No 20.

It was *answered*: That an obligement to relieve the purſuer, and retire his bonds, implies every thing that may make the relief effectual; and conſequently, that his debtor's means may be affected, and made furthcoming. 2*do*, The defender did already acquieſce, in as far as he deponed in the furthcoming, and cannot now decline to clear his former oath. 3*tio*, In another proceſs of forthcoming, on the ſame bond, againſt Margaret Seaton, the Lords did oblige her to depone in the furthcoming. 4*to*, The purſuer doth further liquidate his claim, by condeſcending and inſtructing the debts he has paid, in which he is a liquid creditor.

It was *replied:* The obligement of relief implies no more than the words do expreſs, by which nothing was intended, but to oblige Watſon perſonally. 2*do*, The defender might have declined to depone at firſt; and now he declines to lay his buſineſs open to the purſuer, who has no intereſt to require it. 3*tio*, Margaret Seaton had been holden as confeſt; and in a ſuſpenſion craved only to be reponed to her oath; and, though ſhe did offer the ſame grounds, yet ſhe inſiſted only *ad hunc effectum*, to be reponed, in which ſhe prevailed. 4*to*, It alters not the caſe, though the purſuer may have paid certain of the ſums expreſſed in the bond of relief, and thereby is become a liquid creditor; ſeeing his right to theſe bonds is not the foundation of the arreſtment and forthcoming.

THE LORDS found, a bond to relieve the purſuer, and retire his bonds in the terms above expreſſed, was no ground for arreſtment and furthcoming.

Fol. Dic. v. 1. *p.* 54. *Dalrymple, No* 33. *p.* 41.

1712. *February* 26.

KATHARINE ROSS, Relict of David Dickſon, Supplicant, *againſt* WILLIAM RENTON, Factor to the Eſtate of Begbie.

No 21.
A depending proceſs of reduction, (which does not conclude for payment of money) is not a proper ground of arreſtment.

UPON a repreſentation made by Katharine Roſs, that William Renton had arreſted all her effects, upon the dependence of a proceſs of reduction raiſed by him againſt her:——THE LORDS found, That the depending reduction (which concludes not the payment of money, but the removing a right out of the way) is not the proper ground of arreſtment: And therefore ordained the arreſtment, uſed upon that depending proceſs, to be looſed without caution or conſignation.

Fol. Dic. v. 1. *p.* 54. *Forbes, p.* 594.

1712. *June* 17.

WILLIAM KER of Chatto, *againſt* WALTER SCOT of Well, and OTHER CREDITORS of Sir WILLIAM and ROBERT SCOTS of Harden.

No 22.
An heritable bond, before infeftment,

THE deceaſed Robert Scot of Harden having, as heir, ſerved and retoured in in general, and executor to Sir William Scot of Harden, his brother, diſponed to

No 22.
may be the foundation of an arreſtment.

William Ker of Chatto, his brother-in-law, all debts, heritable and moveable, goods and gear owing and belonging to him: Chatto raiſed a proceſs of declarator and payment. Wherein Walter Scot of Well, and other creditors of Sir William Scot, compearing, claimed preference to Chatto upon the act 24, Parl. 1661: In regard he derived right only from Robert Scot, Sir William's heir, and they were creditors to Sir William, who had uſed diligence within three years after his death.

