

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

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

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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 obligation to infest. Alleged for the debtor, That the sum fell under executry, and, as such an obligation 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 obligation to infest ; for here is an obligation 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 allegiance, 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 obligation to heirs and executors, is moveable. Answered, *Esto* the father had received the money, yet the obligation of destination, in favours of the heir, is prestable to him by the executors, and does not vanish 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.

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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 intended : 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