

1697. *January 1.* BOYLE of KELBURN *against* The CREDITORS of CUNYNGHAME of CORSEHILL.

LORD Arbruchell reported the competition between Boyle of Kelburn and the other Creditors of Cunynghame of Corsehill. Kelburn craved preference on two bonds whereon infestment had followed; the one for £15,000, and the other for £11,000. The Creditors repeated their reduction on the Act of Parliament 1621, that they were *inter conjunctas personas*, being brothers-in-law.

ANSWERED,—Their onerous cause was sufficiently instructed by a back-bond, granted by Kelburn to Corsehill, bearing, that they were for the use and behoof of the creditors therein mentioned, who were extraneous persons, and their original bonds produced.

REPLIED,—This was not a habile way to establish their right: *1mo.* Because the back-bonds were in date a day posterior to the heritable bonds; and, *ipso momento* that the bonds were granted to Kelburn singly, (the back-bond to qualify it not being then *in rerum natura*,) there was a *jus quæsitum* to the creditors to quarrel them, which could not be elided by the subsequent back-bonds. *2do.* It was a contrivance between the debtor, (who shortly after broke,) and Kelburn, his trustee, to give a voluntary preference and gratification to such people as would compeone and give down part of their sums; and their back-bonds might have been metamorphosed and changed as oft as Proteus did. *3tio.* It was kept up, and not mentioned to the very creditors in the back-bond, till Corsehill broke.

REPLIED,—The distance of a day between the bonds and back-bond can make no difference, nor infer that the one was not the cause of the other, seeing they were delivered *simul et semel*; and offered to prove they were not kept up as clandestine and latent rights to deceive, or to put out, or in, whom they pleased; but some of the creditors were present at the very time of the transaction, and others were acquainted with it before Corsehill came to be known to be a notour bankrupt.

Upon a hearing, the Lords, before answer, allowed a conjunct probation of the several matters of fact alleged by either party. *Vol. I. Page 749.*

1697. *January 2.* BLAIR *against* STIRLING of GLORAT.

THE Lords advised the probation, in the pursuit betwixt Blair, late minister at Ruglen, and Stirling of Glorat, who was convened to pay a debt of his father's, on missive letters, promising to take course with it if he would forbear executing a caption he had taken out against him; and Glorat pretending he was minor when he wrote them, and had revoked them, being to his plain lesion,—the Lords allowed a conjunct probation, the one to prove minority, the other majority, at the time of the writing; which was advised this day. Both of them proved; but, after balancing the testimonies, they found the probation of the majority much more pregnant, being adminiculated by the kirk-session books; and which, though not authentic, yet were also confirmed by the depositions of witnesses astructing the same; and there were presumptions against

Glorat's witnesses, asserting his minority, that it looked like a premeditated tale which had been taught them, and wanted not suspicion of prevarication : and the Lords modified large expenses against Glorat. *Vol. I. Page 750.*

1697. *January 5.* DRUMMOND of RICARTOUN *against* SIR WILLIAM NICOLSON of that ilk, and His CREDITORS.

IN an action at Drummond of Ricartoun's instance against Sir William Nicolson of that ilk, and his Creditors, for proving, that, though he was bound coprincipal with him in a bond, yet he was but truly cautioner ; and that, a little before Sir William's death, he had ordered the drawing a bond of relief, and was satisfied with it, but prevented, by his falling distracted ; and so it was not gotten signed ; and which he had proven by the comuners, witnesses, and writer.

ALLEGED for the Creditors,—That the heir being dead, he who now fell to be apparent heir must be called, ere the process can go on.

ANSWERED,—The Creditors are the only true contradictors now, the estate being roupied.

The Lords ordained the heir to be cited *incidenter* in this state of the process, ere they would proceed to advise it. And it may have difficulty how such a point can be made out by witnesses ; for though it be pregnant against Sir William's heirs, that he acknowledged Ricartoun was only cautioner, and that the comuners depone he was willing to give him a bond of relief, yet it seems hard to make such a probation meet the creditors, having been only taken by the Lords *ex officio*, and before answer, without determining the relevancy, and what it should import, being more than a *nuda emissio verborum*, which used not to be allowed to be probable by witnesses. *Vol. I. Page 750.*

1697. *January 7.* COUNTESS of KINCARDEN *against* WILLIAM ERSKINE.

PHESDO reported Veronica, Countess of Kincarden, against Mr William Erskine, to count for the rent of £500 Scots, possessed by the Lady Cardross, his mother, for the years he was factor of that estate ; seeing, though she was a creditor, and had an infetment of annualrent, yet, by the decret of ranking, not only the Lady Kincarden, but several other creditors were preferred to her.

ALLEGED,—That the factors, before his entry, and those since his overgiving, always allowed her to possess ; and it had been unreasonable that he only should have quarrelled his mother's right, and have removed her.

ANSWERED,—The decret of ranking was his rule ; and though the Lady Kincarden connived when the rent paid her full jointure, yet it being now considerably fallen, that can never exoner him from the diligence incumbent on a factor ; and if he thought it uneasy, or undutiful to interfere with his mother, he might have given over the place.

The Lords did not decide it ; but thought, if he knew of the decret of rank-