Alleged for Chatto, the purſuer: 1*mo*, The act of Parliament 1661, (which is a correctory law, and to be ſtrictly interpreted) concerns only right of lands. For as to moveables, all confirming within ſix months of the debtor's deceaſe come in *pari paſſu*. 2*do*, Sir William's creditors can have no preference, becauſe they have not within the three years uſed any complete diligence by appriſing or adjudication, poinding, or decreet of furthcoming, Stair, Inſtit. B. 4. tit. 35. § 14. For, if inchoate diligence within three years were ſufficient, if perfected thereafter, it might come to found a preference for thirty years, which is abſurd. Nor doth it avail them that they were interrupted in the completing of their diligence by Robert Scot's death: Since the preſcription of three years doth run *contra non-valentes agere*; December 19, 1678, Paterſon againſt Bruce*. 3*tio*, The act concerns only the competition of legal diligence. For, if creditors do not ſecure themſelves by diligence, within a year after their debtor's deceaſe, his heir may diſpone as he pleaſeth; as appears from a clauſe in the end of the ſtatute, annulling only diſpoſitions granted by an heir within year and day after the predeceſſor's death; and the diſpoſition was made to the purſuer after the year and day. Now, as an apparent heir cannot wrong his predeceſſor's creditors by a voluntary right within the year, he may *e contrario* effectually diſpone after elapſing thereof, if the defunct's creditors have not conſulted their own ſecurity, by inhibition, a charge to enter heir, or arreſtment, which might be done *intra annum deliberandi*, *See* Stair, B. 4. tit. 35.

Answered for the defenders: 1*mo*, The act of Parliament is conceived in general terms againſt the deeds of heirs; which word *heirs*, comprehends the repreſentatives in moveables as well as heritage: As a bond granted to heirs and ſucceſſors would belong to the executors and neareſt of kin, unleſs expreſsly excluded. There is equal reaſon to extend this interpretation to the ſucceſſor in moveables as well as heritage: It being no leſs unreaſonable, that the neareſt of kin's creditor's ſhould carry off the executry in prejudice of the defunct's creditors, than that the creditors of his heir ſhould affect the heritage to the prejudice of his own creditors. Beſides, the diſpoſition to Chatto contains not only moveables, but all heritable ſums, as to which the act of Parliament doth unqueſtionably take place. 2*do*, The act doth not require complete diligence within the three years, for it may often fall out, that diligence cannot be completed in that time: 'Tis true, the bare commencement of diligence, within three years, would

* Stair, v. 2. p. 659. *voce* CREDITORS of a DEFUNCT.

No 22. not be ſufficient, if the uſer of the diligence fell *in mora*, which is the reaſon of my Lord's Stair's opinion: But if a creditor, *in curſu diligentiæ*, be interrupted by an accident which could not be provided againſt, (as Chatto was by Robert Scot's dying before the three years were expired), the act could not be interpreted to exclude ſuch diligence from the benefit thereof. Nor doth the deciſion betwixt Paterſon and Bruce come up to this caſe; for there diligence was not ſo much as commenced within the three years. 3*tio*, One uſing diligence within the three years may reduce diſpoſitions or legal diligence to his prejudice: But diſpoſitions of that nature, within year and day, are, *ipſo jure*, null, and may be quarrelled at all times even by creditors who had omitted diligence within the *triennium*. And it were abſurd to imagine, that creditors of the apparent heir, who could not, within three years, affect the defunct's eſtate, to the prejudice of his creditors, might prejudice them by taking voluntary rights from the heir after year and day.

THE LORDS found, That the act of Parliament 1661 doth not concern this caſe; and therefore repelled the ground of preference founded thereon.

2*do*, *Alleged* for the defenders: The diſpoſition *omnium bonorum* by Robert Scot to the purſuer, his own brother-in-law, is null, unleſs the onerous cauſe thereof be inſtructed.

Replied for the purſuer, The diſpoſition muſt ſtand good, becauſe the diſponer had a viſible eſtate (beſides the ſubject diſponed) ſufficient to pay all his debts.

THE LORDS found, That the diſpoſition, being *inter conjunctas*, is reducible, unleſs Chatto ſhew a ſeparate unincumbered eſtate ſufficient to ſatisfy all Sir William's creditors.

3*tio*, *Alleged* for the defenders: They ought to be preferred, becauſe of their timely diligence by arreſtment before the diſpoſition.

