

sion, which, of its own nature, is heritable, and that the charge was executed against one of the cautioners, and not against the principal. No 132.

Newbyth, MS. p. 52.

*** This case is also reported by Gilmour :

IN a process pursued at the instance of Colonel James Montgomery and his Lady against her brother, the LORDS found, that an heritable bond became moveable by a charge of horning used against a cautioner, though the principal was not charged ; and that there was no necessity to use requisition, though the sum was eiked to the reversion of a wadset, in respect the bond appointed execution to pass without requisition.

Gilmour, No 176. p. 127.

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

No 133.

FOUND, that an arrestment and furthcoming, at the instance of an appriser, do not make the sums in the apprising moveable.

Fol. Dic. v. 1. p. 374. P. Falconer.

*** See this case No 109. p. 5552.

1728. *November 12.* REIDS *against* CAMPBELL.

No 134.

A BOND being made heritable by adjudication, it was found, that a subsequent charge of horning did not make it again become moveable. See APPENDIX.

Fol. Dic. v. 1. p. 374.

SECT. XXVI.

The last step of Diligence is the rule.

1665. *January 13.* JANET SHAND *against* CHARLES CHARTERS.

CRICHTON of Castlemain, and Crichton of St Leonard, granted a bond to Shand, and ——— Herren his spouse, the longest liver of them two, and their

No 135.
A creditor in
a bond, in

No 135.
 which two
 persons were
 bound, led an
 apprising a-
 gainst one of
 the debtors,
 and after-
 wards char-
 ged the other
 debtor for
 payment;
 and, after the
 charge, gave
 in the appris-
 ing to be al-
 lowed.
 Found, that
 the sum was
 rendered he-
 ritable.

heirs, &c. with a clause for infestment; whereupon there was an apprising led in John Shand's lifetime against one of the debtors; thereafter John Shand charges the other debtor for payment; after the charge, John Shand gives in the apprisings to be allowed, and after his death his wife takes infestment upon the apprising. The bond being now produced before the Lords in an exhibition pursued by Janet Shand as heir to John Shand, there is a competition for delivery betwixt Janet Shand, as heir to John Shand, as being heritable, and Charles Charters, as having right from ——— Herren, John Shand's relict, as being moveable. It was *alleged* by the heir, That the sum became heritable by the supervening of the apprising. It was *answered*, That there was a charge after the apprising which returned the bond to be moveable. It was *answered*, That the charge was not against the party whose lands were apprised, but against the other party. *2dly*, The charge could only return the bond to its first condition before the apprising; so that the bond being since 1641, the relict is excluded, and the charge cannot bring her in. *3dly*, Albeit it could, yet, after the charge, the defunct returned to his heritable right by obtaining that apprising allowed, which allowance the relict produced, and took infestment; so that these last acts being upon the real right, the heir must be preferred; and therefore the ground of preference of the executor or heir is the will of the defunct, either to make use of his heritable or moveable right, which is still ambulatory, and in his power; and whatever right he last makes use of evidences his choice, and according thereto the right is either heritable or moveable; but here he did last make use of his real right, by allowance of the apprising, after the charge, which the relict homologated by taking infestment conform. It was *answered* for the creditor of the relict, That this being one debt, though due by many debtors, the charge against one did sufficiently show the purpose of the defunct to make use of his right; and the charge doth render the bond simply moveable; and doth not return to the condition it was before the apprising. To the *3d*, Passing from the charge must either be express, or a deed of evident consequence; but the allowance of the apprising is not such, which might be done only *ad hunc effectum*, that if the appriser should pass from his charge, the apprising might revive, and be secure.

THE LORDS found the sum heritable.

Fol. Dic. v. I. p. 374. Stair, v. I. p. 249.

* * * Newbyth reports the same case :

JAMES CRICHTON of Castlemains being debtor by bond to umquhile Hugh Shand, and Marion Herren his spouse, payable to the longest liver of them two, and their heirs; whereupon there is comprising led in both their names; and the husband having predeceased, the said Marion purchased an infestment thereupon to herself solely, of the hail lands comprised, thinking thereby to appro-

priate the whole sum to herself, though, by the bond, she could have no right thereto, but simply to the annualrent thereof after her husband's decease; the said Hugh being dead, Janet Shand, as heir to the said Hugh, pursues Charles Charters, as haver of the writs, for exhibition and delivery thereof to her. The writs being exhibited, it was craved for the said Janet, as heir to Hugh, that the bonds, comprisings, inhibitions, and other writs following thereupon, might be delivered to her, the bond being moveable, albeit bearing annualrent; and that the term was elapsed, being dated in *anno* 1635, in respect the relict and wives are secluded thereby, and albeit the said Marion her name be borrowed thereto, and inserted therein, and payable to her as longest liver, *et quoad eum*, it cannot import but a liferent of the same; and that comprising hath followed thereupon. It was *alleged* by the defender, That, since the apprising, there was a charge of horning given at the husband's instance to James Crichton of St Leonards, who was cautioner, by which charge the husband declared his intention that the bond should be moveable, and that his relict should have the benefit thereof. To which it was *duplied*, Ought to be repelled, in respect the husband, after the charge of horning, gave in his apprising to be allowed.—THE LORDS found the sum to be heritable, and consequently to belong to the heirs, in regard of the apprising and allowance thereof, notwithstanding the charge of horning given to the cautioner, the allowance being *ulterior actus*; and therefore preferred the heir served and retoured to the relict and her assignee, Charles Charters, albeit the assignee was most favourable, as being a most lawful creditor to the relict, who had acquired the money of her own industry; and therefore ordained the writs to be delivered up to the heir.

No 135.

Newbyth, MS. p. 17.

 S E C T. XXVII.

Effect, if the diligence be null or informal.

1665. January 18. WILLIAM STEWART *against* STEWARTS.

WILLIAM STEWART pursues a poinding of the ground of the lands of Errol, upon an infestment of annualrent granted to his grandfather by the Earl of Errol, by his bond, and infestment following thereupon, in which bond there were cautioners: The annualrent was for a sum of 7000 merks, and a sum of 8000 merks.

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No 136.

A creditor in an infestment of annualrent having made requisition,