

lict be such a stranger executor as that she ought to have a third of the dead's part of the moveables confirmed, conform to the 14th Act, Parliament 1617.

*Vol. I. Page 492.*

1694. *January 18.*—The reduction pursued by Alexander Napier against Ayton, mentioned 7th December last, being further debated, they insisted on a third nullity for opening the decreet, *viz.* That Inchderny called for two testaments and a disposition, and yet the decreet related only to one of them, and the other two received no answer. ANSWERED,—They needed none, seeing there were decreets of reduction formerly pronounced against them. REPLIED,—These should have been in this decreet, else it is without probation. The Lords found this nullity not sufficient to loose or open the decreet.

*Vol. I. Page 592.*

*January 26.*—The case of Napier of Blackston against Ayton of Inchderny (mentioned 10th January last,) was farther debated; and they insisted upon two more nullities, *viz.* that the time of Catharine Drummond the liferentrix's death, as it was not libelled, so it had no warrant from the interlocutor subscribed by the President. This the plurality of the Lords repelled, and thought it no nullity; seeing it was in favours of the defender Blackston, making him liable in less, and that caution was found to restore, if any more was exacted. The *second* nullity was, that he was not only decerned to restore the principal sum uplifted by him out of the Earl of Tweddale's hand, but also the annualrent of it since the time he received it; which not only wanted a warrant from the summons and interlocutor, but was unjust, unless they had proven he had lent it out and gotten annualrent for it. ALLEGED,—It was to be presumed, and it was a necessary consequence; and the clerks had liberty to make such extensions as only related to the formality of the decreet. ANSWERED,—He lifted it *bona fide* by virtue of a right then valid, and was not bound to lend it out upon annualrent. The Lords found this a nullity. Then the debate arose, Whether such nullities did open the decreet so as to allow the parties to say what they could against the material justice of the decreet, or only that the party might be allowed to fortify and adminiculate the defect: For the President ALLEGED,—If that were all the meaning of it, then the remedy the people had of winning into decreets, where they were truly lesed, by the mistake of the Lords or otherwise, would be altogether evacuated. But at last the parties, waving this, agreed to enter on the material justice of the cause.

*Vol. I. Page 599.*

---

1694. *January 27.* JAMES GRIMMAN *against* His CREDITORS.

THE execution of a summons of *bonorum* was quarrelled in a petition given in by Carnagie of Phineven, and the other creditors of James Grimman, on this nullity,—That it was executed by a messenger who had not qualified himself by taking the oath to King William; which deprived him *ipso facto*, conform to the Act of Parliament 1693; and for certiorating the lieges, the Lord Lyon had printed the names of all the messengers who had qualified themselves, and published it at the whole market-crosses.

The Lords found this not sufficient to annul the party's execution, to whom there was a *jus quæsitum*; the being habit and repute a messenger being suffi-

cient for him ; much more he having once actually been a messenger ; unless they could prove, by the pursuer's oath, that they knew he was not qualified when they employed him : but recommended to the king's advocate to pursue the messenger, and get him punished for officiating without being qualified.

*Vol. I. Page 599.*

1694. *January 31.* JANET HAMILTON and SAMUEL WINRAM, *against* COCHRAN of Ruchsoles.

PHESDO reported Janet Hamilton, and Samuel Winram, her husband, against Cochran of Ruchsoles : Ruchsoles shunning to implement his back-bond, in paying the 2800 merks for the comprising disposed to him by the said Janet, in respect she had not procured a sufficient right and disposition thereof from her husband ; and particularly, that it was not the same, nor equal in substance, with the first draught, in so far as it bore not warrandice from their authors as well as their own facts and deeds.

ANSWERED, *1mo.* Forrest, the author, had consented. *2do.* It bore a clause, that the debt was truly owing and unpaid ; which explication imported warrandice against the author's deeds.

REPLIED,—That the debts might be owing, and yet incumbered with inhibitions on the author's deeds.

The Lords found, there was no necessity of a specific implement, and that this disposition was equal in substance with that in the back-bond ; and so was a performance *per equipollens* : and repelled the other objections about the witness, that they were unknown, unless they offered to improve it as false ; and thought it unnecessary to determine, whether the procuring her husband's second disposition, after the day prefixed in the back-bond, was receivable, seeing the first point cleared all. And severals thought, seeing there was no irritancy, the failie was still purgeable, notwithstanding of the elapsing of the day, unless he condescended upon damage he had sustained by the delay ; which he could not, farther than that he apprehended he had made an ill bargain, and was now content to be free of it : but *res non erat integra*, for he had bought in another apprising from Carrin, which strengthened his right, and there were others offering to transact with her, when he bought this apprising from her ; and so there was no more *locus penitentiae*.

*Vol. I. Page 599.*

1694. *January 31.* GRAHAM *against* ARNALD.

MERSINGTON reported Bailie Graham against Stephen Arnald in Roan. The Lords found his letter, bearing a mandate and commission to buy a ship, very scrimp ; yet, considering the mercatorian style, they sustained it, being conjoined with Graham's proving that Arnald, in prosecution of that letter, obtained a pass to the ship (licensing it to trade to France,) from the Marquis de Seignelay, the French secretary ; because the letter bore more than a naked purpose and resolution to enter into a society trade ; but was conditionally conceived, if he