1693. *December* 12. SIR ALEXANDER COCKBURN of LANTON'S CREDITORS *against* PATRICK HEPBURN of MONKRIG.

THE competition between Patrick Hepburn of Monkrig, and the other creditors of Sir Alexander Cockburn of Lanton, was reported. Hepburn craved to be preferred on his base seasine. They opponed, It was not clad with possession.

ANSWERED.—That, after his taking of seasine, he had received half a year's annualrent of his sum; and, though it was for a term elapsed prior to the date of his seasine, yet it was sufficient to clothe his base infeftment with possession; seeing annualrent is not paid by virtue of the real right, but by the personal obligement in the heritable bond which is the ground and warrant of the seasine; and if a citation on a summons for poinding the ground will make it public, much more the actual receipt of annualrent. And here there was half a year's interest owing, after the seasine as well as before it; and if he had either given an indefinite receipt, or ascribed it to the payment of that half year subsequent to the seasine, it would have undoubtedly preferred him; *ergo*, it must do it here.

The other creditors REPLIED, That nothing clad an infeftment with possession but only annualrent for terms due after the seasine; seeing *nulla sasina nulla terra;* and his ascribing it to the prior term has consumed his election, and manifested his design, that he cannot now recur.

The Lords, thinking the point somewhat new, resolved to hear it in their own presence; but inclined to find it not a public right.

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1693. *December* 14. CARRE of CAVERS *against* LORD POLWART.

CARRE of Cavers having charged the Lord Polwart, on his bond, he gave in a bill complaining of the clerk of the bills, who had presented horning on that registered bond; seeing, by the act rescissory, in 1690, and the explanatory act in 1693, a superseder was given, both for principal sums and their annualrents, to all forfeited persons whose names were enumerated; whereof he was one: And it was referred to the commission of Parliament, to consider how far they should be liberated of their annualrents; and therefore, the Lords were not competent judges thereto, but behoved to remit it to the Commission's cognizance.

The Lords distinguished three cases. 1*mo*. Of the principal sum and annualrents current during the forfeiture; and as to these, the Lords were clear, that the Parliament had taken them out of the Session's jurisdiction, and made the Commission privative judges thereto. The *second* case was, as to annualrents fallen since the Revolution in 1688; and, as to these, the Lords generally thought there could be no question that these were due, and fell not under the Commission. The *third* was, of annualrent owing by the forfeited person, before the doom of the forfeiture and when they were still in possession of their estates. And here the Lords divided; four of them thinking, that the Commission were also empowered to grant a superseder for these, and that the Lords could not

meddle with them: but six or seven carried it, that the Parliament's remit was taxative, and only relating to the annualrents due during the forfeiture and dispossession, and thought the Lords not excluded nor incompetent as to the annualrents due before the forfeiture; and, therefore, that the letters of horning were warrantable *quoad* these.

Then it fell to be considered, that the horning being declared null, and recalled, in so far as it gave warrant to charge for the principal sum and annualrents, during the forfeiture, that, therefore, they should fall *in totum*, and be declared null: But the Lords remembered, that a charge might be illegal *quoad* a part,—as if I charge for a sum, whereas a part is instructed paid by a discharge produced; yet it may subsist *pro reliquo:* and that many things may be good reasons of suspension, and yet not amount to a nullity; seeing, *utile per inutile non vitiatur;* and, therefore, they inclined to sustain this charge as to the annualrents preceding the forfeiture; otherwise he would but raise new letters, and charge for these; which would only multiply expenses on the parties, and put them to give in a new bill of suspension.

It was started in this case, if creditors might, for such debts as were superseded and referred to the Commission, serve inhibition, and raise adjudication or other real diligence; for, if that were stopped, as well as personal, then a creditor, who lends his money now, and has all that diligence and execution open to him, is in a better condition than those creditors whose debts are prior to the forfeiture. But this point was not decided. *Vid.* 3d January 1694. [Campbell against Neilson.] *Vol. I. Page* 578.

1693. *December* 15. Janet Kincaid *against* Provost Coltrain in Wigton.

The Lords thought it hard to take away the bonds, (which were now in his hands, and so became his evidents;) especially seeing she had accepted of the discharge. Yet, being an ignorant woman, and that there was some appearance that the arbiters had wronged her by mistake, in thinking some bonds she had in her own name, at the time of her marriage, would fall under the *jus mariti;* whereas they were heritable *quoad maritum,* they bearing annualrent, and their term of payment being past before the marriage; therefore they, before answer, allowed the commoners and witnesses to be examined upon what motive they decerned her to give the 1200 merks-bond; if it was in contemplation of these sums, which they supposed would have belonged to her husband, but truly did not. And though Provost Coltrain had given his oath upon it already, yet it was but an oath of calumny, and could not hinder the expiscation.

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1693. *December* 15. Mr John Gall *against* The Lady Kinfauns.

Mr John Gall, charging the Lady Kinfauns for his stipend, on a decreet of locality; the Lady craved her liferent lands to be free, because, these forty years bygone, the ministers there had always received payment out of other parts of the barony. Yet the Lords found, he could not be restricted; seeing it was modi-