No 115.

*** Dalrymple reports the same case::

Dr Irving having right by progress to a decreet of Council against New-grange and his Lady, for unwarrantable intromitting with, and cancelling an heritable bond, granted by the said Newgrange to the Countess of Southesk; William Oliphant raises a reduction of the disposition and assignation of the said bond, ex capite inhibitionis, alleging, that the said decreet of Council being surrogatum in place of the said heritable bond, was an heritable right; and consequently was reducible, as being posterior to the pursuer's diligence; for, albeit inhibitions do not reach alienations of moveables, notwithstanding of the style of the letters prohibiting the party to dispose thereof; yet all heritable rights are affectable thereby; and, though the 51st act, Parl. 1661, does provide, that heritable bonds shall be arrestable; yet it declares, that such bonds shall remain in their own nature unchanged, as to all other effects; and, before that act, and more especially before the 1641, no bond bearing annualrent being arrestable, all dispositions thereof were reducible ex capite inhibitionis.

It was answered; Inhibitions relate only to rights of lands and moveables upon lands, which are species or corpora, but not to bonds or obligations, whether heritable or moveable, unless infeftment had followed; which is the opinion of my Lord Stair and Dirleton. Neither does the style prohibiting alienations, dispositions, &c. mention bonds, except in that part thereof where contracting of debt is forbidden; and there bonds are expressly mentioned, because contracting of debts, and granting of bonds, are the foundation of diligence that might affect and carry away lands against the design of that prohibitory diligence, which, by style, reaches not the bond, nor, by custom, any moveables. 2do, No purchaser of conveyances to bonds did ever search the Register for inhibitions; because they were never understood affectable thereby; neither does it import, as to the present question, whether such rights were arrestable before the 1641, or not.

"The Lords found, That assignations to heritable bonds, whereupon no infeftment followed, though containing a clause to infeft, were not reducible excapite inhibitionis." See Inhibition.

Dalrymple, No 45. p. 58.

SECT. XX.

Claim of Relief.

1628. July 10.

CANT against EDGAR.

No 116.

A CAUTIONER having paid an heritable bond before his decease, the Lords found, that the benefit of the relief belonged to his executors, although he had

obtained decree against the debter for repayment of the sums paid out, with No 116. annualrent thereof during the not payment.

Fol. Dic. v. 1. p. 373. Durie.

- * * See this case No 19. p. 3199.
- ** Auchinleck reports the same case:

Although a bond be heritable, yet if it be paid by the cautioner in his own time, his bond of relief is found, and must pertain to executors.

Auchinleck, MS. p. 15.

1629. July 10.

WARDLAW against WARDLAW.

No 117.

THE Laird of Torrie, for the relief of the sums of money for which he became cautioner for Mr David Wardlaw, was infeft in the said Mr David's lands of Cullarnie. Before Torrie's decease, he paid the sums for which he was cautioner. The Laird of Torrie's Heir pursues Mr David for the sums as due to him, by reason his father was infeft in his lands for his relief; likewise the Laird of Torrie's Executors pursue Mr David for the same sums, as due to them, alleging the bond of relief to be moveable, and consequently due to the executors.—

THE LORDS found the sums due to the heir, and he who only could renounce the infeftments.

Fol. Dic. v. 1. p. 373. Auchinleck, MS. p. 3.

** This case is reported by Durie:

UMOUHILE Wardlaw of Torry being cautioner for Mr David Wardlaw in a sum by an heritable bond, and for his relief, beside the clause of relief contained in the bond, having taken infeftment in his principal lands, the cautioner having paid the sum, being distressed therefor; and after his decease the cautioner's heir, and also his other bairns, as executors to him, either of them claiming this relief to be due to them, and pursuing by two distinct pursuits, the principal party for payment of that sum, the one as due to the executor, and the other as due to the heir, in respect that he alleged, that the bond being heritable, the relief ought to be of that same nature; likeas the infeftment given to the defunct for his relief proved that the same pertained to his heir and not to his executor; it was found, nevertheless, that the said relief so sought against the principal party, by personal pursuit, was due to the executor, and not to the heir; seeing the heir sought not the benefit of his infeftment, as he might against the land, if he had been distrest, but only pursued personal action for payment; and that infeftment would not have prejudged the defunct in his own time, to have miskenned the relief, which he took by infeftment, ad