No 108. moveable, and not made heritable by the back-bond; for though the disponee was not obliged to denude, unless upon payment as well of the sums he should advance, as of what was formerly due, yet this could operate no more but a bare personal retention, which *inerat de jure* without the clause.

Stair. Dirleton.

*** See this case No 21. p. 5453. and No 86. p. 5526.

1683. *January* 17. WISHART *against* NORTHESK.

No 109.
A moveable bond of corroboration does not alter the nature of the original heritable bond, but the debt still remains heritable.

See Sect. 28. *h. t.* as to the other points in this case.

ELIZABETH WISHART, relict of the deceast James Bonnar, as executrix confirmed to him, and as having right from ——— Bonnar, nearest of kin to the said James, intented action against the Earl of Northesk, for payment of a sum contained in an heritable bond, bearing an obligement to infeft, and also a clause secluding executors; and also raised another action against the Laird of Morphie, for payment of a sum contained in his bond of the same tenor. There was compearance made for Miln and Bannatine, who were heirs-portioners by their mother to the defunct, and craved to be preferred to the executors, both sums being heritable. It was *replied* for the executors, That the sums were made moveable by a charge of horning. It was *duplied* for the heirs, That the clause secluding executors being the detination of the creditor, did exclude the executors, notwithstanding of the horning.—THE LORDS found, that Northesk and Morphie's bonds did belong to the heirs, notwithstanding of the charge of horning, in respect of the clause secluding executors; but they found, that the annualrent of these bonds did belong to the executors. Thereafter, it being *alleged*, that the annualrent of Morphie's bond became heritable, there being a comprising for both principal and annualrents; and it being *answered* for the executors, That after the comprising, the sums were made moveable by an arrestment at the compriser's instance, in an action to make arrested goods furthcoming; the LORDS found, that an arrestment, or an action for making arrested goods furthcoming, did not make the sums contained in the apprising moveable. The executors did insist against Keith of Craig for payment of a sum contained in an heritable bond granted to the defunct, in respect the executors alleged, that there was a moveable bond of corroboration granted by Keith of Craig of the said heritable bond.—THE LORDS found, that the corroboration did not alter the nature of the heritable bond, but that it remained still heritable.

March 1.—In the competition betwixt Wisharts, executors to the deceast James Bonnar, Ballantine and Miln his heirs, anent two heritable bonds granted by the Earl of Northesk and Laird Morphie, which bonds bore not only an obligement to infeft, but likeways a clause secluding executors, the LORDS

found, that a charge of horning made these bonds so moveable, that, notwithstanding of the clause secluding executors, yet they did belong to the executors, sicklike, as if the foresaid clause had never been inserted in the bonds, in regard that, by the charge of horning, the creditor had sufficiently declared his mind to have up his money from the debtor; in which case, if it had been lying by the defunct, it would have belonged to the executors, and that the debtor's not making payment in obedience to the diligence, could not be profitable to the heir so as to keep the money still heritable. This interlocutor was pronounced upon a hearing in presence, and hereby, they altered a former interlocutor given upon a report from the Outer-House. No 109.

Fol. Dic. v. 1. *p.* 372. *P. Falconer, No* 43. *p.* 23. *& No* 56. *p.* 35.

1707. *December* 4.

ALEXANDER AITKEN of Middlegrange *against* JAMES GOODLETS, elder and younger of Abbotshaugh.

No 110.
A person disponed his estate to his eldest son, with the burden of certain provisions to his younger children, which he had become bound to pay in his contract of marriage. Found, that the provisions were heritable.

JAMES GOODLET, in his contract of marriage with Agnes Melross, 'obliged 'himself, his heirs and successors, in the estate therein mentioned, to pay to 'the rest of the children, to be procreated of the marriage, the sum of L. 10,000 'Scots, to be divided equally among them at their respective ages of sixteen 'years, with annualrent during the not payment, and this provision, that the 'portion of any of these younger children dying unmarried should fall to the 'survivers.' There having been four children of the marriage, whereof one went abroad without returning home, the father disponed his estate in favours of his eldest son James Goodlet younger, with the burden of paying his anterior just and lawful debts, and 10,000 merks to Alexander and Jean Goodlets his other children, as their portion natural. Jean having died, leaving a daughter behind her, who was served heir to her mother, and then died, Alexander Aitken, the father, as heir to his child, pursued James Goodlets, elder and younger, for payment of the 5000 merks provided to Jean his wife, and for the equal third part of John's portion, who had deceased before his sister, after he was sixteen years complete.

Alleged for the defenders; Absolvitor, *quoad* the 5000 merks, because moveable, and so not to be carried by a service. 2*do*, Absolvitor from any share of the brother's portion, because *non constat* he is dead. And *esto* his death were proved, the pursuer's wife being neither heir nor executor to him, his portion would belong to the surviving brother.

Replied for the pursuer; Though the 5000 merks was moveable by the contract of marriage, it became heritable by the supervenient disposition, which made it a real right upon the estate disponed by James Goodlet elder to his son, both the procuratory of resignation and precept of sasine being affected with