Angus Linklatter took burden upon him, for his son-in-law's serving his wife heir: He was bound only that his daughter, being served, should denude. 2. *Esto* the defender were liable as representing his grandfather, yet since he is but one of four heirs-portioners, he can only be liable to implement a fourth part of his grandfather's obligement. *L.* 86. §. 3. *ff. de Legat.* 1.

In respect it was ANSWERED—1. As Angus Linklatter stood obliged that Catharine, his daughter, should share equally: so the daughter obliged herself that how soon she fell to have right, she should provide her share to the bairns of the second marriage. The father was bound, as burden-taker for her, to make her obligement effectual. The reserved power to use and dispose, was intended only for alienating to strangers, as his circumstances might require; which not having happened, the obligement in favours of Catharine's bairns of that marriage stands binding. In whomsoever the neglect was, in not entering Catharine heir to her father, the heirs of the marriage ought not to be prejudiced. The *bona fides* in contracts of marriage obligeth the grandfather, as burden-taker for his daughter, to supply that defect; which is still practicable by the defender, his heir. 2. The doctrine is good in the general, that heirs-portioners are liable only *pro virili parte;* but there is this speciality in the present case, that the other three heirs-portioners stand only infeft in their own fourth parts; whereas the defender stands wrongfully infeft in that fourth part which, by the contract, was provided to belong to the pursuer, as heir of his mother's second marriage. The text brought out of the civil, [law] for the defender, doth not come home to this case; for there were several heirs equally instituted, and the testator bequeathed a piece of land belonging to one of them to a third party, which the whole co-heirs were obliged to redeem, or pay the price; whereas here there was no institution of heirs, nor settlement made by the grandfather, but only he provided his daughter's fourth part of his land to the heirs of her second marriage, and thereby in effect disinherited the defender. *Page* 658.

1713. *February* 12. The POOR and KIRK-SESSION of AIR, Supplicants.

THE Lords granted the benefit of the poor's roll to the poor and kirk-session of Air, for prosecuting two depending actions, at their instance, against the magistrates of Air, which they could not otherwise do without encroaching upon the poor's stock. *Page* 661.

1713. *July* 24. The CREDITORS of the deceased ROBERT ROSS of Auchlossin, competing.

IN a ranking of the creditors of the deceased Robert Ross of Auchlossin, and Francis Ross, his son; Arthur Forbes, brother to the laird of Balflug, produced

the contract of marriage betwixt him and Jean Ross, Robert's daughter, dated September 27, 1701; whereby Robert and Francis stood obliged conjunctly to pay to Arthur Forbes 2000 merks of tocher; and an heritable bond granted by father and son, January 2, 1703, to Arthur Forbes, in satisfaction thereof, completed by infeftment; and Nicol Ross, brother to the said Robert Ross, produced an heritable bond granted by father and son jointly to Nicol, and Margaret Leslie, his spouse, for 7500 merks of principal, dated December 24, 1702, in place of other grounds of debt formerly due to Nicol by the father: and both Arthur Forbes and Nicol Ross had timely adjudged. Which rights they contended to be sufficient ground to rank them as real creditors to Robert Ross, the father. The other creditors of Robert Ross produced a disposition and infeftment granted by him of his estate, with the burden of all his debts to his son, before the granting of these heritable bonds in favours of Arthur Forbes and Nicol Ross: and pleaded that Arthur Forbes and Nicol Ross having innovated their former security by taking heritable bonds in satisfaction thereof, from the father and son, after the father was denuded in his son's favours, with the burden of all his debts; whereby the father's creditors, at the time of the disposition, became real and preferable to all the son's creditors, and debts contracted by the father, after the disposition; and consequently preferable to Arthur Forbes and Nicol Ross, who are to be considered as the son's creditors, and ranked after the father's creditors, only from the date of the new obligations; seeing when innovation takes place, the former security falls, *et etiam pignora solvuntur*.

