

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.