ported; and, though he was only holden as confessed both on the debt and the promise of payment of annualrent, yet the Lords would not now repone him to his oath, after so long an interval as fourteen years; and, because he being *lapsus bonis*, little regard was to be had to his oath. *Vol. I. Page* 633.

1694. *July* 17. LADY LAURISTON *against* ALEXANDER ARBUTHNOT of KNOX.

HE had obtained a decreet of improbation of a bond taken betwixt the contract and the marriage. They now raise a reduction of that decreet, and crave production of Knox's active title. ANSWERED,—You have no interest to call for it, nor am I obliged to produce to you; your title being declared false and improven. REPLIED,—This were to bar all reductions of decreets of improbation.

The Lords found they could not question his title till first they reduced the certification in the improbation, or got themselves reponed against the same.

Vol. I. Page 633.

1694. *July* 19. HELEN HOGG *against* The MAGISTRATES of KIRKALDY.

THE debate arose upon the conception of a bond, whereby a father lends out a sum of money, not payable to himself, but to his wife, and, failing of her by decease, to his daughter Lillias Masterton, in fee, with power to the mother to uplift. The point was, If the mother was fiar, and the daughter only substitute; or, if the mother was only liferenter, and the daughter fiar. For this last opinion there were cited the following decisions:—Durie, *22d February* 1623, *Leitch; 28th July* 1626, *Tullyallen; 20th February* 1629, *Drumkilbo;* and Stair, *23d July* 1675, *Lamington.* For the daughter it was urged, That the money was hers, and not the mother's; and that the father's design was, to give it in a provision and tocher to his daughter; and the last termination of heirs was on the daughter's heirs.

Yet the Lords found the mother was fiar in this case, and the daughter only substitute; and preferred the mother's assignee. *Vol. I. Page* 634.

1694. *July* 19. SUSANNA STEWART *against* JAMES SINCLAIR.

IN the case of Susanna Stewart against James Sinclair, clerk to the loosing of arrestments, for paying her debt of 500 merks, owing by Hay of Park, for loosing the arrestment laid on by her upon his emoluments as one of the five commissioners of the register's office, without caution or consignation, but only upon his own bond; whereas it being on a decreet, it was not looseable: and seeing it was found, by a posterior interlocutor of the Lords, that these daily obventions and casualties were arrestable, and not precisely of the nature of an

aliment, or a soldier's pay, nor in the case of Sir Robert Murray, Justice-clerk, his pension, which was found not arrestable; therefore the clerk should be liable.

He ALLEGED, That what he did was by order and warrant of my Lord Mersington, then Ordinary, who had the advice of the President, and four or five of the Lords, it being in vacance, rather than to suffer Park to be affronted in the mean time, to loose the arrestment. This defence being acknowledged by the Lords present, they thought it unworthy to allow the clerk to suffer for what he did by their authority and warrant, though only verbal; and, therefore, the Lords present at the communing offered to pay the sum out of their own pockets. The rest of the Lords, from a generous emulation, refused to be exemed, and so it was laid upon the whole, upon an assignation to the debt against Park's heirs; though there be no hopes or expectation of relief. The sum is small; however, it is an instance of that rule of law, *si judex litem suam fecerit, dammum partis læsæ resarcire tenetur*, whereof there are but few examples. *Vol. I. Page* 634.

1694. *July* 6 *and* 19. SIR DAVID CARNEGIE of PITTARROW, *against* SIR ALEXANDER FALCONER of GLENFARQUHAR.

July 6.—SIR David Carnegie of Pittarrow against Sir Alexander Falconer of Glenfarquhar, upon a decreet of miln multures, and astriction of Sir Alexander's lands of Scotston and Powburn, to Pittarrow's miln of Conveth, which was feued out to the Wishearts of Pittarrow, by the abbots of Aberbrotheck in 1225. Sir Alexander craved to be reponed; in regard the point of right was not *deductum in judicium*, nor the declarator of astriction insisted in on the one side, nor the declarator of exemption and immunity on the other. Sir David opponed his decreets; and though, at first, it was only an action for abstracted multures, yet the point of right came in to be determined in the debate. The Lords found it proper, ere they would decide, to name two of their number, with the reporter, to essay an understanding between the parties. *Vol. I. Page* 628.

July 19.—The case of Pittarrow against Glenfarquhar, mentioned 6th current, was again reported: and, after perusal of the decreets, the Lords, by the plurality of five against four, found the point of right of the constitution of the thirlage was not *deductum in judicium*; and, therefore, opened the decreet, and allowed Glenfarquhar's lawyers to be heard on the material justice of the cause, and whether his lands were thirled or not, or if he had prescribed an exemption and immunity.

In this process, it had been debated, whether the master's farm was thirled with the *omnia grana crescentia*, seeing it excepted nothing but seed and teind. —See, for this, Durie, 11*th July* 1621, *Keith*. *Vol. I. Page* 635.

1694. *July* 19. The TOWN of EDINBURGH *against* SIR WILLIAM BINNY.

THE Town of Edinburgh against Sir William Binny, about the property of a piece of waste ground lying at the Timber-hoof at Leith. He founded on his