

that, the defunct died intestate, and therefore it divided betwixt the brother and sister, so that the sister had one half *ex testamento*, and a fourth by the legal succession;—*dissent*. Alemore, and three or four more, who thought that the testament should be set aside altogether.

This altered, the 11th *August*.—But the Lords altered again, and returned, almost unanimously, to the first interlocutor.

1763. *November 29.* *PARK against* _____.

A BARGAIN about a house was concluded in this manner:—Two persons made an offer of a sum of money for a house in a missive letter wrote by one of them, and the offer was accepted by the seller, not holograph of him, but written by the buyer, who wrote the first, and attested by two persons not designed, but the subscription was acknowledged.

In a pursuit, at the instance of the buyers, for implement of the bargain, the Lords found, that a bargain concerning an heritable subject could only be finally concluded by a formal writing, that is, a writing, either holograph or according to the requisites of the Act of Parliament 1681; and that a party's acknowledging his subscription only proved the fact of the bargain, but did not make the writing solemn, and could signify no more than a party's acknowledgment of his subscription to a bond prescribed, or null upon the Act 1681. In such cases the debt may be acknowledged, as when a man pays interest upon a null bond, and such acknowledgment will, no doubt, make the debt effectual; but no acknowledgment can authenticate a null writing. This carried only by one vote, and the decisions had varied a little.

1763. *November 31.* *ALLAN against* ALLAN.

IN this case the Lords unanimously found, that a child having discharged his *legitim*, in consequence of a provision given him, the father cannot, by a deed *mortis causa*, repon him against this discharge in prejudice of his other children.

See, upon this point, a learned paper of Mr Ferguson's.

1763. *December 16.* *GIBB against* LIVINGSTON.

IN this case the Lords determined that a reduction, upon the Act of Parliament 1621, is competent against the creditor-adjudger of the confident person as well as the confident person himself; and Lord Auchinleck said, it was decided in the 1755, January 28, in the case of one *Neilson*, that a reduction of a sale of land,

upon the head of fraud and circumvention, was competent against the adjudger from the buyer; and Lord Coalston said, he remembered a later case, *Michael Menzies* against *Gillespie*, where the like was found. But, in regard that, in this case, the action was against the adjudger, and on account of the long delay and other circumstances of the cause, they found that the *onus probandi* of the insolvency, and the gratuitousness of the deed, was incumbent upon the pursuer.

25th July 1766.—This day they found that the pursuer might prove by writ or oath of party, and, consequently, that the defender was still to be considered as a conjunct or confident person, not as a stranger; for, in the case of a stranger, the narrative of the deed, bearing the money received, would have been *probatio probata*. See *Fac. Coll.* IV. p. 78.

See, in relation to this point, Home, 23d November 1725, *Nairn*, where the general point is very well argued; and a decision in Falconer, 21st June, 1737, *Gartshore* against *Bell*, where this point was overlooked, and an adjudger considered in the same light as a purchaser.

1764. February 3. BARBOUR and COOPER against M'GOWAN.

THE question here was concerning the property of certain goods, Whether they belonged to one Thomson, a living man, or one Gardner, a dead man? They were pointed by M'Gowan, a creditor of both Thomson and Gardner, as the property of Thomson, and they were confirmed by Barbour, as the property of Gardner the defunct. A competition about these goods, betwixt those two creditors, came before the Court, and at that time Barbour was only decerned executor to Gardner, so that any other creditor might have come and been joined with him in the confirmation.

The Lords found the goods to be the property of Gardner, after which Barbour completed his diligence by confirmation, by which, no doubt, according to the ordinary rules of law, he got a preference to all the other creditors; but, in respect of the uncertainty of the property, and that M'Gowan had appeared and disputed for a preference in the competition, the Lords unanimously found, that this had the same effect as if he had been confirmed with Barbour, and therefore brought him in *pari passu*.

1764. June 14.

GALA against ———.

IN this case the Lords found, that a debtor having left, by his testament, a legacy of a particular sum to his creditor, different from the sum in which he was indebted, the brocard of *debitor non præsumitur donare* does not apply, and the legacy is due over and above the debt.