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

Page 21, No. 108.

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 obligement to infeft, 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 obligement to infeft, 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 practique, 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 decreet upon the arrestment have made the ground thereof moveable, without a charge upon the decreet, more than a decreet of registration, without a charge, would have had that effect. The Lords repelled the answer, in respect of the reply; and found the diligence

therein condescended on did not make the sum moveable after the apprising; and so was not equivalent to a charge.—*March* 1683.

Page 41, No. 187.

1683. *March.* JAMES HENDERSON *against* SAUGHTONHALL.

FOUND, that, of bonds taken to a man and his wife, and the longest liver, the husband is fiar-substitute, though the wife survive; and that the sum, though moveable, needs no confirmation.

Page 42, No. 188.

1683. *March.* DAVID SCRIMZOUR *against* MARGARET HAY and her ASSIGNEE.

ONE having paid £100 sterling of £200, upon the creditor's obligement to warrant him as to that £100; was not found obliged to pay the other £100 to an assignee, till he got surety that he should be harmless as to the first £100; but was allowed retention upon that head, though the debtor was not yet troubled for it, the cedent being insolvent.

Page 61, No. 257.

1683. *March.* BAILIE JUSTICE *against* NISBET and AIKENHEAD.

IN a competition between an appriser and one having right by a disposition of a date anterior to the denunciation, where the obtainer of the disposition had expede a base infeftment thereon, after the decreet of apprising, but before the appriser had charged the superior; which base right was confirmed by the superior after the appriser's charge;—it was alleged for the receiver of the disposition, That he, having the first complete real right, ought to be preferred to the appriser, whose apprising and charge against the superior was but a diligence; for, though a charge be equivalent to infeftment, in a competition of diligences of the same nature, *viz.* apprisings and adjudications, it hath not that effect where a comprising competes with a voluntary right. 2. As the disobeyed charge did not infer contempt or *mora* in the superior, unless the appriser had offered a charter and a year's duty, nor would hinder him from nonentry, ward, marriage, &c. upon the death of the debtor, far less could a stranger-purchaser, who is completing his diligence, be prejudged by the charger, who is only obliged to notice what diligence is real and upon record. 3. Though it may be pretended that the legal diligence is favourable, a buyer's case is more favourable; for it were harder to disappoint a purchaser, who pays a real price that may be affected by the seller's creditors, than to frustrate the diligence of a compriser, who is at no greater loss thereby than he had before. Answered for the appriser, A charge against the superior is esteemed equivalent to infeftment, as to all effects except removing; and it was not in the power of the superior,