1676. *November* 18. The EARL of SOUTHESK *against* Mr JOHN ELEIS, Elder.

IN an exhibition, at the Earl's instance, as having right, *jure mariti*, in and to a bond granted by the late William Duke of Hamilton; wherein he, as principal, and the late Earl of Dirleton, as cautioner, was obliged to Mr Livingston for the sum of a thousand pounds sterling; which was paid by the Earl, to whom the Countess of Dirleton was executrix, and thereby had right; and had left the same to Anna, now Countess of Southesk, by a legacy; against Mr John Eleis, as haver of the bond,—it was ALLEGED for Mr John, That he had an assignation thereto from the Countess of Dirleton; and being ordained to exhibit the same, and they having referred to his oath, he gave in a qualified oath, bearing that he had an assignation to that bond from the Countess of Dirleton; and that it was sent to him from England for his security, as being cautioner for her in the confirmed testament, wherein she was executrix; and so was not obliged to exhibit or deliver until he was relieved of that cautionary.

2d. He had made a transaction, subscribed by the said Earl and the rest of the daughters and legators of the Countess of Dirleton, whereby he was obliged to discover and pursue for the whole debts which were left in legacy, upon his own charges, for which they were to allow him; and he to have retention of a fifth part of all that should be recovered; and so of this bond due by Duke Hamilton.

It was REPLIED to the *first*, That the assignation was sent blank, and Mr John had filled up his own name, without warrant: and whensoever he should be distressed, as cautioner, he might then seek his relief; but that could not hinder his exhibition and delivery of the bond, his assignation, with a translation thereto.

It was REPLIED to the *second*, That this bond cannot fall under the transaction, because it was only for discovery of the Earl of Dirleton's estate, which could fall to the daughters and legators, and might belong to them in common; whereas Duke Hamilton's bond was known to the defender, and did belong to the Countess of Southesk only; and, by contract of marriage, was disponed to the late Earl of Southesk: neither did the defender ever do any diligence, or had been at any charges for recovering thereof, and so could crave no fifth part. Likeas, if it were found to fall under the transaction, it was *pactum de quota litis*, and reprobated in law.

The Lords, having considered the assignation and contract, founded upon the condescendence of pains and expenses, given in by the defender; as to the first allegeance, did ordain exhibition of the bond and assignation; and that a translation should be granted; the Earl of Southesk giving bond to relieve the said Mr John, as cautioner, whensoever he should be distressed: and, as to the *second*, they did find that he had right to the fifth part of the said bond; and that it fell within the transaction, notwithstanding of what was answered; and likewise declared that Mr John should be obliged to pursue, or that the Earl himself might pursue, in his own name, and take up the bond, assignation, and translation; and albeit that in that case he should be at the whole expenses and

pains, yet Mr John should have the fifth part. Which seems hard; his charges and pains being the cause of the obligement.

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1676. *November* 21. ELIZABETH SMITH *against* JANET MORISONE.

MR James Smith, minister at Errol, having left in legacy, to the said Elizabeth, his sister, a yearly annuity, during her lifetime, of forty pounds Scots; Mr John Herbertson, who was his executor, gave bond for payment thereof; whereupon the said Elizabeth did pursue Janet Morisone, his relict, as executrix, for payment of all bygones, and in time coming.

It was ALLEGED, That she could not be liable. 1*st*. Because she was executrix-creditrix, by virtue of her contract of marriage. 2*d*. Her husband having died at the horn, she had the gift of his escheat without a back-bond; and so was not liable to any other creditor.

It was REPLIED to the *first*, That she had intromitted with much more than what was due to her by her contract of marriage, and so was liable for all farther intromission to other creditors.

It was REPLIED to the *second*, That, being executrix, and having intromitted by virtue of that title, *ipso facto* she did constitute herself debtor thereby; and any new gift of escheat could not defend her, because it was only impetrated *animo fraudandi creditorum;* and she, having constituted herself debtor, by confirmation, was liable in law as successor, and representing her husband.

The Lords repelled the first defence, and found her liable to count, notwithstanding she was executrix-creditrix, for all farther intromission which did exceed her own debt; but, as to the second, they did argue much amongst themselves, and without determining that point of law, if she could make use of the gift of escheat, they did find, that if she gave a back-bond, she was liable; and albeit she gave none, yet, by virtue of an act in Exchequer, ordaining that all donatars getting gifts for their own debts, should be liable to their creditors, they did find her liable to count, as said is: but it is thought that she was liable upon that head, that she was confirmed, and had intromitted with much more than would satisfy her debt; and so, in law, had constituted herself debtor, before the gift.

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1676. *November* 23. SIR DAVID CARMICHELL of BALMUDIE *against* MR JOHN DEMPSTER of PITLIVER.

SIR David, as assignee by his son David Carmichell, to a bond granted to him by Pitliver, for the sum of eighteen thousand merks, having charged for pay-