

‘ 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

No 139.  
creditors of  
the debtor.  
The debtor  
in question  
survived the  
sale, but died  
before divi-  
sion of the  
price. Found,  
that so much  
of the price  
as correspond-  
ed with the  
annualrents  
was move-  
able, but that  
the share cor-  
responding to  
the principal  
sum in the  
bond conti-  
nued heri-  
table.

About this time, several adjudications were led against Cathcart's subjects by his other creditors; and, in order to prevent the expense of a judicial sale, the creditors agreed upon an application to the debtor, to name commissioners, with powers to sell the lands, and divide the price among the creditors *pari passu*.

A commission was accordingly executed by Cathcart, and the commissioners under it were empowered to sell the lands, and grant dispositions in the name of Cathcart to the purchasers, which were declared to be 'sufficient security to them.' After part of the lands was sold, the creditors, in a deed executed betwixt them and the trustees, ratified the commission and sales, with this proviso, 'that the produce arising from the sales should be divided equally among the creditors, according to the extent of their debts.' The attornies for Dr Brown joined in the original application, and were parties to this deed.

Dr Brown survived the sale of these subjects, but died in Jamaica before any payment was made. By his will, he left his whole personal estate to Mr Blackburn, who conveyed all right he had to it under the will, in favour of Patrick Brown, in consequence of a transaction between them.

In a multiplepounding brought by the purchasers of Cathcart's subjects, a competition arose betwixt Patrick Brown claiming under the will, and Samuel Brown, the heir of conquest to Dr Brown, which of them had right to the part of the price corresponding to the Doctor's debt. The issue of this competition depended on the question, Whether the debt was heritable or moveable at the time of the Doctor's death? For, if heritable, it went to the heir of conquest, all Dr Brown's fortune having been of his own acquisition; but, if moveable, it went to Patrick Brown, who had right to the moveable effects.

*Pleaded* for Patrick Brown: Though the debt due to Dr Brown was at one time heritably secured, this security was given up, and the debt became moveable by the transaction for bringing on a voluntary sale of the estate. Dr Brown, acting by his attornies, was a party to the whole of the transaction.

The concert among the creditors to come in *pari passu*, and the powers given to the commissioners to draw the price of the lands, as well as to sell them, and to give sufficient dispositions to the purchasers, necessarily import, that the heritable securities were entirely departed from. The right of every creditor, after the commission, resolved into a personal claim against the commissioner, for a proportion of the price corresponding to his debt *pari passu* with the other creditors.

*Pleaded* for the heir of conquest; The attornies had no powers from Dr Brown to alter the nature of his debt from heritable to moveable. Their powers went no farther than to complete the security of the heritable bond by infestment.

But no such alteration on the debt was agreed to by the attornies. The transaction only imported, that Dr Brown should restrict his claim as to any preference he might be entitled to, and come in *pari passu* with the other heritable credi-

tors. It was not stipulated that he should depart from his infeftment as an heritable security for his share of the price. The transaction does not go that length; and the lands could not have been disburdened of the heritable security upon them by any disposition from the trustees to the purchasers, nor until Dr Brown's share of the price was paid up to him. He was in the same situation, in this respect, as if the lands had been sold at a judicial sale, where the heritable securities continue on the lands until the price is paid to the creditors.

THE COURT were of opinion, That the attornies of Dr Brown had not sufficient authority from their commission to change the nature of the debt from heritable to moveable; and likewise, that the transaction did not import, that the heritable security was to be given up.

THE COURT found, ' That the share of the price of Mr Cathcart's lands, in the hands of the purchasers, the raisers of the multiplepinding, effeiring to the annualrents due in Dr Brown's heritable bond, at the time of his death, is *moveable*, and falls to the Doctor's *executors*; but that the share of the price, effeiring to the principal sum in said bond, is heritable, and falls to his heir of conquest.'

Lord Ordinary, *Hales*.

Act. *Armstrong*.

Alt. *Crosbie*.

Clerk, *Tait*.

*Fol. Dic. v. 3. p. 268. Fac. Col. No 59. p. 106.*

1791. November 30.

DURIE *against* COURTS.

No 140.

A PERSON having executed a trust-deed, conveying to the trustees his whole property; in the narrative he declares it to be his intention, that his houses, &c. should, if they thought fit, be sold, and the produce of the whole heritable and personal estate applied in the manner therein mentioned. The deed then makes over to the trustees for the use and behoof, in the *first* place of the heirs of his body, whom failing, a certain *series* of heirs, all the heritable subjects, and all and sundry debts and sums of money, heritable as well as moveable. One of the heirs to whom the right of succession devolved under this deed, having bequeathed her whole effects, real and personal, by testament, to her mother; this settlement was disputed, in so far as regarded an heritable bond for L. 2,000, which was claimed by the heir in heritage of the granter of the trust-deed. *Urged* for the mother, That the right which accrued to her was not the property of any specific effects, either heritable or moveable, but the residue of the value of an estate conveyed to trustees for certain purposes, and which, at their pleasure, they could make either heritable or moveable, being accountable only for its produce to those to whom it was destined. It surely could not be disputed, that had the trustees, before the testatrix's death, got payment of this heritable bond, it would have been validly conveyed by