the general custom of weighing them elsewhere, *quia specialia derogant generalibus.*

This custom was found relevant.

Act. Charger, Cunyghame. *Alt.* Sinclair.

Advocates' MS. No. 59, *folio* 79.

1670. *July* 5. CALDERWOOD *against* HANDIESYDE and SHAW.

THIS is a reduction of a disposition, 1*mo*, Because granted on death-bed. 2*do*, On the act of Parliament 1661, preferring the creditors of the defunct to the creditors of the apparent heir. 3*tio*, On the act of Parliament 1621, anent dispositions not made for onerous causes.

To this last, it was ANSWERED,—That the disposition itself bore that it was made for onerous causes.

REPLIED,—That he behoved to prove the onerous causes for which it was granted otherways than by the disposition itself.

DUPLIED,—If the disposition had been *inter conjunctas personas*, then he confesses he ought to have instructed the onerous causes, albeit the disposition had borne the same: but being among strangers, he needed not; especially considering the defender is willing to give his oath upon the onerous equivalent causes thereof.

The Lords REPELLED the reason and reply, in respect of the answer and duply.

Then ALLEGED,—That the disposition bore only in general, that it was granted for causes onerous, without condescending on the special causes thereof; which was not relevant.

REPLIED,—It were a hard thing to reduce all dispositions bearing only, in general, causes onerous.

The Lords REPELLED the allegeance, in respect of the reply.

Act. Chalmers. *Alt.* Lermont and Sinclair.

Advocates' MS. No. 60, *folio* 79.

1670. *July* 5. The PROVOST and BAILIES of RENFREW *against* PORTERFEILD of that Ilk.

THIS is a reduction by this town, of a decreet arbitral, proceeding upon a submission entered into by the Provost then, (in name of the town,) *in anno* 1632, with this defender, anent some lands belonging to the said town, in property or as common good. The reason was, that the said town, and far less the provost by himself, had no power to enter into a submission anent their property given them by his Majesty's predecessors, with this express condition, that it should not be leasum to them to annalyie the same: but their submitting is a sort of aliena-

tion; *item*, the same is prohibited by sundry acts of Parliament. *Vid.* James VI. 6. Parl. 13, act 181; and Parl. 1587, act 112.

Act. Lockhart. *Alt.*

Advocates' MS. No. 61, *folio* 79.

1670. *July* 15. JOSEPH DOUGLAS and —— PRINGLE, his Spouse, *against* the Eldest Daughter of PRINGLE of Soutray.

THIS is a reduction and improbation of a testament made by the deceased Pringle of Soutray, wherein he nominates his eldest daughter his executrix and universal legatrix, and so leaves her his whole moveables, to the clear prejudice of his other daughters, of which the pursuer's wife is one. The reason is, that though this testament was subscribed indeed by the defunct, yet it is offered to be proven that the nomination of the defender, as executrix and universal legatrix, &c. was filled up after his decease: and so the testament is altogether null; the nomination of an executor being *caput et fundamentum testamenti*, and so essential a part thereof, that *eo omisso totum testamentum corruit.*

ANSWERED, 1*mo*, That the reason ought to be repelled, because, though the nomination was filled up after the defunct's decease, yet it was so done by special order from the testator, and so must be sustained as done by him before his decease. 2*do*, Though it was not filled up till after his decease, yet by his own hand, in his testament, he had done the equivalent; in so far as he had nominated this defender his heir to his whole goods and geir, as well moveable as unmoveable, as well real as personal; which, though it would never reach his real estate, yet certainly will import the same as if he had nominated her his executrix and universal legatrix.

REPLIED,—To the first, that that order was only nuncupative, and so makes the testament nuncupative, which is null and ineffectual by the law of Scotland. To the 2*d*, the testament wanting a formal nomination of an executor, (which is the essence and being of it,) it can never subsist, but is null and altogether unvalid.

DUPLIED,—To the first, that that testament is only nuncupative whereof no part is redacted in writ, but the same was wholly delivered before witnesses; so then this testament quarrelled can never be reputed a nuncupative testament. To the second, a testament by our law is good and valid, if a man leave a legacy, one or more nominated tutors to his children, though he makes no nomination of an executor in the same. Yet *jure civili, testamentum in quo non erat institutio heredis erat nullum.*

Act. Lockart. *Alt.* M'Keinzie.

Advocates' MS. No. 62, *folio* 80.