

father after the intention of Smith's cause: Gray confirms himself as a creditor to his father in as many sums as he was bound for his father as cautioner, to the end he might get his relief that way. It being alleged by Smith, that Gray should not be preferred in these sums he had confirmed after the intention of his cause, which he was *in mala fide* to do, except he had been cited before to object against it,—Gray answered, that it was lawful for him to do that which any stranger might have done. The Lords found, that, notwithstanding of the intention of Smith's cause, (which was *inanis actio*, Gray not being his right party contradictory, being neither executor nor intromittor,) Gray might confirm himself creditor as he did, and have allowance of all the debts paid by him before the confirmation.—*9th Dec. 1630.*

Afterwards the defender having alleged, that he could not be convened as executor to his father, because he had only confirmed himself as a creditor to his father in divers sums of money, wherein he was bound as cautioner for him, *ad hunc effectum solummodo* that he might be relieved of his cautionary, and has given up inventory of no more goods and gear than would relieve himself; in which he ought to be preferred to all other creditors;—the Lords found that none of the debts confirmed could be received, except such as were paid by the excipient before the intending of the pursuer's action: Albeit it was alleged by him, that the bonds wherein he stood cautioner for his father were registrat, at least the terms of payment were bypast, long before the pursuer's action was intended: So that, he being the person that might be distressed for the same, he had right of retention of the same goods confirmed, for his own relief: for, as it would be a competent exception for him, if he were pursued by the defunct's creditors for making of arrested goods forthcoming, so that defence is alike competent, in this case, to retain the said goods in his own hands till he be relieved of his cautionary; especially seeing he could not do diligence for his own relief, by pursuing of himself. The Lords would give him no allowance of any bonds confirmed by him, but of such as he had been distressed for, and had paid before the pursuer intended his action: and, for the rest, he should come *in pari passu* with the rest of the creditors.—*2d Feb. 1628.* *Page 114.*

1630. *December 9.* The HEIRS of N. WHITE and MARGARET PORTEOUS
against DAVID BICKERTON.

DAVID Bickerton being obliged, by an heritable bond, to pay to N. White and Margaret Porteous, his spouse, and the heirs procreate betwixt them, which failyeing, to their heirs whatsoever, the sum of 500 merks; it was adjudged that the whole should appertain to the husband's heirs, and nothing to the wife's.

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1630. *December 18.* THOMAS STARK of ACHINVOILL *against* ALEXANDER
BRUCE.

SIR John Bruce of Airth, being infest as heir to his father in the superiority of

certain lands within Monkland, holding by him again of Sir James Cleland; by contract betwixt him and Thomas Stark of Achinvoill, disposes the superiority of the said lands to the said Thomas, and obligeth himself and his heirs to resign the said superiority in Sir James Cleland's hands, for a new infeftment to be given thereof to the said Thomas. Before Thomas is seised in the said superiority, Sir John Bruce died, and Thomas, having charged Alexander Bruce to enter heir to his father Sir John, gets the foresaid contract registrat against Alexander, as lawfully charged to enter heir to his father. After this he charged Alexander for fulfilling of the contract, and denounced him at the horn; and, having done all the diligence he could to get himself infeft, at last he summoned the director of the chancery to compear before the Lords, and to hear and see him decerned, by their decret obtained, to direct precepts out of the chancery for infefting of the said Thomas in the said superiority, in respect that Sir James Cleland had resigned the said superiority in the king's hands, by which his majesty was Sir James Bruce's immediate superior of the said superiority. The Lords sustained the summons, notwithstanding that the said Alexander was not infeft himself; for they thought the pursuer could do no more than he had done, and so the next superior should supply the contumacy of Alexander.

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1630. *December 18.* The EARL of CASSILS *against* ALEXANDER BARCLAY.

WITNESSES, *ex officio*, are ordinarily examined before the Lords; yet sometimes, upon considerations, they have directed a commission for examining of them, where the parties cannot conveniently come before the Lords. As in an action between the Earl of Cassils and Alexander Barclay, wherein there were divers witnesses examined *ex officio*;—the Lords directed a commission to the minister of Maybole to examine Alexander's wife, *ex officio*, upon some points.

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1630. *December 22.* ANDREW MUDIE *against* RONALD MURRAY.

ANDREW Mudie, executor dative confirmed to Mr Umphrey Blenshill, and Ronald Murray, were striving for a cloak which pertained to the defunct. Andrew Mudie had confirmed it with the rest of the defunct's moveables; Ronald had bought it from Mr Umphrey's son and apparent heir, it being in none of their possessions, but both seeking it from one Smith, that had it. Ronald alleged, It could not pertain to the executor, because it was moveable heirship, and so could not be confirmed. Andrew answered, He could pretend no right to it, as having bought it from the defunct's apparent heir; for the apparent heir, till he was served, had no right to it. The Lords, although none of them seemed to have good right to it, yet, in respect the executor had a sentence for him, and there was no heir to challenge it, and, perhaps, would never be, they preferred the executor.

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