

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.

Page 313.

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