

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.

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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*.

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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 obligation to diligence, being general, imported both real and personal diligence.

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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.

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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-

dent's lifetime ; but here the defunct's executors were competing, and not another creditor upon his diligence.

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1683. *February & March.* BONNAR'S CREDITORS *against* WISHART his RELICT.

IN a competition betwixt an heir and executors, for the sums in a bond bearing an obligation to infest, and secluding executors, on which the creditor had given a charge of horning, and died before payment ;—Alleged for the heir, 'Though a bond that is heritable by an obligation to infest, may be rendered moveable by a charge, yet the calling for payment of a bond, where executors are excluded expressly, doth not import any design in the creditor to alter the destination in favours of executors, but only imports a design to have the money better secured for the heir's behoof ; and the clause secluding executors in a bond that was heritable *ex sua natura*, did argue *enixam voluntatem* to cut off the pretensions of executors : And, though the charge would make the sum fall under escheat, it could not make it belong to executors ; for several things belong to heirs that fall under escheat, such as heirship moveables, tacks for years, &c. Answered for the executors, The design of taking bonds secluding executors, is mainly to secure against the commissaries, that a title might be made to them without the charges of quote and confirmation ; and, if a charge of horning did not make such bonds moveable, creditors would be difficulted how to secure their money from the burden of confirmation, and at the same time to preserve it easily as a fund for younger children's provision, seeing parents are generally averse from granting assignations to such bonds in their own lifetime : so that the clause secluding executors is not to be considered as the parent's resolution to prefer the heir, but only as the quality of an heritable right ; and the case of Chrystie against Chrystie, 13th July 1676, was but a single practise, and contained a specialty too. The Lords found, by the plurality of one vote, That the charge of horning did make the sum moveable, and to belong to executors. —*February* 1683.

Thereafter it was alleged, That, after the charge of horning, the creditor had apprised, which took off the effect of the charge. Answered, That, after the apprising, the creditor denounced the debtor upon the charge, and took out letters of caption, and arrested him in prison : and also arrested sums of money belonging to him ; upon which, action of forthcoming was commenced, and carried on some length : all which being done before the creditor's decease, were strong indications of his inclination to have up his money, and more than equivalent to a charge of horning. Replied, Custom having fixed upon the formality of a charge, no equivalent acts are to be sustained ; and, suppose a person had charged for an heritable sum, and thereafter comprised for it, the charger's proceeding to denunciation and caption would not have made it moveable ; nor would a decret upon the arrestment have made the ground thereof moveable, without a charge upon the decret, more than a decret of registration, without a charge, would have had that effect. The Lords repelled the answer, in respect of the reply ; and found the diligence