fect execution might follow by adjudication: And, by the summons whereupon the decreet proceeded, it was only craved that the estate should be affected: And, by the adjudication, Bramford's estate was only affected; and the adjudger was content to declare that he should affect no other estate.

Yet some of the Lords were of the opinion, That the decreet not being in these terms,—That the Lords decerned, *cognitionis causa*, to the effect execution might follow against Bramford's estate,—it was *in arbitrio judicis*, to sustain the decreet to be a ground of adjudication or not: And that Mr William Weir, having been accessory to the appeals, at the instance of Callender, from the Lords of Session, deserved no favour. And it was carried by plurality, that the adjudication should be reduced.

Newtoun, *Reporter*. Mr John Hay, *Clerk*.

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1676. *December 5.* RUTHERFORD *against* WEDDEL.

The Lords, in a suspension at the instance of a bankrupt, who was prisoner, did allow him to come out without the habit; because it was represented, that the debt was, for the most part, not contracted by himself, but by his father: Albeit some of the Lords were of the opinion, that the Act of Sederunt bearing no distinction, and being made upon good consideration, and conform to the practice of all other nations, that bankrupts should be known, by a habit, to be persons that deserved no trust; and that others may be affrighted from contracting or undergoing debts which they are not able to pay: And that the pretence foresaid was frivolous; it not being presumable that a person would be heir, and become liable to debts that he had not contracted, unless there were effects and sufficiency of estate to pay the same: And, if such pretences should be allowed, the law would be altogether illusory.

Gosford, *Reporter*. Mr Thomas Hay, *Clerk*.

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1676. *December 22.* TAIT *against* WALKER.

THE children of a second marriage, having pursued the son of the first, for implement of their mother's contract of marriage, and the provisions therein contained in their favours:—

It was ALLEGED, That they were debtors themselves, in so far as they were executors named and confirmed to their father:

And it being REPLIED, That the testament was given up by the mother, they being infants for the time, and she was not their tutrix, and so could not bind them:—

The Lords found, That there was difficulty in the case; in respect the pursuers were now past 40 years, and they had never questioned or desired to be reponed against the said confirmation. And, on the other part, it was hard that a deed of their mother, having no authority to do the same as tutor or cu-

rator, should bind them: and there was no necessity to be reponed against the same, it not being their deed, and being *ipso jure* void: and therefore, before answer, the Lords thought fit to try if the pursuers had meddled with any part of the executry, or had done any deed that could import homologation of the said testament.

Newbyth, *Reporter.*

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1677. *January* 11. VISCOUNT of OXENFORD *against* Mr JOHN COCKBURN.

Mr John Cockburn having gone abroad with the Viscount of Oxenford; and, after his return, having gotten several bonds, from the said Viscount, of considerable sums, and also a pension of 1000 merks: And having charged upon the same, the Viscount suspended upon that reason,—That the said Mr John, during their being abroad, had received great sums of money remitted to him upon the Viscount's account, for which he had not counted; and that, after count and reckoning, he will be found debtor to the Viscount in more than the sums charged for:

And it being ALLEGED by the said Mr John, that he is only countable for his intromission; and that his actual intromission ought to be instructed by writ or by his oath: and the declarations of merchants and factors abroad cannot be probation to bind upon him so great intromissions:

The Lords considered the condition of the Viscount for the time, that he could not intromit himself; and that the said Mr John had such influence upon him, that having been his governor at schools, and, upon the desire of his friends, being put from him by an Act of Council, he, notwithstanding, without and contrary to the advice of his friends, carried him abroad; and, since his return, had gotten from him the bonds foresaid: And therefore thought fit to try the business to the bottom; and to ordain the said Mr John to give in his counts of what was received and debursed when the Viscount was abroad; and the factors and other witnesses to be examined concerning his intromission; and whether or not any monies, that were remitted for the Viscount's use, were received by the Viscount himself, or by the said Mr John.

Redford, *Reporter.* Mr John Hay, *Clerk.*

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1677. *January* 12. *Inter eosdem.*

IN the same case it was found,—That an instrument of requisition was null, because it did not bear that the procuratory was produced. And an instrument being produced, extended under the notary's hand, and being quarrelled upon the ground foresaid, the Lords did not allow the notary to give out another instrument, bearing the procuratory to be produced; nor did admit probation, by witnesses, that the procuratory was produced; seeing such solemnities are not presumed, and cannot be proven by witnesses, but by valid and formal instru-