

for in so far the bond was found to become again moveable, and to belong to the executors. *Vide* TERM LEGAL and CONVENTIONAL, *ead. die inter eosd.*

Fol. Dic. v. 3. p. 268. Kilkerran, (HERITABLE AND MOVEABLE.) No 2. p. 243.

* * See Clerk Home's report of this case, No 4. p. 5415.

No 137.

1748. July 13. SIR WILLIAM DUNBAR *against* The EXECUTORS of BRODIE.

LOWIS of Merchiston, and Scot of Blair, becoming both bankrupt, they, in 1720, granted conveyances of their estates, real and personal, in favour of certain trustees, for the use and behoof of their creditors, and bearing to be in order to facilitate their payment by a sale of the subjects, to which conveyances the most of the creditors acceded. But as a few stood out, and that it was not at that time a settled point, Whether or not a debtor, bankrupt in terms of the act 1696 could effectually grant a trust right for the behoof of his creditors, so as to exclude the diligence of such as should not chuse to accede thereto; and as that scruple might scar purchasers; it was agreed by the acceding creditors, that they should assign their debts to the trustees. Among the rest, Mr William Brodie, in prosecution of this plan, assigned to the trustees three debts due to him, expressing the purpose thereof to be, that by an adjudication proceeding thereon, and on the debts assigned by the other creditors, a sufficient right might be made up to the purchaser; and one adjudication was accordingly led for the whole debts due to the several acceding creditors.

The event justified this precaution; for the non-acceding creditors having proceeded to separate diligence by adjudication, notwithstanding the opposition made by the trustees, who pleaded that the bankrupts were denuded by the trust conveyances made for the behoof of all their creditors equally and proportionally, the LORDS, — January 1729, 'Allowed them to proceed in their separate diligence;' and in February 1736, at their instance, 'Reduced the trust-right,' No 244. p. 1208.

The trustees had in the mean time proceeded to sell several parcels of the estate; and as the prices were adequate, the outstanding creditors acquiesced in the sales; and as the adjudications were all within year and day, so far as the prices were paid, the whole drew their shares in proportion to their debts.

While part of the price of the subjects sold was yet unpaid, and other subjects remained unsold, Mr Brodie died; and a competition ensuing between Sir William Dunbar his heir, and the Lady Dipple his executor, each claiming the whole of the debt remaining due to him, the trustees brought a multiplepoinding, wherein the LORDS 'preferred the executors to the defunct's interest in the price of the subjects sold before Mr Brodie's death, and yet resting unpaid, and preferred the heir upon the subjects that were unsold at his death.'

As this decision was agreeable to a former precedent, *vide supra*, Murray

No 138.

A debtor disposed his estate to trustees. Some of the creditors assigned their debts to the same trustees, to lead an adjudication to be made over to a purchaser. The adjudication was found to make the debts heritable.

No 138. Kinnymound *contra* Cathcart and Rothead, No 136. p. 5590. so it was in itself just. As to what was argued for the heir with regard to the subjects sold, that notwithstanding the sale of a subject adjudged, the debt stood secured by the adjudication, as nothing but payment can extinguish an adjudication, which is a settled point in judicial sales; the answer was, that judicial sales proceed without consent of the creditor, whose security therefore it would be unjust in the law to loose till the creditor should obtain payment, which does not apply to the case of a voluntary sale. And as to what was argued for the executor with regard to the subjects unsold, that the trust-right, even when acceded to by the creditors, was by the express tenor of it only intended to facilitate their payment by a sale of the subjects, which could not infer a purpose to alter the nature of their security; and that neither did the adjudication alter the case, as the conveyance of the debts whereon it proceeded expressly bore, that the same had only been intended to make up a sufficient right to the person who should be purchaser of the lands, and for the better enabling the trustees to uplift the debts and other subjects conveyed to them; if arguments of that kind were hearkened to, neither trust-rights nor adjudications would ever render debts heritable. However the intention of such rights may have been expressed by the creditors, it could not be thence inferred, that the creditors could not use them to other purposes.

