

*casum*, and as if the party intended a substitution to the heir. Which is very subtle.

But, on a bill, they ordained this point to be heard again in presence. Which was accordingly done on the 1st of March 1683, and then they reversed their former interlocutor; and found a charge of horning rendered a bond secluding executors moveable, as well as any other bond would be so loosed.

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1683. February 16.

BAITH *against* BEITH.

BAITH *against* Beith, reported by Redford. In a contract-matrimonial, the husband's father obliges himself that his son shall come in equally with the rest of his children, both as to all moveables and heritage he shall happen to have at the time of his decease: thereafter he assigns an heritable bond to another son: the brother quarrels this; and, craving a share of it upon the fore-said clause, it was ANSWERED,—The clause not took away his *jus et liberum arbitrium disponendi*, and he had not this at the time of his decease, being denuded; and so fell not under the clause.

The Lords finding it was not for onerous causes, nor upon necessity, to a stranger, but merely gratuitous to another child, they judged it fraudulent; at least not the parents' design to innovate the clause, and only to give it *pro tanto*; and therefore admitted the brother to a part of it.

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1683. February 17. INGLIS of CRAMMOND *against* JAMES CURRY, late PROVOST of EDINBURGH.

THE Lords repelled Curry's ground of compensation founded upon Samuel Moncrief's debt, which Samuel was Crammond's author and cedent; because not instructed nor liquidated before Crammond's arrestment, but long after; and even then it was only by holding Moncrief the bankrupt as confessed upon a debt alleged owing by him to Curry: and, though he had compeared and deponed, his oath could not prejudge Crammond, or his other lawful creditors doing prior diligence, against whom nothing could compensate but a debt owing by Moncrief by bond or decreet anterior to their arrestments or other lawful diligences done by them against him.

And on occasion of this interlocutor, I heard the Lords had found the like within these few years, in a case between the Earl of Annandale and William Johnston of Wamphry and his Creditors. Annandale offering to prove payment of some articles by Wamphry's oath, the Lords found his deposition could not prejudge his creditors who had adjudged from him. See Stair 14th July 1666, *Sharp against Glen*.

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