

1685. *November.*REACH *against* POLWART.

A RELICT having, as executor-creditor to her husband, pursued his son of a former marriage for the sum in a bond, which she proved, by his oath, he had taken out when his father was dying, and [got] renewed in his own name, without any assignation from the father;—Alleged for the defender, That he, being creditor, by his contract of marriage, to his father, anterior to the pursuer's marriage, might take payment from him, or a bond to be delivered to the father's debtor, upon which the defender might get payment, or new security; 2. The defender has a gift of his father's escheat. Answered for the pursuer, It is not denied but the defender might have received payment or assignation from his father; but the bare having of the bond imports not the transmission of a right thereto, especially when it appears not, by writ or witnesses, that the father delivered the bond *ad hunc effectum*; 2. The pursuer was confirmed executor-creditor before the gift in favours of the defender; and all the legal diligence of creditors affecting moveables, anterior to the gift of the debtor's escheat, are preferable to the donator. The Lords sustained the second answer made for the pursuer, which did determine the cause without necessity to consider the first. *Vide* No. 457, [Auld against Smith, February 1684.]

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1685. *November* 11.PITTRICHIE *against* UDNEY.

IN a process for damage, against a person who induced the pursuer to take a cautioner, whom the defender knew at the time to be insolvent;—the Lords rejected the summons as not relevant, though all was referred to the defender's oath.

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1685. *December.*LORD YESTER *against* LORD LAUDERDALE.

MY Lord Yester and his Lady having craved a decret, *cognitionis causa*, against the Lord Lauderdale, upon his renunciation to be heir to the Duke his brother;—it was alleged for the defender, That he, as a personal creditor to the Duke, had interest to stop decret and adjudication, by alleging that the debt was paid, in so far as the £10,000 sterling, contained in the Lady Yester's bond of provision, was innovate or implemented in her contract of marriage, wherein £12,000 of tocher was contracted for her by the Duke; and *debitor non presumitur donare*. Answered for the pursuer, That he could not be hindered to constitute his right against the Duke, whom the defender had renounced to be heir to; and he was willing all defences should be reserved to the defender, in so far as he is creditor to the Duke *contra executionem*. Replied for the defender, *Malitiis non est indulgendum*; and the pursuers, without any visible advantage to themselves, would greatly prejudge the Duke's