five hundred merks, due by the Laird of Rentoun to Trotter of Charterhall, did pursue for payment.

It was ALLEGED for Rentoun, That he could not be *in tuto* to make payment, because the assignation was so qualified that the monies could not be uplifted but to reëmploy, conform to the particular provision therein contained, in favours of the heirs of provision and persons substituted after the death of the assignee.

It was ANSWERED, That it was *jus tertii* to the Laird of Rentoun, who was debtor, and in whose favours there was no clause of provision.

The Lords did repel the defence, and found, that the debtor ought to be decerned to make payment, which would exoner him: reserving to the heirs of line, or any other person substituted, to be heard before the extracting of the decreet, upon the reëmployment of the said sum; conform to the special provisions contained in the assignation. Thereafter, compearance was made for Walter Stewart, as creditor to the heirs of line of Charterhall, who did grant the assignation, and, having arrested and intented reduction, in their name, of the assignation, *ex capite lecti*, did crave that the money ought to be made forthcoming to him; and the reason of his reduction might be admitted to his probation.

It was ANSWERED, That the arrestment could give no right, because the pursuer was content to lose the same: and, for the reduction *ex capite lecti*, it could not be sustained at the instance of a creditor of an apparent heir, seeing he could have no interest, unless there were an heir served and retoured, whereby he might establish a title in his person, as a lawful creditor, and thereby affect the sums by a legal diligence which was not yet done; and so could not be reserved to him, as accords.

It was REPLIED, That a creditor of an apparent heir may pursue any right which may be competent to his debtor, if he were served heir.

The Lords did repel the defence, in respect of the reply; and found, that a lawful creditor to an apparent heir had a good interest to reduce any right made by the defunct, to whom they might be served, seeing their voluntary lying out ought not to prejudge their creditors; and that they having reduced any right might stand in their way, they might with an assurance take a legal course how to establish a lawful title in their person, to recover any debt or right that would belong to the apparent heir, their debtor.

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1675. *July* 27. The COUNTESS of ERROLL *against* The EARL of ERROLL.

THE Countess having pursued the Earl to purge the little Mill of Esselmount, which was a part of her conjunct-fee lands, of a wadset which did affect the same, and whereof the wadsetter was in possession; which distress was referred to the Earl's oath of verity:—It was ALLEGED, That the distress being *factum alienum*, and not a deed of this Earl, but of his predecessor, to whom he was heir, he was not in law obliged to give his oath of verity thereupon: and the legal course that the Countess must take, is first to pursue for possession

of the mill, upon her contract of marriage and infeftment; and, in case she be debarred by the wadsetter, then to have recourse upon the warrandice against the Earl, as representing.

The Lords did repel the defence; and found, That the summons being referred to the defender's oath, that he certainly knew of the distress; and that the wadset was prior to the contract of marriage, and so would maintain the wadsetter's possession, if he were pursued.

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1675. *July* 27. JOHN BROWN, Bailie in Haddington, *against* ROBERT FORREST, Merchant there.

IN a reduction of a decreet-arbitral, decerning John Brown to take burden for his daughters, to cause them renounce their right to some acres in Haddington, to which they were provided by George Brown, in fee, and their father only in liferent, upon this reason,—That the decreet was *ultra vires*, and without any ground of law, the pursuer never having submitted for his children; but only all differences betwixt him and Robert Forrest, the defender:—

It was ANSWERED, that the children's right being granted to them when they were infants, *et in familia* with their father, and had no means to acquire any right themselves; which disposition was after that George Brown, the granter thereof, was debtor to the defender; their father having submitted all differences, was justly decerned to take burden for his children, to cause them renounce: wherein no iniquity could be committed, seeing, in law, they might be compelled to do the same.

The Lords did reduce the decreet-arbitral, as being *ultra vires;* the submission being only by the father, and not as taking burden for the children: especially he having a distinct right of liferent, which was then in question, and whereupon he defended *in judicio possessorio:* but they reserved to George Forrest to reduce the daughters' right, as accords.

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1675. *November* 12. The COUNTESS of ERROLL *against* The EARL of ERROLL.

THE Countess of Erroll, being provided by her contract of marriage, to the barony of Esselmount, by Gilbert, Earl of Errol, who was obliged to warrant the rental to be worth of yearly rent seventy chalders of victual, or money-rent, estimating one hundred merks to a chalder of victual;—did pursue this Earl of Erroll, as heir to the deceased Gilbert Earl of Erroll, to make up the said rental, which was alleged to be defective; because it was offered to be proven, that, the time of the marriage, the saids lands were worth, of constant yearly rent in victual and money, no less than seventy chalders, estimating one hundred merks for the chalder.

It was REPLIED, That the kains, customs, and others, being converted to near