

price, on the pretence of offering to prove that the ware was insufficient; after they have acquiesced in it, without protesting, or offering it back, and had sold it; for the *actio redhibitoria*, or *quanti minoris*, only took place, where, immediately upon discovering the insufficiency, it was reclaimed against, and was yet extant and undisposed of. See 7th July 1675, *Paton*. But reserved his action for damages against Cheisly, the cedent, for selling him rotten tobacco, as accords. But it was thought relevant to prove, by his oath, that he sold by samples which were disconform; or that he knew the insufficiency.

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1694. *January 6.* EUPHAM SCOTT, and GEORGE WINRHAM of Eymouth, her Husband, *against* DANIEL NICOLSON, Writer in Edinburgh.

THE Lords advised the probation in the concluded cause pursued by Eupham Scott, and George Winrham of Eymouth, her husband, against Daniel Nicolson, writer in Edinburgh; that the bond whereon he had obtained a decret against her, and on which she had granted him a bond of corroboration, was truly a bond lying blank in her father's charter-chest, and taken out thereof; and Mr Alexander Hay's name, for Daniel's behoof, filled up in it. The Lords found it proven, by the depositions of James Scott, Robert Legett, and others, that it had been a retired bond, and found in Clerkington's charter-chest amongst other papers, and delivered by the said James Scott to Daniel; and therefore they reduced it, and declared the bond of corroboration and transaction made thereon null.

This was only carried by one vote; and, though it was proven that James Scott had taken this bond out of his charter-chest, yet it was not so clear that Daniel was *consciuis fraudis*; and he had acquired it for an onerous cause of debt owing by James Scott to Lands, Daniel's father-in-law, though not adequate.

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1694. *January 9.* LORD PITSLIGO'S CREDITORS *against* The Two LADIES.

ARRBRUCHELL reported the competition between the creditors of Lord Pitsligo and the two Ladies. The Lords sustained the old Lady's infertment, being for the principal sum of 4000 merks, notwithstanding it was alleged to be *donatio inter virum et uxorem*; seeing there was no contract of marriage, and this provision came in place of it; and ordained her to be ranked conform to the date of Watson's infertment, who was her trustee. And as to the young Lady, preferred her as to her jointure of forty chalders of victual, because prior to all the creditors' diligence. But, as to her additional provision of ten chalders more in 1687, found the creditors preferable to her therein, unless she can prove that, at the time, her husband had a sufficient visible estate to pay all his creditors, and the additional jointure beside: and repelled that allegiance proponed for her,—offering to fortify it, by proving it depended on two onerous causes, *viz.* the alimending the children, and the inlake of her principal jointure, which fell short of the forty chalders of victual; for the Lords found she could not canvel

and contradict the narrative of her own right, which bore expressly for love and favour : and, if her jointure-lands did not pay the foresaid quantity of victual, she might have adjudged thereon ; but cannot retain and ascribe this additional right for making up the same. *Vol. I. Page 589.*

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1694. *January 9.* The MAGISTRATES of EDINBURGH *against* MR JOHN DUNCAN, Merchant.

PHILLIPHAUGH reported the Magistrates of Edinburgh against Mr John Duncan, merchant, and tacksman of the customs on the wine ; who craved an abatement, because of the supervenient law taking it away, and the sterility of the subject, which, by several accidents, had failed. The Lords, observing a clause in his tack, that, in the *first* place, the Town-council should be judges to him, they remitted him to apply to the Magistrates, (though he had taken an instrument against them already renouncing the tack, and offering to count for his intrusions as collector ;) but resolved, if they did not settle, to take the cognizance of it to themselves. *Vol. I. Page 589.*

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1693 and 1694. ELIZABETH FIFE, Relict of MR DAVID GRAY, *against* MR WILLIAM CLERK, Advocate.

1693. *February 9.*—THE LORDS found it was *pars contractus* and a *synallagma* ; and that Mr David Gray's representatives ought to implement and fulfil to Mr William, as well as he to them : but found *condictio causa data causa non secuta* took not place in this case, so as to free Mr William, on their not delivering to him the grounds and warrants of that apprising ; but that this being *factum impræstabile*, in place thereof succeeded *damnum et interesse* : and therefore ordained Mr William to condescend on the damage he sustained through the want of these writs undelivered to him. For the Lords considered that the apprising was led but against a liferentrix ; and that, in Buchard's improbation, he had suffered certification to pass, through not producing the comprising and other writs he had in his hands. *Vol. I. Page 557.*

1694. *January 9.*—Philliphaugh reported Elizabeth Fife, relict of Mr David Gray, against Mr William Clerk, advocate, mentioned 9th February 1693. The Lords, having ordained Mr William to condescend on the damage sustained through his not getting up from Mr David the grounds and warrants of Hogan's apprising. And he having accordingly given a condescendence in several particulars, the Lords repelled the same : in regard the comprising was only led against Miller, a liferentrix, and Mr William peaceably bruiked the liferentlands during her life, (though he ascribed it to the gift of her escheat ;) and that he had other comprising to have defended by, and yet he suffered certification to pass against them.

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