

cient for him ; much more he having once actually been a messenger ; unless they could prove, by the pursuer's oath, that they knew he was not qualified when they employed him : but recommended to the king's advocate to pursue the messenger, and get him punished for officiating without being qualified.

*Vol. I. Page 599.*

1694. *January 31.* JANET HAMILTON and SAMUEL WINRAM, *against* COCHRAN of Ruchsoles.

PHESDO reported Janet Hamilton, and Samuel Winram, her husband, against Cochran of Ruchsoles : Ruchsoles shunning to implement his back-bond, in paying the 2800 merks for the comprising disposed to him by the said Janet, in respect she had not procured a sufficient right and disposition thereof from her husband ; and particularly, that it was not the same, nor equal in substance, with the first draught, in so far as it bore not warrandice from their authors as well as their own facts and deeds.

ANSWERED, *1mo.* Forrest, the author, had consented. *2do.* It bore a clause, that the debt was truly owing and unpaid ; which explication imported warrandice against the author's deeds.

REPLIED,—That the debts might be owing, and yet incumbered with inhibitions on the author's deeds.

The Lords found, there was no necessity of a specific implement, and that this disposition was equal in substance with that in the back-bond ; and so was a performance *per equipollens* : and repelled the other objections about the witnesses, that they were unknown, unless they offered to improve it as false ; and thought it unnecessary to determine, whether the procuring her husband's second disposition, after the day prefixed in the back-bond, was receivable, seeing the first point cleared all. And severals thought, seeing there was no irritancy, the failie was still purgeable, notwithstanding of the elapsing of the day, unless he condescended upon damage he had sustained by the delay ; which he could not, farther than that he apprehended he had made an ill bargain, and was now content to be free of it : but *res non erat integra*, for he had bought in another apprising from Carrin, which strengthened his right, and there were others offering to transact with her, when he bought this apprising from her ; and so there was no more *locus penitentiae*.

*Vol. I. Page 599.*

1694. *January 31.* GRAHAM *against* ARNALD.

MERSINGTON reported Bailie Graham against Stephen Arnald in Roan. The Lords found his letter, bearing a mandate and commission to buy a ship, very scrimp ; yet, considering the mercatorian style, they sustained it, being conjoined with Graham's proving that Arnald, in prosecution of that letter, obtained a pass to the ship (licensing it to trade to France,) from the Marquis de Seignelay, the French secretary ; because the letter bore more than a naked purpose and resolution to enter into a society trade ; but was conditionally conceived, if he

could procure a pass. Therefore, the Lords allowed them to prove that he sent them a pass accordingly, which was a farther ratification of the bargain; but reserved thir two points to be considered at the advising:—*1mo.* If Arnald's choosing Edward Marjorybanks was so personal as that he could not substitute nor assume his brother John, nor Bailie Graham. *2do.* Though the trade was designed for France, yet, seeing the cargo of herrings was too long in loading, that it could not reach France before Lent, if the merchants might not, for their best advantage, change the port, and send them to Stockholm. But the mystery of Arnald's refusing to adhere to the bargain was, the cargo came to a bad market; and so he would turn over the whole loss upon them, and keep himself free on this defence, That all he wrote was but resolutions and purposes.

*Vol. I. Page 599.*

1694. *February 1.* COLQUHOUN *against* COLQUHOUN of CRAIGTON.

PHESDO reported Colquhoun against Colquhoun of Craigton. Some of the Lords were for examining witnesses before answer, on the trust of the dispositions given by the pursuer's mother to Craigton, in respect of the pregnancy of the qualifications of trust; whereof the Lords took particular notice of one,—*viz.* that though he had an absolute disposition, without reserving her liferent, yet he suffered her to possess the land five or six years. But the plurality carried, that his dispositions could not be taken away, but by writ, or his own oath; but allowed the pursuer to adduce whom he pleased, to be present at his deponing, to refresh his memory with circumstances: and ordained him to depone on the onerous causes of his right, if they were adequate or not; for the Lords thought if it was a gift, then her son's right would be preferable to it.

*Vol. I. Page 600.*

1694. *February 1.* ROBERT JOHNSTON *against* HAMILTON of GAIREN.

PHESDO reported Robert Johnston, son to James Johnston, writer to the signet, against Hamilton of Gairen. The apparent heir of Gairen had got the possession, by buying in an apprising. Johnston, who had another right preferable to that apprising, pursues for maills and duties. Gairen offers to prove his apprising satisfied, and paid by intromission with Whitehead of Park's estate; which was also comprised for the same debt. Johnston finds it relevant, of consent; but alleged it was only proponed to retain the possession of the lands two or three years longer, during the dependence of the count and reckoning, wherein he would certainly succumb; and so these years' rents would be clearly lost; and, therefore, he offered to find caution, if Hamilton prevailed, to refund the rents.

The Lords thought this very equitable, if it were not to turn one out of his possession; and, therefore, they fell on this medium:—that Gairen should continue to possess, but find caution for one year's rent, in which space he might bring his account to a period, if he was serious in it, to be refunded to Johnston