now, after sixteen years, and after an adjudication led upon it, another creditor raises a reduction; and, calling for the grounds and warrants, he finds the execution to have been done at the defender's dwelling-house, and not personal, as the decreet bore; and so craved to be preferred.

The Lords balanced long the inconveniencies on both hands: For, 1*mo.* They considered, after so long a time, one is not able to produce the executions of his summons whereon a sentence followed; but, if he do, and there be found any nullity or disconformity with the decreet, then it is upon his own peril. 2*do.* The extractors ought to be cited, to answer either for their fraud or ignorance in giving forth a decreet contrary to their warrants. 3*tio.* That, in such cases, an execution, bearing he was personally apprehended, might be stolen out from these obscure persons, prevailed on by a little money, and a null and insufficient one put in its place. 4*to.* That, if the defender compeared and proponed other defences in the adjudication following on that decreet of constitution, and said nothing against the debt, nor craved to be reponed, that was a clear confession and homologation; and another creditor of his cannot, after so long a time, quarrel that decreet. But, 5*to.* It is of the highest importance if I once get out a decreet which has no warrants nor foundation from the minutes, because I have assigned it to a third party, therefore, that it cannot be regulated nor controlled against me by the minutes; and there shall be no redress, but such a sham decreet shall stand; and an extractor shall be master of the security and property of the subjects.

The Lords resolved to hear this case argued, and superseded to give answer till then. *Vol. I. Page* 675.

1696. *February* 4.—The Lords heard the cause between Veitch, Carlile of Boytach, and Gordon in Dumfries, mentioned 28th February 1695; and, having balanced the inconveniencies on both hands, they sustained the decreet, holding Boytach as confessed; and repelled the nullity that it was extracted disconform to the warrant,---the second execution bearing expressly that he was not personally apprehended, but only at his dwelling-house, so that he could never, on that citation, be holden confessed; in respect, an adjudication being deduced on that decreet, Boytach compeared therein, and craved a term to produce a progress, but craved not to be reponed to his oath; and that it was now, after many years, come into the person of a third party and a singular successor; and Boytach was now become bankrupt; and the party might very likely lose his debt if it came to his oath; and the first execution bore him to be personally apprehended. All which circumstances the Lords conjoined. But the Lords would have examined the clerk, extractor, and messenger, if they had been alive;—but it was represented they were all dead; and the Lords thought the clerks and extractors ought to be liable in damages in such cases, because of their malversation. *Vol. I. Page* 708.

1696. *February 5.* Sir Patrick Home, and his Tenants in Coldingham, *against* Jean Home, Lady Plendergaist, and Renton the Messenger.

Whitelaw reported Sir Patrick Home, and his Tenants in Coldingham,

against Jean Home, Lady Plendergaist, and Renton the messenger. The Lords found the poinding illegal and unwarrantable, and ordained the bonds taken from the tenants to be restored; but inclined to think she had a colourable and probable title to poind, being on a decreet, which would be sufficient to assoilyie at Privy Council from the riot; but they did not judge it convenient to anticipate the Privy Council's judgment, by inserting these words in the interlocutor, seeing they remitted no more to the Session but to discuss the point of right; for they being valued teinds, they were not the subject of an infeftment of annualrent, nor of poinding, but only of drawing, or making the intromitter liable. *Vol. I. Page* 708.

1696. *Jan. 23 and Feb.* 6. SIR ARCHIBALD KENNEDY of CULZEAN and LADY GIRVANMAINS *against* ROBERT BLACKWOOD and the CREDITORS of KENNEDY of GIRVANMAINS.

Jan. 23.----MERSINGTON offered the famous debate between Sir Archibald Kennedy of Culzean, as assignee by the Lady Girvanmains, against Robert Blackwood, purchaser of these lands at a roup, and the Creditors of that estate; wherein it was contended, that, by the conception of the contract of marriage, the Lady Girvanmains was plainly fiar of the estate, because, failing heirs of the marriage, the heirs of her body, of any subsequent marriage, are the next substitutes; and that Craig, *lib. 2. Dieg.* 22. clearly stated this case, and determined the fee in favours of the wife; and that the Duchess of Monmouth's contract was advised nearly in parallel terms, by which she was left fiar of the lordship of Buccleuch. —See 12*th July* 1671, *Gairn* against *Sandilands.*

The Lords ordained the cause to be heard in their own presence. But, lest the rent should perish in the tenant' hands during the dependence, they ordained them, *medio tempore,* to be paid to the buyer at the roup, in regard he had found sufficient caution, so they would be always liable to any who was found to have best right. For the least effect can be allowed to a roup is to put the buyer in possession; and it is hard, after a sale is perfected, to begin reductions, quarrelling the common debtor's right to the lands; which would introduce a strange confusion amongst the creditors, who, upon the faith of his being generally reputed proprietor, lent him vast sums of money.

Vol. I. Page 703.

February 6.—The Lords advised the cause of the Creditors of Kennedy of Girvanmains against the Lady and Sir A. Kennedy of Cullain, mentioned 23d January 1696; and, after long arguing, found, though the dispositive clause of the tailyie in the beginning of the contract of marriage was dubious, and seemed to make the wife fiar, yet the ambiguity was much cleared and taken off by the subsequent clauses, importing no more in her person but a liferent; and therefore, on the whole matter, found the husband fiar, and sustained the creditors' diligences. This was carried by a plurality of eight against four; though some argued, that the *cynosura et regula interpretandi* where the fee was lodged, ought to be drawn from the dispositive clause, and not the subsequent ones. But, on a representation that the lands were bought too cheap at the roup, the Lords inclined to recommend to the buyers to add one or two