Replied for the purſuer: This can be no ground of preference upon the act of Parliament 1621; becauſe that ſtatute preſuppoſeth the granter of a diſpoſition to be bankrupt, which Robert Scot was not. 2*do*, The arreſtment being only upon a dependence for an heritable ſum ſecured by infeftment, or at leaſt an obligement to infeft, it could not be the ground of arreſtment, unleſs made moveable by a charge.—Stair, *Inſtit. lib.* 3. *tit.* 1. § 27.

Duplied for the defenders, 1*mo*, Though Robert Scot was not abſolutely bankrupt, yet he had no other ſubject of eſtate which his other creditors had ready acceſs to affect. 2*do*, The arreſtment upon the dependence became liquid by a decreet, which rendered the heritable ſum a habile ſubject to arreſt for. And as the Viſcount of Stair obſerves, That ſums heritably ſecured, without actual infeftment, are arreſtable: So, *a pari*, heritable bonds, whereupon infeftment has not followed, (as in this caſe), may be the foundation of arreſtment. But then the queſtion is not, whether this be a preferable arreſtment in competition with the diligence of other creditors; but whether it be ſufficient, in the terms of the act 1621, to obviate poſterior voluntary gratifications, which an inchoate diligence may do.

THE LORDS found, That the defender's arreſtment, prior to the diſpoſition, ought to be preferred thereto. No 22.

4*to*, *Alleged* for the defenders: They being donatars to the eſcheat of Robert Scot, muſt be preferred to the diſpoſition of the eſcheat goods granted by him after he was denounced and regiſtered at the horn.

Replied for the purſuer, 1*mo*, The gift of eſcheat is null; in reſpect Robert Scot was charged at his houſe of Eliſtoun, and denounced at Selkirk, when he was actually reſiding with his family at Edinburgh, where he had been for ſixty days before. 2*do*, The diſpoſition was completed by intimation and citation before obtaining of the gift, which, as it would have ſecured the debtor's paying, ſhould afford preference as if payment had been made.

Duplied for the defenders: If the charge or denunciation were not orderly, the purſuer may reduce, as accords. 2*do*, No voluntary conveyance, by one regiſtered at the horn, is valid againſt the Fiſk, whether completed or not before the gift; and there is a great difference betwixt payments made by debtor's *bona fide*, and a competition upon a null right.

THE LORDS preferred Sir William's creditors as donatars of eſcheat: reſerving reduction, as accords.

5*to*, *Alleged* for the defenders: The purſuer, who was cautioner for Robert Scot in Sir William's confirmed teſtament, could not take a diſpoſition to the goods confirmed in prejudice of Sir William's creditors, to whom his executry was to be made furthcoming.

Replied for the purſuer: His getting right to the goods and debts confirmed, doth not aſſoilzie him from his cautionry; but when purſued, *eo nomine*, he will have this defence, That he cannot be liable till the repreſentatives of the executor be firſt diſcuſſed; and there is an unaffected eſtate for payment of all theſe debts. And ſeeing Robert Scot, who had right to the executry eſtabliſhed in his perſon, might have diſponed it to any ſtranger; what hindered him to convey it to Chatto?

Duplied for the defenders: Without determining how far an executor could convey the executry-goods to the prejudice of the defunct's creditors, it is plain he could not do it to his cautioner; for the deſign of caution is to make them furthcoming to the creditors, legataries, &c. *Et quem de evictione tenet actio, multo magis agentem, repellet exceptio.* Conſequently it is needleſs to debate how far he would have *beneficium discussionis:* There being a great difference betwixt a purſuit againſt an executor's cautioner, and an incident competition about the executry, where the cautioner claiming preference may be debarred *personali objectione.*

THE LORDS found, That the purſuer, being cautioner in the confirmed teſtament, could not accept a diſpoſition to all the confirmed goods, ſo as to make them his own property. (*See* BANKRUPT. *See* CREDITORS of a DEFUNCT. *See* LITIGIOUS, by denunciation.)

Fol. Dic. v. 1. *p.* 54. *Forbes, p.* 595.