1693. *December* 19. LORD TARBET *against* FRASER, Advocate.

THE Lords, before answer, ordained Mr Fraser to depone how the tailyie now craved to be put in the clerk's hands came to him; whether he got it from the clerks, or from my Lord Lovat; for though Lovat's sisters had an interest in it, yet the Lords thought it hard to cause an advocate produce his client's papers in the clerk's hands, if he got it immediately from them, albeit all defences were reserved against delivery. *Vol. I. Page* 580.

1693. *December* 19. JOHN DUNCAN, Merchant in Dundee, *against* CRIGHTON of RUTHVENS.

THE Lords repelled the reasons of suspension, that the debt was arrested in the Laird of Nevoy's hands, who was *correus debendi*, and conjunct principal in the bond with Ruthvens; seeing the arrestment was of an old date, past five years ago, and Nevoy was dead, and no process of forthcoming insisted in; but, to secure the debtor, Ruthvens, they ordained Duncan, the charger, to find caution to secure them against the arrestment. *Vol. I. Page* 580.

1693. *December* 19. FERGUSON of FINNARTS *against* WILLIAM SETON.

FERGUSON of Finnarts against William Seton, for repetition of some money he had uplifted of his, by a right from the Exchequer, when he was forfeited.

ALLEGED.—He was not a donatar, but had purchased and acquired for eight years' purchase, and his signatures and entry had stood him two years more; and the Act rescissory 1690, restoring forfeited persons, did not allow repetition against buyers, but only against donatars.

ANSWERED.—It bears "donatars and others;" which must import more than donatars' assignees, deriving right from them.

The Lords thought the cause new; and, therefore, ordained the reporter, before answer, to try whether he actually paid the eight years' purchase or not; for, if he only gave bond for it to the Lords of the Treasury, and that was not exacted at the time of the Revolution, then he was liable to restore: but if he had made payment, the Lords would consider how far the payment of a partial price, (though not adequate to the worth of the lands,) would secure him from repetition of sums *bona fide* received and consumed; seeing Finnarts had got back his lands, and was in possession thereof, and only now wanted thir sums, which he was likewise craving back. *Vol. I. Page* 580.

1693. *December* 20. WILLIAM STEWART, Writer in Edinburgh, *against* SIR ANDREW AGNEW of LOCHNAW, Sheriff of Galloway.

THE Lords found, there was no reason to cause Sir Andrew pay any part of

the sums contained in the decreet-arbitral, till Agnew of Galdinoch, the charger's cedent, did implement and fulfil his part of the decreet-arbitral, by giving Sir Andrew a general discharge of the tutor-accounts, and of all his claims, except only the said sum of 5000 merks, decerned to him in full thereof; for this were to draw the money out of Sir Andrew's hands, and yet leave him to the hazard of Galdinoch's quarrelling the said decreet-arbitral, who assigned Stewart in general to the count and reckoning, but did not homologate the decreet-arbitral. And, though it was not conceived conditionally, and the one made the cause of the other, yet the Lords thought it was implied; and, therefore, found the letters orderly proceeded; the charger obtaining his cedent's general discharge to Sir Andrew, of all clags and claims he had to lay to his charge, except the sum decerned in the said decreet-arbitral. *Vol. I. Page* 580.

1693. *December* 21. The MAGISTRATES of the TOWN of GLASGOW *against* ROBERT GIBSON, their Tacksman.

THE Lords found the payment to the Provost unwarrantable, seeing the tack made it payable to the Town-treasurer, who only should receive the Town's money; and that it was not sufficient that the Town was owing Walter Gibson, their Provost, a greater sum, because then he should have got an act of council warranting him to pay it; and the Provost may yet pursue the Town: And as to the twenty shillings on the boll of malt, find him liable for the same, unless he subsumes that he was interrupted and debarred from the uplifting of it, as an illegal imposition; seeing he uplifted some: which the President thought not sufficient to make him any further liable than for his actual intromission: but the generality of the Lords found *ut supra*. *Vol. I. Page* 581.

1693. *December* 21. CHARLES JACKSON and his CHILDREN *against* SIR JAMES COCKBURN of that ilk.

THE Lords found the fitted account betwixt Sir Hary Wilkie, on the one hand, and Sir James Cockburn and Sir William Seton, on the other hand, produced, stating the balance to be only £4,217 Scots, not to be the rule or standard by which Charles Jackson was bound to count; seeing it appeared, by the decreet of preference which Charles had obtained against Peter de Grave as creditor and assignee by Sir Hary Wilkie, that it was not produced by him, but by Sir Hary and his assignee; and, though he insisted for that balance *primo loco*, yet it did not hinder him to make a further additional charge against Sir James. But the Lords did not find the count stated between Sir James and Andrew Houston of Garthland to be the rule either, till Sir James was heard whether it was *res inter alios acta*. And as to the *second* point, whether it was *bona fide* paid to Sir Hary Wilkie and his assignee, the Lords found he had no right to the said balance, and therefore found the payment unwarrantable: seeing it was not instructed that Sir Hary was a partner in the tack of the customs and excise with his brother, David Wilkie, and that his assignation thereto from Mr Archibald, as executor confirmed to his father David, was *a non ha-*