Answered for Arthur Forbes and Nicol Ross,—1. No clause in the disposition by Robert Ross to his son, (which was gratuitous, without any onerous, just, or necessary cause,) can militate against them who were lawful creditors before to the father. 2. Their heritable bonds were granted before the son's right from the father was any way public, or the seasin registered. And a latent right *inter conjunctos* can be of no force against true creditors; especially where the father, after granting a general disposition to his son, continued in possession till his death, whereby every person was *in optima fide* to contract with him, at least until the son's right appeared on record; *July* 2, 1673, *Steil and Jackson* contra *Mason; February* 12, 1669, *Pot* contra *Pollock; November* 28, 1679, *Cathcart* contra *Glass; December* 4, 1673, *Reid* contra *Reid*. And it can never be understood, that the father's gratuitous disposition to his own son can be more effectual to the father's creditors, than if it had been directly granted to themselves. Now he the father was not in a condition to prefer one creditor to another. 3. By our law a prior right, though innovated, may be good evidence of the antecedent onerous cause of a subsequent obligement.

The Lords found that Arthur Forbes and Nicol Ross, having *bona fide* accepted of the heritable bonds in place of former debts due by the father, before the father's infeftment to the son was on record; ought to be ranked as creditors of the father.

One of the Lords thought that if the anterior security was discharged, the heritable bonds granted in lieu thereof could not be ranked with those debts of the father with which the son's disposition was burdened. Another was of opinion, that whether the old security was discharged or not, the new bond was a clear innovation. A third Lord differed from the last, upon this, among other grounds,

that if an heir of tailyie, tied up with a clause irritant, in case of his contracting debt, should pay an old debt contracted by the maker of the tailyie, with money borrowed from another hand, and give to the lender an heritable security upon the estate for the same; that real right would be good and effectual, notwithstanding of the clause irritant, if the new creditor could prove that his money was so applied. To which the case of the Lord Kinnaird was objected, who having, with money borrowed by himself, cleared debts that affected his estate before it was tailyied, found himself under a necessity, after advising with the best lawyers, to apply to the Parliament for empowering him to grant security, or sell land to pay off these creditors whose money had been applied to satisfy these debts with which the tailyie had been burdened. But it was answered, that in the Lord Kinnaird's case, the new creditors were not able to prove that their money was applied to the payment of the old debts. Others of the Lords supposed that a creditor taking bond from his debtor inhibited, in implement of a debt due before inhibition, the new security could not be reduced *ex capite inhibitionis*, if the creditor could prove that anterior onerous debt to which that security was surrogated. Another Lord delivered his opinion thus: The creditors here being ignorant not only of what had passed betwixt father and son, but also of their condition and insolvency, and having *ignorantia facti* given up the old securities; *condictio chirographi indebite traditi* was competent to them by law; so that there being just ground for calling back the securities innovated, the pretended innovation doth evanish. *Page* 713.

1713. *Nov.* 17. WILLIAM ROBERTSON, one of the under Clerks of Session, and GEORGE CRUICKSHANKS *against* the relict and children of WILLIAM MELVIL.

JOHN HALDEN of Myreton, having caused Margaret Cruickshanks, his wife, sign her name upon a blank half sheet of paper, before two subscribing witnesses, wherein, after her death, he filled up an assignation to a bond of 2000 merks, granted by George Anderson of Foxtoun to the said Margaret Cruickshanks; William Robertson, to whom she had formerly assigned the said bond, with a faculty to alter, and George Cruickshanks, her executor *qua* nearest of kin, raised a reduction of the assignation in favours of John Halden, against the representatives of William Melvil, to whom it was transferred by Halden for an onerous cause.

The Lords reduced the assignation, upon this ground, that it was proved to have been a blank sheet of paper, with the subscription of Margaret Cruickshanks and witnesses, only filled up after the decease of the granter, and there was no evidence or document of a communing to warrant the filling up of the same. Here one of the witnesses having deponed, that he filled up the blank after Margaret Cruickshanks's death, and the other deponed that it was blank at subscribing; it was presumed to have continued blank till her death. The Lords thought, that though before the late Act of Parliament about blank writs, writs might have been blank in the substantial parts, where there were schedules, or something to direct how to fill them up; yet the making a writ entirely blank, without any circumstance