repetition against them upon the warrandice of their several dispositions to him. And the Lords now altered their former interlocutor, finding she had immediate access against the Duke for that part of the price whereto she was preferred; and found the Duke was *in bona fide* to pay: seeing he had raised a multiplepoinding, and was preferred for his own debt; and the rest of the creditors were ranked, and he had paid them conform to their ranking, and this decreet was not quarrelled for some time. And the case of *Montgomery* contra *William Wallace*, 19*th July* 1662, was cited: and the Lords remembered, that last winter, in *James Reddoch's* pursuit *contra* the *Lady Rothes*, the Lords sustained voluntary payments, in the terms of their back-bond, as *bona fide* made.

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1694. *February* 6. THOMAS OGILVIE of CORDAUCH *against* JAMES OGILVIE of NEWTON of BELLERTY and ALEXANDER OGILVIE of POOL.

THIS was a reduction of a disposition, on this ground, That it was only conditional, by one brother to another, without adequate onerous causes, and only to take effect if the disponer should die without children; and so the conception of the clause was alleged to be suspensive; that the dominion and property was not conveyed till it appeared that the condition did not exist; and being only of the nature of a tailyie, and destination of a substitution, it did not so divest the disponer but he might contract debt, and thereafter do other rational deeds to affect these lands. But the Lords, having read and considered the disposition, they found it conceived in resolutive terms, *viz.* that if the disponer should have children of his own body, then the disposition should be void and null; and found any debt he contracted afterwards could not affect that land; and therefore reduced the adjudications led thereon for the same: though sundry thought it was not the disponer's meaning so to incapacitate himself, but only the ignorance of the writer, who strained it in that manner, not knowing the difference betwixt the two clauses. *Vol. I. Page* 602.

1694. *February* 6. BLAIR and ISOBEL MITCHELL *against* PATRICK ANDERSON.

THE case between Blair and Isobel Mitchell, his assignee, against Patrick Anderson in Perth, was reported. The Lords found the clause in the contract of marriage, providing all goods, moveable and immoveable, to the longest liver, comprehended the heritable bond of £100 Scots, whereupon infeftment had followed; seeing, with us, sums heritably secured were reputed *inter immobilia;* and we had not received that distinction made in the common law, of three species, *bona mobilia et immobilia, et nomina debitorum.* And as to the *second* defence, That she behoved to be served heir of provision to her husband ere she could have right to the sum,—the Lords found she needed not; because the words ran that it should fall and be disposed of by the survivor. But, seeing the debtor was the defunct's nephew, and nearest of kin, the Lords allowed him either to give her a precept of *clare constat,* whereon she might be infeft,

and then renounce; or that she grant him a disposition, with a procuratory of resignation *ad remanentiam;* in his option. *Vol. I. Page* 602.

1694. *February* 6. The EXECUTORS of GEORGE BROWN of HORN *against* DAVIDSON of BALGAY.

THE Lords repelled the first two objections against the compensation, and found it was materially *inter easdem personas,* and was liquid; but sustained the last ground urged against the compensation, *viz.* that it was proponed *post sententiam,* contrary to the Act of Parliament 1592, albeit it was proponed in the former decreet, and there repelled *illo ordine;* which the Lords interpreted not to found a compensation in a suspension of that decreet, but that it might be free to them to insist in it by way of action. There were likewise sundry nullities proponed against the decreet itself, against which the compensation was sought; such as, that the commission for selling the gloves at Queen's-Bridge, with the confession of the party as to the price he received for them, are only proven by the assertion of the clerk, extractor of the decreet, without any other adminicle in write; and that the BECAUSE of the decreet bore, in regard the defender refused to subscribe a submission: but, seeing the Lords repelled the compensation *hoc loco,* there was no need of deciding thir nullities.

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1694. *February* 6. SIR THOMAS STEWART of GAIRNTULLY *against* THOMAS YOUNG.

ANSTRUTHER reported Sir Thomas Stewart of Gairntully's reduction of Thomas Young's decreet, liquidating the damage by Gairntully's selling other oak woods during the time theirs was cutting, contrary to a clause in their contract; and for his taking away sundry of the trees to his own use. The Lords would not loose the decreet now, after fifteen years, being in 1679; and did not think it a nullity that his oath of calumny was not advised, seeing that does not hinder the party to use another probation; and though his mandate in away-carrying of the trees was not proven by his oath, (as it was sustained to be so proven by the act of litiscontestation;) seeing the warrant arose, *ex evidentia facti,* from the testimonies of the witnesses, who proved that the trees were brought to his own house. And the Lords thought it unreasonable to enter upon decreets after so long a time, when Mackonachy (to whom the separate bargain was made,) was now dead. *Vol. I. Page* 603.

1694. *February* 6. GREY of CREICHIE *against* UDNEY of AUCHTERALLAN and SIR RICHARD MAITLAND of PITRICHIE.

THE Lords found, though the father was still alive, and the son a profligate