEARMONTH and LINDSAY

No. 3.

Arrestment used in the hands of the nearest in kin, before confirmation, is inept.

2*d*, In a competition between an arrestment in the hands of the nearest in kin, partially confirmed, and a confirmation as

ARCHIBALD HAMILTON, residing in St. Domingo, was indebted to Atkinson, Mure, and Bogle, to the amount of £4919 Sterling, and was likewise indebted to Learmonth and Lindsay to the amount of £1567 Sterling. Hamilton remitted money to John Miller in Glasgow, to the amount of £5717 Sterling, by whom it was placed in the branch of the Royal Bank of Scotland there. John Miller shortly afterward died; and George his brother acted as his executor.

In the year 1799, Hamilton died abroad, and left a will, wherein he appointed certain executors, of whom several resided abroad, and all ultimately declined to accept or act.

To secure this fund, the parties proceeded in the following manner:

Learmonth and Lindsay, on the 25th July and 12th December 1799, executed an arrestment to found jurisdiction; and having raised an action of

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executor creditor, *ad omissa*, the former attaches no more than the fund specially confirmed, and the latter is the only valid diligence by which the remainder can be attached.

constitution before the Admiralty Court, against the testamentary executors of Hamilton, and against Mrs. Mary Hamilton his sister and nearest in kin, arrested the fund *in medio* on the 27th March and 4th July 1800. At this time Mrs. Mary Hamilton had not made up any title by confirmation; and having renounced, she was assoilzied from the action of constitution. Learmonth and Lindsay, however, raised a reduction of this decree, and obtained a decree of reduction, constitution, and payment against her, on 25th July 1803.

Atkinson, Mure, and Bogle, on the 29th and 30th December 1801, executed an arrestment to found jurisdiction; and having raised a process of constitution against the testamentary executors, and Mrs. Mary Hamilton, arrested the fund *in medio* on the 4th and 5th January 1802, while it lay in the branch of the Bank, Glasgow; and on the 13th and 17th January 1803, after it was removed to the Bank in Edinburgh.

On the 9th March 1801, Mrs. Mary Hamilton, as nearest in kin to Archibald Hamilton, expede a partial confirmation to the extent of £100. Sterling. Farther, Atkinson, Mure, and Bogle, expede a confirmation *quoad omissa*, as executor creditor to Hamilton, on the 8th February 1803, on discovering that the confirmation expede by Mrs. Hamilton was a partial one. On the 11th February 1802, George Miller had raised a process of multiplepoinding, in the course of which the above interests were produced.

Atkinson, Mure, and Bogle, objected to the diligences produced by Learmonth and Lindsay, 1*st*, That their arrestments being laid prior to the date of Mrs. Mary Hamilton's title as executor by confirmation, were inept. 2*d*, That even if the arrestments had been effectual, yet as Mrs. Mary Hamilton had only expede a partial confirmation to the extent of £100 Sterling, the arrestments could only attach to that amount; and therefore the confirmation as executor creditor *quoad omissa*, was the regular and preferable diligence. 27th July 1779, Sloan Laurie against Spalding Gordon, No. 94. p. 3918.

The Lord Ordinary pronounced the following interlocutor: 'Finds that 'the arrestments used by Messrs. Learmonth and Lindsay, although prior in 'date to those used by Atkinson, Mure, and Bogle, cannot give them any pre-'ference, or be of any avail, in respect the same were used before the time 'that Mrs. Mary Hamilton had by confirmation vested any proper right to herself 'in the funds in question; and that therefore the arrestments used by Atkin-'son, Mure, and Bogle, being used posterior to Mrs. Mary Hamilton's confirma-'tion, are to be held preferable to the others: Finds, however, that as Mrs. 'Mary Hamilton did not expede a general confirmation, but only the confir-'mation of a particular fund to the extent of £100; so the arrestments used 'against her cannot give the users of such diligence any right to a greater sum 'further than to the amount of the £100 specially confirmed: Finds, that with 'regard to the remainder of the funds not confirmed by her, they remained *in* '*bonis* of Archibald Hamilton the defunct, till taken up in a habile manner;

'and finds that this was done accordingly, by the confirmation of Atkinson, No. 3.
'Mure, and Bogle, as executors creditors *ad omissa*, whereby they vested in
'themselves a right to the said funds, and in consideration of which they have
'by that diligence a preferable right to the other competing creditors, who ne-
'glected to use that diligence in proper time.'

The Lord Ordinary afterwards reported the case to the Court on memorials, and the Lords adhered, (14th January 1808.)

In deciding the question between these parties, it was unnecessary for the Court to do more than to adhere to that part of the Lord Ordinary's interlocutor, which finds, 'That the arrestments used by Learmonth and Lindsay, 'although prior in date to those used by Messrs. Atkinson, Mure, and Bogle, 'cannot give them any preference, or be of any avail, in respect the same were 'used before the time that Mrs. Mary Hamilton had by confirmation vested 'any proper right to herself in the funds in question; and that therefore the 'arrestments of Atkinson, Mure, and Bogle, being posterior to Mrs. Mary 'Hamilton's confirmation, are to be held preferable to the others;' because the arrestments of Learmonth and Lindsay, being in this respect inept and null, there was no longer any party having an interest to agitate the second and important point of law laid down in the last finding of the Lord Ordinary's interlocutor.

But it is proper to notice historically, that the Court were no less clear with respect to that part of the interlocutor. They considered that, in a competition, confirmation as executor creditor *ad omissa* was the only proper and regular diligence to attach the fund *in medio*, where the nearest in kin had only expede a partial confirmation; and that this question had been well and solemnly decided in the case 27th July 1779, Sloane Laurie against Spalding Gordon, quoted in support of the pursuer's argument.

Lord Ordinary, *Cullen*. Act. *J. W. Murray*. Alt. *W. Boswell*. *Tod & Romanes*, *Alex. Boswell*, and *Robinson & Ainslie*, Agents. *M.* Clerk.

J. W. *Fac. Coll. No. 23. p. 76.*

1808. *May 25.* HENRY VEITCH *against* DAVID YOUNG.

No. 4.
If Books and Furniture, though rendered heritable *destinatione*, transmit from the dead to the living without service by possession?

LORD ELLIOCK, by a deed of entail 23d February 1790, resigned his estate of Elliock, "in favour and for new infeftment to be made and granted to myself, and the heirs whatsoever of my body, whom failing, to Lieutenant James Veitch of the 72d Regiment of Foot, and the heirs male of his body;" and failing them to certain other heirs and substitutes therein mentioned, under the usual prohibitive, irritant, and resolutive clauses.

In the same deed, he added a clause in the following terms: "And I do hereby assign, and make over to the heirs whatsomever of my body, whom