1683. *March.* SIR GEORGE LOCKHART *against* STUART of ARVORLOCH.

IN a multiplepoinding betwixt an annual-renter and a personal creditor, who had arrested the common debtor's rents for terms after the other's infeftment, and recovered a decreet of forthcoming before it was made public ;—the Lords preferred the annual-renter, seeing a base infeftment affords a sufficient right to mails and duties in a competition with personal rights.

Page 164, No. 594.

1683. *March.* ANDREW CANT *against* WESTERTON.

BY a contract of marriage, the tocher being payable to the husband, his heirs and executors, and he obliged to add the like sum, and to employ the same on land or annual-rent to himself, and his wife in liferent, and to the bairns of the marriage in fee ; the heir claimed the said tocher, as belonging to him by virtue of the said destination, and in the case of the Act of Parliament about securities, containing an obligement to infeft. Alleged for the debtor, That the sum fell under executry, and, as such an obligement is reputed moveable *passivè*, and prestable by the debtor's executors ; so, *e contra*, it ought to be performed to these *activè ;* nor is it in the case of the Act of Parliament, where the creditor intends to make his money heritable, by taking from his debtor an obligement to infeft ; for here is an obligement by the father, who was creditor himself ; and the heir cannot quarrel the not-performance on't. The Lords inclined to sustain the defender's allegeance, as being exclusive of the pursuer's title ; but, before answer, ordained the executors to be cited. Alleged for the executors, That the sum, by the quality of the obligement to heirs and executors, is moveable. Answered, *Esto* the father had received the money, yet the obligement of destination, in favours of the heir, is prestable to him by the executors, and does not evanish by the father's death. Replied, The word heirs is not to be strictly understood to exclude bairns from coming in *pro rata*, though this be the contract of a first marriage ; since, then, the younger children would not have any provision.

Page 8, No. 35.

1683. *March.* DUFF of DRUMMUIRE *against* INNES of COXTOUN.

A SUMMONS of transferring *passivè* against an apparent heir, being raised within year and day after the defunct's death ; the pursuer having craved that the depositions of some witnesses might be taken to lie *in retentis*, for proving some points of the principal libel ;—Alleged for the defender, That no act or step in an old process can proceed *intra annum deliberandi*, more than a new process could be intented : besides, there would be this inconveniency in such a method, that the apparent heir durst not move any interrogatories to the witnesses, for fear of a passive title ; and the reserving his interrogatories and objections

would signify nothing, if the witness died in the mean time, during the interval of the defender's deliberation. Answered for the pursuer, Any action that hinders not the apparent heir to deliberate, and contains no personal conclusion against him, such as declarators, transferrings, &c. may be pursued *intra annum deliberandi*. The Lords refused to examine the witnesses; nor would they, at the pursuer's desire, grant presently a commission for examining the witnesses, who were very old men, at a day after expiring of the year of deliberation, which would run out before another session.

Page 9, No. 40.

1683. *March.* ROBERT RICHARDSON *against* SIR WILLIAM SHARP.

A GRATUITY of 3000 merks, given by the king to a soldier for apprehending a rebel, found not arrestable by his creditors, especially before it was paid to him by the cash-keeper, as having the privilege of *stipendium militare*.

Page 14, No. 79.

1683. *March.* ALEXANDER ABERCROMBIE *against* DAVID SEATON.

AN assignee to a bond, who was obliged to use all manner of legal diligence against the debtor, before he recurred against the cedent; having proceeded the length of caption against the debtor;—the Lords found, That he had done sufficient diligence, and needed not to take a gift of escheat, nor poind goods, nor adjudge lands; and therefore sustained process against the cedent: albeit it was alleged that the obligement to diligence, being general, imported both real and personal diligence.

Page 21, No. 106.

1683. *March.* BAILLIE of TORWOODHEAD *against* PATRICK GARNER.

FOUND, that a person having taken an assignation to mails and duties in corroboration of a debt, and entered into possession by uplifting a part, was not obliged to continue to intromit as apprisers are. But here it was not alleged that he had excluded any other creditor from intromitting.

Page 21, No. 107.

1683. *March.* SEATON and HARVEY *against* LUMSDEN.

FOUND, that the assignation of sums heritable, by a clause secluding executors, is not *in bonis defuncti*, or confirmable, though not intimated in the ce-