Ecl. Dic. v. 3. p. 268. Kilkerran; (HERITABLE AND MOVEABLE.) No 4. p. 245.

* * * D. Falconer reports the same case :

MR WILLIAM BRODIE advocate was creditor by moveable bonds to Scot, *alias* Blair of Blair, who disposed his estate to trustees for the benefit of his creditors, some of whom assigned their debts to the same trustees, particularly Mr Brodie, on the narrative, ' That for a further security to any person or persons who might become purchaser or purchasers of the foresaid effects disposed to the said trustees in manner foresaid; and for more readily uplifting the debts and others assigned to them, it appeared necessary that an adjudication or adjudications should be taken of the said heritable subjects, and other legal diligence be used for the debts conveyed by the said Mr William Blair to his creditors, and that the same should be assigned and made over to the purchaser and purchasers; and it being expedient that the creditors, for avoiding the expense of a multiplicity of adjudications and other legal diligence, should assign their debts to the said trustees, to the effect they might lead adjudication, and use other legal diligence, and make over the same to the purchaser or purchasers, and in virtue thereof uplift the debts and other subjects which belonged to the common debtor, so far as the trustee should find it necessary, he assigned his, to the effect that they might lead an adjudication, and use other legal diligence, &c; which adjudication the trustees were empowered to convey in favour of the purchaser or purchasers, &c. with this provision, that the granting of that present assignation

‘ should nowise hurt or prejudice Mr Brodie of any diligence used by him by
 ‘ arrestment, or of any diligence he should think fit to use against the person
 ‘ of the debtors, or against any other lands, goods or gear, which should there-
 ‘ after pertain to them; these presents being only granted by him to the said
 ‘ trustees, in order to make up a sufficient right to the purchaser, for his secu-
 ‘ rity, and for enabling the said trustees to uplift the debts and other subjects
 ‘ conveyed to them.’

No 138.

On this assignation an adjudication of Blair's estate was led in 1736, and the Earl of Aberdeen having adjudged for himself, obtained a decret 3d February 1736, reducing the trust-deed, ‘ so far allenary as the same could militate against him.’

Mr Brodie died 1739, and Blair's heritable effects being afterwards sold by the trustees, a competition arose between Sir William Dunbar of Durn, Mr Brodie's heir, and the Lady Dipple his executor, for his share in the price, effecting to his debt.

THE LORD ORDINARY ‘ preferred the executor.’

Pleaded in a reclaiming bill, The debt stood really secured at Mr Brodie's death, by the adjudication led by the trustees, to whom he had assigned it, and consequently was heritable.

Answered, The adjudication was not led for the benefit of Mr Brodie, but that it might be disposed as a further security to the purchaser, as the express terms of the assignation whereon it proceeds bear; and this being the intent thereof, it does not vary the rule of succession in the subject, as was found 5th June 1745; Duff of Muirton against Duff of Drummur, No 7. p. 5429.

Pleaded for the heir, The adjudication was necessary to the creditors, as the trust disposition was reduced in favour of those creditors who did not accede thereto.

The adjudication in the case of Duff was led after the sale of the estate, by trustees, with consent of the creditor in whose name the adjudication was used merely for the security of the purchaser.

THE LORDS found the sum heritable. See No 244. p. 1208.

For the Heir, *R. Craigie*, Alt. *H. Home*. Clerk, *Kirkpatrick*.
D. Falconer, v. 1. No 276. p. 370.

1779. January 26. PATRICK BROWN against SAMUEL BROWN.

WILLIAM CATHCART granted an heritable bond over his lands to Dr Brown, for security of a debt previously due to him. Dr Brown, who resided at Kingstons, executed a power of attorney to Messrs Blackburn and Barclay, authorising them to obtain him infest on this heritable bond, and ‘ to act and do all other things relative to the premises, as if he were personally present.’ Infestment was accordingly taken in his name by his attornies.

No 139.

An heritable bond was granted to a creditor over certain lands, which were afterwards sold for behoof of the