

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.]

*Page* 127, No. 467.

---

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.

*Page* 258, No. 915.

---

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 prejudice the Duke's

creditors, seeing the passing of one adjudication would oblige all the creditors to do the like, whereby expenses would be accumulated, and the estate rendered less able to pay all the debts; and the defender was content to have debated the pursuer's interest, which they refused. The Lords sustained the defence for the personal creditor, if instantly verified.

Page 2, No. 8.

---

1685. December. CHRISTIAN MICHIE against Mr JOHN RICHARDSON.

A WIFE, by her contract of marriage, being provided to a liferent of the whole conquest, with a provision that she should do no deed without consent of Sir James Dundass of Arnistoun;—the husband acquired tenements to the value of £700 or £800 a-year; and she, a little before his death, renounced and restricted the liferent to £300, free of all public burden, in favours of her husband, and ratified the deed judicially upon oath. She and her second husband raised reduction of her renunciation, upon these grounds:—1. It was done, *stante matrimonio*, and so revokable; 2. It was done without consent of Sir James Dundass, to whom, by the husband's consent, she was interdicted. Answered, She cannot be reponed against her ratification by oath, which is *vinculum spirituale*; 2. The provision in the contract imports no interdiction, nor is it conceived *irritanter*. Replied, By our law, wives can do no deeds unless authorised by their husbands or friends, and the husband could no more authorise her *in rem suam*, than a curator could authorise his minor; 2. By the civil law, wives, in respect of their frailty, have a privilege of revoking all their deeds of intercession, either for their husbands or third parties, *per senatusconsultum vel leianum*; and they are secured against all deeds in favours of the husband *per orationem Antonini, ne mutuo amore se spolient*. And the oath doth not hinder revocation of deeds in favours of the husband, more than the revocation of personal obligations to pay sums, which do not oblige the wife, though granted to third parties with her husband's consent, and ratified upon oath; 3. The Act of James III, Par. 11, respects only the case of alienations made to third parties, with the husband's consent, which, if ratified by oath, are not revokable; and doth not concern deeds granted to the husband, without being lawfully authorised; 4. The provision in the contract, requiring Arnistoun's consent, was, in effect, a real interdiction, *quoad* the husband who consented to it, needing no publication. And it was *contra fidem et in fraudem contractus*, for him to do any deed contrary to the provision, which was expressly designed to obviate his taking advantage of his wife. And whatever might be said of a wife's renunciation to her husband, upon equal and rational terms, where she reserves a competent subsistence; here there is enorm lesion *ultra dimidium*, the wife having restricted her liferent of an opulent conquest to £300. Duplied, By our law, wives, though they cannot oblige themselves personally for sums, they may validly contract, and denude themselves of rights standing in their persons, either in favours of their husbands, or other third parties with consent of their husbands. And though deeds, with consent of their husbands, in favours of third parties, judicially ratified without oath, are considered as revokable, the interposing of an oath excludes all revocation. And the difference betwixt a wife's