No 124. than by testament; but there being no reason libelled thereupon in this process, but only the pursuit moved here by the heir, to whom this reason was not competent, the action received no decision upon this ground.

Fol. Dic. v. 1. p. 374. Durie, p. 113.

*** Haddington reports the same case:

GORDON ANDREW being obliged to umquhile Mr James Donaldson in the sum of 4000 merks, payable at four terms, and in annualrent during the non-payment, Mr James made his second son Robert assignee to this bond. James Donaldson, eldest son to the defunct, pursued reduction of the assignation, because the bond was conceived to Mr James and the heirs of his first marriage, and *alleged*, That the assignation was made by Mr James *in lecto ægritudinis*. THE LORDS first assoilzied the defender for the annualrents received by the assignee by virtue thereof before the reduction intented. Thereafter the defender *alleged*, That before the assignation made to him by the space of six weeks, his father had made the sum moveable by charges of horning to pay it. It was *answered*, That notwithstanding thereof, Mr James had in effect passed from the charges, and acknowledged the sum immoveable by the assignation, whereby he had made his son Robert assignee to the sum and to the annualrents thereof, for terms bygone and to come, likeas, the assignee had acknowledged the bond heritable by receiving payment of the annualrent for terms after his father's decease. Notwithstanding whereof, the LORDS considering that charges for payment of the principal sum had once made it moveable, that the addition of the clause in the assignation for annualrent of terms bygone and to come altered not the effect of the charge and bond, and that the receipt of subsequent term's annualrents by the assignee altered not the nature of the bond and assignation, since it was not unlawful to him to take payment of annualrent so long as the sum was not paid, albeit the bond had been moveable, and therefore found the exception relevant.

Haddington, MS. No 3031.

1672. *June* 25.

The SISTERS and EXECUTORS of SIR ROBERT SEATON *against* His BROTHER and HEIR.

No 125. A creditor charged for a sum secured by infeftment of annualrent. This was

UMQUHILE SIR ROBERT SEATON having due to him, by bond and infeftment, 58,000 merks payable upon requisition, obtains a posterior bond of corroboration for the same sum, with some bygone annualrents accumulated, bearing 'but prejudice or derogation to the principal bond and infeftment following

No 125.
found to make the debt moveable.

'thereupon,' and bearing a term of payment of the principal sum not yet come, with this provision, that if two terms of the annualrent run together unpaid, it shall be leisom for the said Sir Robert to uplift the whole sum, both principal and annual without requisition; and several terms having run together, he obtained declarator of the failzie, and having registrated the bond of corroboration, charged the Earl of Nithsdale the debtor, and so having died without testament, the competition arises betwixt his sisters as executors, and Gairlton his brother, as heir.—It was *alleged* for the executors, That albeit this sum was once heritable by an infeftment, yet it became moveable by the charge of horning, which according to the unquestionable custom, doth loose all infeftments, and render the sum liquid and moveable, albeit the user of the charge may in anywise he pleases pass from the charge, whereby all the infeftments revive and stand good to him; yet so long as the charge or requisition stands, by the nature of the right, it is incompatible with an infeftment, and neither poinding nor apprising can be used thereupon till a requisition or charge, otherwise the apprising would be null; and the appriser cannot both make use of the principal infeftment and apprising together; but if he make use of the first infeftment, he must pass from the requisition or charge, and the apprising and infeftment following thereon *pro tempore*.—It was *answered*, That albeit commonly a charge renders an heritable sum moveable, yet the only ground is, because the creditor thereby *indicat animum*, that he would rather have his money than make use of his security; and consequently, if he leave it in that case, that he would rather have the sum belong to his executors than to his heir; so that if there be stronger evidences of his intention in favour of the heir, the sum remains still heritable; which point is of great consequence not only as to the sum in question, but as to all the great families in the kingdom, who are ever understood to intend the greatness of their family, and that the sums secured by infeftment should belong to their heirs; and therefore, when they charge, their intention is only to help their security by getting up the sum, and not to weaken it by passing from their infeftments; much less can it be thought that any creditor by such a charge would render a sum moveable, that it might fall to the fisk by single escheat, or that the whole should belong to the husband *jure mariti*, or a third to the wife *jure relictæ*; and in this case there are many more evidences of the defunct's mind in favour of his heir than of his executors; for, 1*mo*, The bond of corroboration bears expressly, 'but 'derogation of the former security,' which is as much as if he had charged upon the bond of corroboration, with express declaration that it should not loose or prejudge his infeftment. 2*do*, After the charge, he did proceed to poind or apprise; but having gotten a part of his bygone annualrents, he sisted; and it is offered to be proved that on his death-bed, being desired to do some deed for applying of this sum, or a part thereof to others, he expressly declared that the sum was secured by infeftment, and that he would not prejudge his heir

