1693. *January* 11. ROBERT SKINNER in Craigsad *against* WALTER SCOTT of Lethem.

ROBERT SKINNER in Craigsad, against Walter Scott of Lethem. The Lords repelled Lethem's reduction and action of repetition, seeing he had homologate the sentence by payment: And though payment in obedience to a distress be no homologation, yet here he had been silent without reclaiming since 1686, and was holden as confessed by the former decreet; and therefore the Lords refused to repone him now. *Vol. I. page* 544.

1693. *January* 12. SIR GEORGE SKEEN of Fintry, *against* CUSHNY, and BANNERMAN of Elsick.

SIR GEORGE SKEEN of Fintry, late provost of Aberdeen, against Cushny, and Bannerman of Elsick. The Lords found the registration of a bond, without a charge of horning, a sufficient distress whereon a cautioner might pay; and that it was included in the nature of relief only to be relieved *in quantum* they have actually paid, and no farther. But here it being questioned, how the cases should be proved against Sir George, a singular successor, the Lords thought, seeing he derived his right from Robslaw, the common debtor's brother-in-law, and so was obliged to know, that his author's right flowed *a conjuncta persona*, they, *ex officio*, ordained the cautioners, his authors, to be examined on the cases they got, and what they actually paid, and that in presence of the creditors; for the Lords found they could not examine both, and that it was safer to take the cedent's oath than the creditors here. *Vol. I. page* 544.

1693. *January* 12. CAPTAIN JOHNSTON *against* LENNOX.

CAPTAIN JOHNSTON, Provost of Dumfries, against Lennox. The Lords repelled her allegeance, that she had renounced her liferent to her brother, to secure it, because she was in hazard for conventicles, and had possessed seven years since her renunciation; which they found could not give her the benefit of a possessory judgment; and that, her brother having disponed it to the Captain, she had only action against her brother the trustee. *Vol. I. page* 544.

1692. *Dec.* 22. and *Jan.* 12, 1693. SIR GODFREY M'CULLOCH'S CREDITORS *against* The DUKE OF HAMILTON.

1692. *December* 22.—PATON, Macclellan, and other creditors of Sir Godfray M'Culloch of Ardwall, against the Duke of Hamilton.

ALLEGED, 1*mo*, The act of Parliament 1690 allowing the Lords of Session to put a value on liferent-escheats, in the roup of bankrupts lands, did relate allenarly to gifts taken after the said act, whereas the gift of Ardwall's escheat was taken long before.

The Lords found that clause of the act general, and extended to both; else few of the estates of bankrupts before that act could be rouped; for they were generally at the horn, and their escheat gifted.

Then ALLEGED, This gift of the Duke's needed no valuation at all, because its cause, *viz.* for relief of Baldune's cautionaries for Ardwall, was satisfied and paid by the Duke's intromissions with the bygone mails and duties.

The Lords found that required a count and reckoning, and could not be presently cognosced; and therefore they behoved to proceed to a valuation; but that they would qualify and burden it with this restriction, that if, on the event it were found, that the cause of the gift of escheat was satisfied, or that fewer years would serve to pay it than the years purchase to which it should be valued by the Lords; that then the superplus should accresce and fall to the creditors, and the gift of escheat should expire, though its years were not run. Some proposed to let gifts of escheat subsist as long as the rebel lived, because many creditors had no other security than by being included in the back-bond, who might recover payment if the gift stood so long as the rebel lived, and would be cut off, where the gift comes to be valued only at four or five years purchase. But this overture, though rational, was found to be out of the road of the act of Parliament, which expressly appointed such liferent escheats to be valued. And here another question fell in *incidenter*, *viz.* the creditors upon a trial at the Treasury could not find that the Duke had granted a back-bond at all; whereon they contended the gift of escheat was null, being granted contrary to express acts of Exchequer, discharging any gifts to be given out, till first a back-bond be taken. The Lords proposed that either the back-bond be produced, or else, that application be yet made to the Treasury, that the gift be qualified and affected with a back-bond. Then they fell to consider at how many years purchase it should be modified, and thought there could be no such fixed value but circumstances might vary; as here Ardwall was under the hazard of a capital sentence, for the slaughter of Gordon of Cardinesse, for which he had fled, and so his liferent was less worth than another man's.—See Craig, *Feud. p.* 331. The Lords desired to hear this point more fully, ere they laid down a general rule to be a leading case in all time coming.

Vol. I. page 537.

1693. *January* 12.—BETWEEN the creditors of Sir Godfrey M'Culloch, and the Duke of Hamilton, as donatar to his liferent-escheat, mentioned 22d December last. The Lords found, seeing a part of the lands was not sold till the 16th of November, that the Martinmas rents of these lands could not belong to the buyer, or creditors, but to the Duke. And as to the other parcel of the lands, sold on the 11th November, that the Duke ought to have the rent of these; because a liferenter dying on that day, his executors get that term's rent. And the Lords valued and modified the liferent-escheat to five years purchase, considering the rebel was about fifty, and was fugitate for slaughter. Some would have it bear a restriction, that if he was apprehended within the five years, and executed, it should terminate and restrict the value. But the Lords thought it a hazard, like a woman's liferent who is bearing children.

Vol. I. page 544.