ceased by the dissolution of the marriage, the heir-male who succeeded to the lands, and got the benefit of these reparations, ought to be liable for the same, and not he,—the debt not being constituted against him during the marriage. The Lords considering he had an annuity out of the estate, and so was *lucratus*, they found him *primo loco* liable; reserving his recourse against the Earl of Home, now the heir-male, to whom it eventually proved to be *in rem versum;* for they thought the merchant not obliged to consider his separate distinct interest from the Lady, and to what use the timber was applied; which could not be instructed, he being now dead, whose oath could have cleared whose faith he had followed, if it had been sought in his lifetime. *Vol. I. Page* 598.

1694. *January* 26. DAVID GORDON *against* URQUHART of MELDRUM.

PRESMENNAN reported David Gordon, son to Mr Thomas Gordon, against Urquhart of Meldrum, on a bond of pension bearing to be payable during Mr Thomas's life. ALLEGED,—It was a mandate, and expired with Meldrum; and he did no service after. ANSWERED,—It was for bygone services as well as to come; which had been often sustained:—as *3d December* 1661, *Jamison* against *M'Leod;* and in *Sir John Nisbet of Dirleton's case* against *the Earl of Galloway*, and *Pitmedden's* against *the Earl of Winton*, even after they were Judges. The Lords sustained the bond, conform to its tenor; and would not restrict it. *Vol. I. Page* 598.

1694. *January* 26. DAVIDSON of BALNACRAIG *against* ALEXANDER LINDSAY.

THE Lords found these words of the partial receipt, declaring it was in part payment of a greater sum, behoved to be ascribed in payment of the bond *primo loco*, and of the tack-duty only in the next place: because the victual in the receipt was liquidated at a far greater price than the victual was modified to in the tack; and if the creditor had been asked, at the time, in payment of which of the two sums he took it, he would certainly have answered for the bond; because he had none bound in it but this bankrupt tenant; whereas, in the tack, he had a cautioner; though a debt due with a cautioner is *durior sors* (to which law commonly ascribes it,) than a debt without one. *Vol. I. Page* 598.

1688 *and* 1694. AYTON of INCHDERNY *against* ALEXANDER NAPIER.

[See the prior, intermediate, and posterior parts of the report of this Case, Dictionary, pages 12,609 and 11,479.]

1688. *January* 13.—THE case of Ayton of Inchderny and Alexander Napier, mentioned 11th December 1686, was debated upon a new point,—If a re-

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-