SECT. XXV.

Diligence against Cautioners.—Diligence upon Apprisings.

1666. *January* 24.

Colonel JAMES MONTGOMERY and his SPOUSE *against* —— STEWART.

No 132.
An heritable bond rendered moveable by a charge against one of the cautioners.

MARGARET M'DONALD and Colonel James Montgomery her spouse, pursue a declarator against Stewart, oye and apparent heir to umquhile Sir William Stewart, to hear and see it found and declared, that umquhile Dame Elizabeth Hamilton, spouse to umquhile Sir William, had right to certain bonds and household plenishing from Sir William, and that the said Margaret had right thereto from the said Dame Elizabeth, by her assignation, and that the sums and goods were moveable, and thereby the assignation granted thereto, albeit on death-bed, was valid. It was condescended on, that the bonds were moveable by a charge of horning. It was *answered*, That the charge was but against one of the cautioners, which was not sufficient to make it moveable.

THE LORDS repelled the allegeance.

Fol. Dic. v. 1. *p.* 374. *Stair, v.* 1. *p.* 343.

*** Newbyth reports the same case:

IN a declarator pursued at the instance of Colonel James Montgomery against James Stewart of Craveing, that a bond of 2000 merks, due by George Home of Ford, and his cautioner, to umquhile Sir William Stewart, with certain other bonds, may be declared moveable; and which might have been assigned or disponed upon death-bed; and which now belongs to the pursuer, having right to the progress libelled in the declarator; it was *alleged*, The declarator could not be sustained as to the 2000 merks bond due by George Home, because the same was heritable, being an eik to ane reversion of some lands lying about Dunbar, belonging to the said George Home, and so could not be declared a moveable sum, and fall under testament, and consequently belongs to the pursuer in manner libelled. Whereunto it was *replied*, That Dame Elizabeth Hamilton having right to the said sum, both by assignation from her husband Sir John Stewart, and also by an express provision contained in the bond, she having caused charge the debtor for payment hath made the same moveable, albeit the same was heritable of before.—THE LORDS found the sum made moveable by the charge of horning, notwithstanding it was an eik to the rever-

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, is 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.

No 135.
A creditor in a bond, in

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