

1679. *December 9.* GRANT of AUCHTERBLAIR *against* MR JAMES GRANT.

IN the action between Mr James Grant and Grant of Auchterblair, wherein there was an interlocutor marked the 27th day of November last ; it having been found by the Lords, That these parties having consigned a blank bond and a discharge in the hands of arbiters, who filled up the blank bond, and delivered the same to one party, and his discharge to the other ; did exclude all reclaiming against the bond, by accepting and acquiescing in the discharge ; as being equivalent to the ratification of a decret-arbitral after it was pronounced :

It was now further ALLEGED by Auchterblair, who suspended the bond filled up, That, if the arbiters had shown him what was in the bond then filled up, when he received the discharge, or before, it might have imported his approbation thereof. But it is offered to be proven, by the arbiters' oaths, that they did not show what was in the bond, but delivered the bond, sealed in a paper, to Mr James Grant, and gave the discharge, sealed also in a piece paper, to the suspender, and obliged them, upon oath, not to open the seals till the next day ; so that his receiving the discharge in this manner could not import his acquiescence and approbation, filled up in the bond, which he did not know.

It was ANSWERED, That this allegiance is contrary to the declaration produced by the arbiters and oversman ; and, though it were true, it alters not the case, seeing Auchterblair, so soon as he had known the sum, ought to have offered back the discharge, and taken instruments thereupon.

It was REPLIED, That, so soon as he knew the sum, he came to the arbiters and reclaimed.

The Lords ordained the arbiters to be examined upon oath, how the bond and discharge were delivered ; and whether the bond was then shown to him ; or, if they signified what was the sum filled up therein ; and if, before the delivery thereof, it was not shown to him ; and whether, therefore, he came to the arbiters to reclaim, and when, and how. *Vol. II, Page 717.*

1679. *December 12.* BETHIA M'KENZIE *against* SIR HUGH CAMPBELL of CALDER.

BETHIA M'Kenzie, having raised a caption against Chisholm of Comber, did therewith charge Sir Hugh Campbell of Calder, Sheriff of the shire, to apprehend the rebel, being in the Sheriff's own house ; as the executions of the caption bear : and yet the Sheriff did not put the letters to execution, but suffered the rebel to escape ; and therefore is liable for the debt.

The defender ALLEGED, *1mo.* That the messenger's execution could only instruct that he had given a charge to the Sheriff ; but that the rebel was with the Sheriff in his own house, cannot be proven by the execution, which is but extrinsic, and at least must be verified by the oaths of the witnesses in the executions. *2do.* It is offered to be proven, that the rebel had fifteen or sixteen men in arms in and about the Sheriff's house, so that he was not in a capacity to make him prisoner ; but, if need be, it is offered to be proven, by the messenger's oath, that he took back his charge upon that consideration, and promised to give no execution.

The pursuer ANSWERED, That it is a proper part of the messenger's office to give executions, not only bearing the charge, but also the circumstances of the place, and condition of the Sheriff and the rebel; which, therefore, is probative and valid unless it be improven; and the messenger being *functus officio*, his oath is not competent in prejudice thereof. Nor could any such promise be effectual against the party at whose instance the caption was truly executed; and the messenger might have been compelled to give the executions, notwithstanding of any promise to the contrary. Neither is the defence relevant, that the Sheriff had not sufficiency of force; but he ought to have attacked the rebel; and nothing could exoner him but an actual force, *vi majori*.

The Lords repelled the defences, and decerned against the Sheriff.

*Vol. II, Page 723.*

1680. *January 27.* AGNES SANDILANDS *against* RACHEL SANDILANDS.

BAILIE Sandilands, in the contract of marriage of his daughter, Agnes Sandilands, provides her with a tocher; and the contract contains this clause, That she shall also be a bairn of the house, and have her share with the other bairns of the family. And, in the contract of Rachel Sandilands, he contracts with her a tocher, which she accepts, in full satisfaction of her portion natural and bairn's part of gear, and all that she can succeed to by the decease of her father, any manner of way. The bailie having died intestate, Agnes and Rachel contend, before the commissaries, for preference,—who should be executor dative; and the commissaries did prefer Agnes, and did exclude Rachel, in respect of the foresaid clauses in her contract of marriage. Rachel raiseth reduction, on this reason:—That the commissaries committed iniquity in excluding her; because where there are more co-heirs or bairns, if all of them should accept tochers in full satisfaction of all they could succeed to by their father's death, that would exclude any of them to succeed, either in heritage or moveables; because, it being a clause in their father's favours, renouncing their interest to him, it returns back to them by his death. For none would pretend that his succession would thereby become *nullius*, or as *bona vacantia* to belong to the king; nor could it belong to any other relation or agnate of the father, seeing the further degree can never succeed while there is a nearer. And, therefore, Rachel's acceptance, “in satisfaction of her,” &c. though it had borne an express renunciation of her father's succession, it could operate no more, but that her father might have freely disposed by nomination, assignation, or legacy, of his dead's part. But, not having so done, Rachel's part must return to her; especially seeing Agnes returns to be a bairn of the house with the other bairns, which must bring in Rachel, there being no other bairn but these two: and, though there were others, yet Agnes, being a bairn, could only give her right to the bairn's part, but not to [the] dead's part; from which either party is excluded by the tocher received.

It was ANSWERED for Agnes, That the reasons of reduction are nowise relevant; for, though it be true, that, where all the children renounce their interest in the father's succession, he not having disposed thereof, it returns to them all,—yet that holds not where some renounce, and others not; for then the re-