gift of the same escheat to another donatar, as being acquired, and as a new purchase made by the rebel after the first gift, whereto the king had right by the continuing rebellion, and the acquisition by the rebel of these goods while he was rebel; which being so acquired after the first gift, by the rebel's remaining so, it gave place to the king of new to confer them.

Act. Hope and Burnet. *Alt.* Nicolson. Scot, *Clerk.* *Vid.* 25th and 28th November, 1626, E. Kinghorn *against* Wood.

In this same process, the persons who, of law, would have been executors to the rebel, being called, and proponing the exception foresaid upon the said prior gift and declarator; and alleging that the donatar, who had obtained declarator, had made one Grahame assignee thereto, who had transacted with them for the said goods escheatable; and so that this pursuer could not seek a declarator upon that which is declared already, seeing they behoved to be countable to him who had obtained the said first gift, and which was declared;—the Lords found, that this allegeance was not competent to these excipients, to be proponed by them, albeit they were specially called in this process; but the same was only competent to the donatar and his assignee.

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1627. *July* 12. ROWAN *against* SHAW.

IN a suspension betwixt Rowan and Shaw, where a bond was made by a debtor, granting him to have borrowed from umquhile Ferguson some money, which the debtor obliged himself to pay to his said creditor, or to another called Shaw, or to either of them, presenters of the bond, and their heirs and executors; which sum being craved from the said debtor, after the decease of Ferguson the principal creditor, by the creditor of the said Ferguson, who had arrested the same; and also the said sum being craved by the executors of Shaw, who was adjected in the bond, acclaiming the same to be due to them, seeing the payment by the bond was appointed to be made to one of the two presenters of the bond, and their heirs and executors, and that they had the bond, and so contended the right of it to pertain to them, and not to Ferguson, nor his creditors;—the Lords preferred the executors of the person adjected, in respect of the tenor of the bond appointing payment to be made to one of the presenters, or their heirs or executors; for, albeit the bond was not presented by Shaw in his own lifetime, and that the sum was the proper money of Ferguson, yet it was found as due to his executors as to Shaw himself, seeing they had the bond: and albeit, by the civil law, *adjectus solutioni non potest petere sed tantum potest solutionem accipere*, yet that agrees not with our practice, whereby *adjectus potest etiam petere*: And albeit, by our practice, *is possit petere*, yet if he and the principal creditor were contending for the sum, the principal creditor, lender of the money, would be preferred to the adjected; nevertheless here, the executors of him who was adjected were preferred to the creditor of him who principally was deduced in the obligation; for, if he had been living, the *adjectus* would have been preferred to himself, because the said executors of the person adjected had the bond in their possession the time of his decease, and it was found *in bonis ejus*, and amongst his writs, after his decease; and that the principal

creditor, Ferguson, lived four months after him, and never sought the sum; likeas, the time of the date of the bond, he was owing greater sums to the person adjected than the sums contained in this bond, which were presumptions that the bond was given to the person adjected, at the very making thereof, for satisfaction of that debt, *pro tanto*. And this allegeance was admitted to probation, and was the cause of this decision, preferring the person adjected to the principal and his creditor, seeing there was nothing qualified to infer simulation, or that the bond came in his hands by any indirect or unlawful means; and it was not respected, that it was alleged that the debtor had paid this sum to the creditor who had arrested.

Act. ———. *Alt.* Millar. Hay, *Clerk*. *Vid.* 2d February 1628, L. Duffus.

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1627. *November* 27. The LAIRD of DRUM *against* His TENANTS.

IN a removing, L. Drum *against* his tenants, an exception proponed for the defenders, and admitted to their probation, *viz.* That they were tenants to Crawfurd, who was apparent heir to his father, who was heritably infeft in the lands, and in continual possession; at the which term assigned to prove, a discharge being produced by the pursuer, subscribed by the tenants, whereby they renounced the proponing of this exception; in respect whereof the pursuer craved a sentence, seeing no other person was called. In the process compeared one for Crawfurd, the apparent heir, and proponed the same exception upon his father's right, and their possession; and alleged, that the tenant's renunciation ought not to debar him to follow out the probation of the said exception: which was found by the Lords he might resume and prosecute, albeit the tenants passed from the same; and that their collusion with the pursuer should not prejudge their master; albeit the said Crawfurd was not called in this process. But because the said Crawfurd had nothing to produce, to show either where himself, or his father, or predecessors were infeft in the land; therefore it was found he could not be admitted for his interest, and thereupon sentence was given.

Act. Primerose. *Alt.* Mowat. Gibson, *Clerk*. *Vid.* 29th June 1626, La. Glengarnock.

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1627. *December* 22. DICKSON *against* JOHN HUME of SLEGDEN.

IN an action, pursued by one Dickson, as heir to his father, *against* John Hume of Slegden, for payment of the sum of 8000 merks payable to his father by the said defender; and the said defender excepting upon a discharge of the sum made to him by the defunct, which he produced: and the pursuer replying, that that discharge was consigned in the notary's hands who writ the same, to remain with him until the defender had perfected an obligation of so much of the said sum as was resting unpaid, that the obligation might be delivered to