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.

Newbyth, MS. p. 17.

No 135.

SECT. XXVII.

Effect, if the diligence be null or informal.

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

No 136.
A creditor in an infeftment of annualrent having made requisition,

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

No 136.
it was contended for his executors, that though the requisition was informal, the sum ought to be declared moveable, it being evident that the defunct intended to make it moveable. The Lords found, according to Stair, the sum continued heritable. According to Gilmour, it was found moveable.

Compearance is made for the pursuer's brothers and sisters, who *alleged*, that as to the sum of 7000 merks, it became moveable, and belongs to them as nearest of kin, in so far as their father made requisition for the same. It was *answered*, The instrument of requisition is null, as being disconform to the clause of requition; in respect, that the original bond was to the husband and wife, the longest liver of them two, in conjunct fee, and their heirs, &c.; and the requisition bears expressly, 'That if the husband, or his heirs, required, with consent of 'the wife, then the debtor shall pay,' *ita est* the instrument bears no consent. It was *answered*, That albeit some points of the requisition were omitted; yet, seeing the mind of the defunct appears to take himself to his personal right, and consequently to prefer his executor to his heir, it is sufficient. The pursuer *answered*, *Non relevat*, because every intimation of the defunct's intention is not enough, but it must be *habili modo*; and the ground whereupon the sums become moveable is, because the requistion looses, and takes away the infeftment; and, therefore, if the requistion be null, the infeftment is valid, and the bairns can never have access.

THE LORDS found the requisition null, and preferred the heir.

January 19.—IN the foresaid cause, it was further *alleged*, for the 8000 merks, that it was also moveable; because, as to it, there was no liferenter, and the fiar himself did require. It was *answered* for the children, That the requisition is null; because it mentions not the production of a procuratory, nor the production of the right itself. 2*dly*, The requisition is made to Bogie as cautioner for the Earl of Kinnoul, whereas he was cautioner for the Earl of Errol, granter of the first bond. It was *replied*, Oppones the requisition, bearing, 'That the 'procurator's power was sufficiently known to the notary.' 2*dly*, *Non relevat*, unless the person required had called for the procuratory or right, and had been refused. 3*dly*, The procuratory is now produced with the right, and the defunct acknowledged the procuratory and right, because he raised horning thereupon.

THE LORDS sustained the requisition, and found the sum moveable, and preferred the bairns thereto. *See* REDEMPTION.

Fol. Dic. v. 1. *p.* 374. *Stair, v.* 1. *p.* 251, & 252.

*** Newbyth reports the same case:

UMQUHILE William Earl of Errol having borrowed L. 10,000 from umquhile Sir William Stewart of Garntully in *anno* 1630, for his security thereanent he granted him two several infeftments, one of 8000 merks, granted to Sir William simply in liferent, and to John Stewart his youngest son in fee, and in wadset 1000 merks granted to Sir William, and dame Agnes Moncrieff, his spouse, in conjunct infeftment, and to the said John Stewart his son in fee; whereupon

No 136.

infeftments did follow accordingly: Likeas the said contract contained clauses of requisition and premonition, and several persons bound as cautioners for the requisition, and bears, that the same should be made by the said Sir William, with consent of the said dame Agnes, and that it should be made to the said Earl and his cautioners. Sir William, during his lifetime, made no requistion, and the said umquhile John Stewart, fiar of the wadset, or infeftment of annualrent, being now deceased, William Stewart his son and heir, who stands infeft in the foresaid annualrent, as heir to him, pursues a poinding of the ground against the Earl of Ethie present possessor of the saids lands, and against the tenants and possessors. In this process compearance is made for the bairns of umquhile John Stewart, who are executors dative surrogate to him, and it is *alleged* for them, There can be no poinding of the ground at the pursuer's instance, because the foresaid sum belongs to them, as being made moveable by the said umquhile John Stewart, their father, not only by a requisition in *anno* 1646, but by a charge of horning in *anno* 1647, and by a denunciation.—THE LORDS decerned in the poinding of the ground, and would not sustain the requisition *ad hunc effectum* to make the sums moveable, *quoad* the 7000 merks which was liferented, in regard the same was not made with consent of the liferentrix, and to the hail cautioners, conform to the condition of the requisition, which the Lords found to be *strictissimi juris*, and therefore found the same still heritable.

1665. *January* 19.—In the same process immediately preceding, the LORDS found the 8000 merks moveable, and sustained the requisition made therefor, albeit made by the father, but to one of the cautioners; and that the instrument bear not the procuratory that was shewn, in regard of the subsequent horning following thereupon; which being raised by the pursuer himself, the LORDS found to be a sufficient homologation of the requisition made by the umquhile father, against which he could never be heard, being heir to his father, to object any defects, seeing he had homologated the requisition by raising the horning, as said is; and therefore found the same to belong to the executors; and found no poinding of the ground for the same.

Newbyth, MS. p. 18, & 19.

*** This case is also reported by Gilmour:

THERE being an infeftment on the lands of Errol, or rather an annualrent furth thereof, granted to umquhile Sir William Stewart of Garntully, and Dame Agnes Moncrieff his spouse, in liferent, aud to John Stewart their son, for 10,000 merks, whereof the Lady was liferenter only of the annualrent effeiring to 8000 merks; and there being a clause of requisition, whereby, after the

No 136. death of Sir William, John has power to require the 8000 merks, with consent of his mother liferentrix; and before his death he did require, but not with her consent, and upon the requisition he did charge. After John's death, his eldest son pursues a poinding of the ground, having obtained himself infeft. The rest of the children being executors, and having confirmed the said 8000 merks, they *alleged*, The sum is moveable and belongs to them as executors. It was *answered*, The requisition is null, not being done with consent of the liferentrix. *Replied*, *Esto argumenti causa* the requisition should have been null as to this effect, that John the fiar could not have compelled the debtor to pay unless the requisition had been used with her consent; yet *ad effectum* to declare his mind, that he would have the money, and so make it moveable, it is sufficient. *Duplied*, The same requisition would have been sufficient enough, if the fiar had offered caution to the liferenter to make the annualrent furthcoming. *Triplied*, That the requisition being made contrary to the contract, it could not be valid to loose the infeftment, which stands in the same force as if requisition had not been used, nor could the requirer have compelled the debtor to pay upon caution, where her consent to require was expressly requisite; which is more than the case of a simple liferenter, where the clause of an express consent is wanting. And in that case also, it is in the power of the Lords to judge, whether the liferenter or the fiar should command the money, which they do sometimes the one way and sometimes the other, as they find the circumstances do require, and according to the sufficiency of the cautioner offered by either party.

THE LORDS found the 8000 merks moveable.

Gilmour, *No* 129. *p.* 94.

SECT. XXVIII.

Effect of disposition of heritable subjects to trustees.

1739. *November* 6.

MURRAY KYNNYNMOUND *against* CATHCART and ROCHEAD.

No 137.

WHERE a disposition of heritable subjects was granted by a debtor to trustees for behoof of his creditors, and acceded to by the creditors, and thereafter a part of the subject was sold by the trustees for creditors' payment; in a question between the heir and executor of one of the creditors, the whole debt was found to be thereby rendered heritable, and to remain so at the creditor's death, except in so far as the creditor was entitled to draw of the sums therein contained out of such of the subjects as were sold by the trustees before his death;