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;

for in so far the bond was found to become again moveable, and to belong to the executors. *Vide* TERM LEGAL and CONVENTIONAL, *eod. die inter eosd.* No 137.

Fol. Dic. v. 3. *p.* 268. *Kilkerran*, (HERITABLE and MOVEABLE.) *No* 2. *p.* 243.

*** See Clerk Home's report of this case, No 4. p. 5415.

1748. *July* 13. SIR WILLIAM DUNBAR *against* The EXECUTORS of BRODIE.

No 138.
A debtor disponed his estate to trustees. Some of the creditors assigned their debts to the same trustees, to lead an adjudication to be made over to a purchaser. The adjudication was found to make the debts heritable.

LOWIS of Merchiston, and SCOT of Blair, becoming both bankrupt, they, in 1720, granted conveyances of their estates, real and personal, in favour of certain trustees, for the use and behoof of their creditors, and bearing to be in order to facilitate their payment by a sale of the subjects, to which conveyances the most of the creditors acceded. But as a few stood out, and that it was not at that time a settled point, Whether or not a debtor, bankrupt in terms of the act 1696 could effectually grant a trust right for the behoof of his creditors, so as to exclude the diligence of such as should not chuse to accede thereto; and as that scruple might scar purchasers; it was agreed by the acceding creditors, that they should assign their debts to the trustees. Among the rest, Mr William Brodie, in prosecution of this plan, assigned to the trustees three debts due to him, expressing the purpose thereof to be, that by an adjudication proceeding thereon, and on the debts assigned by the other creditors, a sufficient right might be made up to the purchaser; and one adjudication was accordingly led for the whole debts due to the several acceding creditors.

The event justified this precaution; for the non-acceding creditors having proceeded to separate diligence by adjudication, notwithstanding the opposition made by the trustees, who pleaded that the bankrupts were denuded by the trust conveyances made for the behoof of all their creditors equally and proportionally, the LORDS, — January 1729, 'Allowed them to proceed in their separate diligence;' and in February 1736, at their instance, 'Reduced the trust-right,' No 244. p. 1208.

The trustees had in the mean time proceeded to sell several parcels of the estate; and as the prices were adequate, the outstanding creditors acquiesced in the sales; and as the adjudications were all within year and day, so far as the prices were paid, the whole drew their shares in proportion to their debts.

While part of the price of the subjects sold was yet unpaid, and other subjects remained unsold, Mr Brodie died; and a competition ensuing between Sir William Dunbar his heir, and the Lady Dipple his executor, each claiming the whole of the debt remaining due to him, the trustees brought a multiplepoinding, wherein the LORDS 'preferred the executors to the defunct's interest in the price of the subjects sold before Mr Brodie's death, and yet resting unpaid, and preferred the heir upon the subjects that were unsold at his death.'

As this decision was agreeable to a former precedent, *vide supra*, Murray