

No 16. instance of a debtor distressed by a charge of horning, though no payment made, No 12. p. 140.; and a delaratory action was certainly competent to her and her cedents against the Dutchess, after the decret 158, that the Dutchess on payment should be liable to relieve her *pro rata*. *Duplied*, The case of the decisions cited are where there is an express obligation to relieve, either indefinitely or *ad certam diem*; which is not the case here: And the declaratory action, invented by the Dutchess's lawyers, is an chimerical imagination, having no more foundation in law than if a creditor, by a conditional bond, should immediately before existence of the condition raise a declarator against the grant-er, that his bond shall be effectual when the condition shall happen to exist; which would certainly be considered an empty airy process. THE LORDS repel-
 led this second defence of prescription. *3tio*, *Alleged* for the Dutchess; that the pursuer, as heir, and deriving right from Sir John Scot, can have no right to this bond, it being moveable; for though it was heritable as bearing annual-
 rent, and prior to the act of parliament 1641, yet the decret taken on it in 1658 made it moveable, even as bonds bearing infestment became moveable by requisition, as Stair observes *lib. 2. tit. 1. § 4.* and Nasmith *contra* Ruthven, *voce* HERITABLE AND MOVEABLE; and Fairholm *contra* Montgomery, *voce* PASSIVE TITLE: and heritable bonds are rendered moveable by any intimation the cre-
 ditor makes, to express his mind not to let the money lie any more in the debt-
 or's hand, but to lift it. Now the taking a decret signifies abundantly his de-
 sign to have his money, and so being moveable, this sum fell to the executors,
 and is not validly conveyed to this pursuer by the heir. *Answered*, The taking
 a decret is no indication of the creditor's mind to have his money; seeing no
 charge of horning, arrestment, or other diligence followed thereon for many
 years thereafter; so it is not the commencement or first step of diligence that
 alters or changes the nature of an heritable bond, but the continuation thereof
 by horning, requisition, or the like explicit deeds, which is the case of the de-
 cision adduced; and even where horning or requisition has been used, they re-
 turn to be heritable, if he for a considerable space desist from farther diligence,
 or accept of his annualrents: So that decret was no more but a constitution of
 the debt, and no declared resolution to lift the money. THE LORDS found the
 decret did not make the bond moveable, unless a charge of horning had fol-
 lowed thereon. See HERITABLE AND MOVEABLE.

Fountainball, v. 2. p. 731.

1731. February.

GRAHAM against LITTLE.

No 17.

A GRANTER of a bond of presentation having paid the debt, upon failing to present the person of the debtor, and having taken an assignation, was not found entitled to relief against the cautioners in the original bond. See APPENDIX.

Fol. Dic. v. 1. p. 222.