No 125. therein; and this charge was given by order of his writer, who might have done it without warrant.—It was *answered* for the executors, that the ground of heritable sums becoming moveable by a charge, is not the creditor's indication of his mind to prefer his executor; for often times such charges are given by persons such as this was, in health and strength, without consideration of their successors, but of themselves, to get up their money upon the account of hazard, or on other intents; but it is the incompatibility that no debt should be both moveable and heritable at once; and all the inconveniences alleged would strike against all requisitions or charges, even upon the principal obligation, which was never controverted; neither is there any moment in the inconveniency, for creditors may pass from the requisition or charge, when and what way they please, and so they know how to evite the hazard of the sums falling n escheat; and if their intention were not to prejudge their heir, it had been easy, which is ordinary, to insert in the like bonds, 'secluding executors;' neither is there any speciality in this case, for the provision, 'but derogation to 'the former security,' cannot be understood as to what is expressly altered by the corroboration, viz. that the sum should be payable upon the failzie of two terms annualrent, without requisition; but only that the creditor might make use of either, or both securities, according to their nature, which cannot import the consistence of incompatibility, viz. the making use of the charge and infeftment at once; for that could not have consisted, though the charge had borne it expressly; and for the defunct's declaring his intention, it is of no moment, seeing he did it not *legitimo modo*, by cancelling or passing from the charge; and the writer's warrant to give the charge is presumed, otherwise all charges would be void, unless the warrant were instructed, or at least were proven by their oath, or writ of the charger, that there was no warrant; and it is very ordinary that for one debt there are several securities by diverse parties, principal and cautioners, or by apprising against them; and yet a charge against any of them makes the debt moveable, *quoad omnes*, even though the other securities contain clauses of requisition, because it imports a passing from all infeftments and securities *pro tempore*, and the creditor's betaking himself to the payment of his sum.

THE LORDS found that this charge made the sum moveable, and to belong to the executors, seeing nothing was done to take it away in the defunct's lifetime; and found the sum did belong to the executors, and not to the heirs.

Fol. Dic. v. 1. p. 374. Stair, v. 2. p. 89.

*** Gosford reports the same case:

THE said Ladies, (Lady Traquair, Lady Semple, and Lady Mary Seaton,) pursuing the Earl of Nithsdale as executors to Sir Robert Seaton their brother,

No 125.

for payment of 100,000 merks, for which the Earl of Nithsdale was debtor to him by bond, compearance was made for Gairlton, who *alleged*, That the foresaid sum being heritable by a wadset and comprising, whereupon infeftments followed, it did belong to him as heir, and fell not under executry.—It was *replied*, That albeit the said sum now pursued for was heritable, and secured by infeftments, as said is, yet the defunct, in his own time, having taken a bond of corroboration, which was moveable, and made the money payable at a term, upon a simple charge of horning on six days; likeas *de facto*, having registrated the same, and raised letters of horning, which were executed against the debtor, it did make the sum moveable, he never having received any annualrent for any terms subsequent to the charge.—It was *answered* for Gairlton, That the letters of horning being executed upon the bond of corroboration, did not alter the nature of the sum, which, notwithstanding, did remain heritable; because the bond of corroboration did bear a special clause, that it was but prejudice of any former heritable security and infeftment; which not being loosed by any requisition, could not be innovated; but the heir of necessity must enter, and renounce the said right before the lands be purged; so that the said sum must be interpreted to be still heritable, and that the bond of corroboration and charge of horning could import no more, but that the defunct might have it in his power to call for these monies, uplift the same from the debtor, but not to make them moveable, and to belong to his executors. It was likewise urged, that if it should be found that a naked charge of horning should make a sum moveable, which before was heritable by infeftment, it would be of dangerous consequence, seeing if the creditor was denounced, notwithstanding of the heritable infeftment not extinguished, the whole sums would fall to the King or his donatar to the prejudice of their lawful creditors; and many families having their estates consisting of wadsets and comprisings, besides which they ordinarily take bonds of corroboration, with power to charge without requisition, whereby they intend nothing but to have power to lift their money by a charge of horning, they should, contrary to their intention, frustrate their eldest son and heir, and make their estates fall to their younger children, and thereby put them in a far better condition than the heir who should represent them.—THE LORDS, notwithstanding, did prefer the executors, and found that a charge of horning, never past from by the defunct, was a *judicium voluntatis* to make the sums moveable, and to belong to his executors; that it being in his power to destroy the executions, and not doing it, or declaring any thing to the contrary before his death, by our constant practice the sums are always thought moveable; which is hard in this case, as it is circumstantiate.

Gosford, MS. No 495. p. 260.