

(Pais periculo petentis.)

1685. December 4. LORD and LADY YESTER against LORD LAUDERDALE.

THE Lady Yester, and Lord Yester for his interest, having pursued Lord Lauderdale, as lawfully charged to enter heir to the deceased Duke of Lauderdale, for payment of L. 10,000 Sterling, contained in two bonds granted by the said Duke, in favours of Lady Yester his daughter; Lord Lauderdale having renounced, Lady Yester did insist for a decret *cognitionis causa*. Lord Lauderdale thereafter compeared as a creditor to the deceased Duke; and *alleged*, that there could be no decret *cognitionis causa*, because he offered to prove, and instantly to verify, that these bonds were satisfied and discharged. It was *answered*, That the same was not competent to Lord Lauderdale, he being only a personal creditor, and so could not stop Lady Yester from doing her diligence; she being going on to adjudge, especially seeing he was not *legitimus contradictor*; for whatever did come of this debate, Lady Yester was not *tuta exceptione rei judicatae*, seeing all the personal creditors might claim the same privilege; and that if a personal creditor, while the defunct was alive, could not be admitted to propone a defence of payment, to stop diligence, where the debtor himself did not compear; so neither, he being dead, is it competent to a creditor of the defunct, to stop diligence *contra hereditatem jacentem*. It was *replied* for Lord Lauderdale, That the pursuer could not but acknowledge, that after diligence is done, every one of the real creditors might separately impugn one another's debts; so that albeit a creditor succumbed, yet there could be no security *exceptione rei judicatae* against the rest. *2do*, The pursuer had no prejudice, in regard there was no delay craved, and there was no anterior adjudication upon the estate.

THE LORDS found, That Lord Lauderdale, as a creditor, might be admitted to propone the foresaid defence of payment, the same being instantly verified; and that it was competent to him, to stop the constitution of any debt, that might affect the *hereditas jacens*, which was the subject of the payment.

*Fol. Dic. v. I. p. II. President Falconer, No 109. p. 76.*

1686. February. SHEARER against CARGILL.

PETER SHEARER, as assignee by James Bell, to a part of his wife's tocher, due by Thomas Cargill of Auchtedonald, having pursued an adjudication against Auchtedonald: *Alleged* for the defender, That adjudication could not proceed for the sum, nor was he liable to pay the same, before James Bell, the cedent, did secure his wife in a liferent provision, conform to the contract of marriage; for the obligation in the contract being mutual, as the cedent could not seek payment, nor adjudge for the sum before first he performed his part of the contract, so neither can Peter Shearer the assignee. *Answered*, That the assignation

No 2.

A personal creditor was permitted, in an adjudication *contra hereditatem jacentem*, to propone the exception of payment, it being instantly verified; and there being no other adjudication of the estate.

No 3.

An assignee pursues adjudication of part of his cedent's wife's tocher. The cedent had not performed his part of the contract. The adjudication allowed.