1694. *July* 6. THOMAS ALEXANDER of NEWTON *against* WILLIAM HAMILTON of ORBISTON.

THOMAS Alexander of Newton, against William Hamilton of Orbiston, for repetition of £1000 he had extorted, in 1685, by casting him and his aged father in prison, on pretence of reset, harbour, and converse with rebels; and, to pass from the pursuit, took this sum from him, giving him a discharge of the money, bearing, that he had given it to another, and that he should refund it if ever he were convened and troubled before a circuit court for these crimes. This was concussion; and to paction for and receive a bribe to pass from his accusation, *contra S. C. Turpilianum.* The question was, If it fell under the Act of Parliament; being neither a fine nor forfeiture, nor composition for the same, but a gratuity to prevent either. The Lords found it fell under that clause of the act 1690 restoring plundered goods;—that money was comprehended under the general name of goods;—and that it was a clear spuilyie, there being no sentence: so that he was liable both upon the act and on the common law.

But the next doubt was, Whether, as it was now found relevant, if it was also sufficiently proven by Orbiston's discharge produced. Some alleged, that unless he was in prison at the time it was not sufficient. But the Lords thought, seeing the discharge bore he had been in prison, this was *metus cadens in constantem virum;* and that he feared the same power could throw him in prison again: therefore they found it sufficiently proven, and decerned him to restore the said sum. It was queried if it should be *cum omni causa,* and the annual-rents from the date; but this was not insisted for. *Vol. I. Page* 628.

1694. *July* 10. The MAGISTRATES of EDINBURGH *against* JAMES CATHCART of CARBISTON.

THE Magistrates of Edinburgh, against James Cathcart of Carbiston, for demolishing a fore-stair brought out too far upon the High Street. ANSWERED,—He did it on the visitation of the Dean of Guild, and a jedge and warrant. REPLIED,—That act was never extracted, and was afterwards recalled; and no visitation can be till first the act be *in scriptis* under the clerk's hand; for verbal warrants are not sufficient.

The Lords thought the first act could not be made up *per membra curiæ;* and therefore found it unwarrantably built; but recommended to the reporter to try how it might be rectified to both parties' satisfaction, without taking it down, if possible. *Vol. I. Page* 628.

1694. *July* 10. MR ANDREW HOWAT *against* MARGARET BLAIR and HOWAT her Son.

MR Andrew Howat, against Margaret Blair and Howat her son, for payment

of 6000 merks intromitted with by the said Andrew's father, which fell to him by Carmichael, his uncle by the mother, and was alleged to have been lost in the burning of Howat's house; and, all defences being now discussed, they recurred at last to deny the passive titles. ALLEGED,--This was not receivable after proponing peremptors, and leading probation thereon, and after advising them. ANSWERED,—By the act of litiscontestation the defenders had not only proponed the defences, denying the passive titles, which would have saved them; but also the pursuer consented to reserve them till the debt was constituted, and the conclusion of the cause; seeing paction and consent may take away law in some cases. Which the Lords found here. *Vol. I. Page* 628.

1694. *July* 10. SIR JOHN CLERK of PENNYCUIK, and ARCHIBALD PRIMROSE of DALMENY, Petitioners.

SIR John Clerk of Pennycuik, and Archibald Primrose of Dalmeny, gave in petitions, representing that they had made the greatest offers at the roups of the baronies of Nicolson and Laswade, and had the price ready to pay; but the creditors not being ranked according to their preference, they knew not whom to pay it to; and therefore craved liberty to consign the principal, that they might be free of the annualrents in time coming: seeing, the rent of the lands they had bought at so dear a rate, the one at 24 years' and the other at 22 years' purchase, will not pay them four of the hundred; whereas, if they be at the creditors' reverence, who may delay long enough in ranking, they must, during all that time, pay six per cent.: which is a most unequal damage to the buyers, and will discourage all bidding at roups. Yet, on the other hand, the Lords considered it would be an intolerable prejudice to creditors, to have their money lying consigned, without interest: and that the buyers at the roup knew their hazard, and yet offered; for, it is not only an article of the roup, that the price was to be paid to those who shall be found to have the best right, but the bond and caution they give for the price bears the same quality and condition; upon which the Lords found that consignation would neither exoner them for principal nor interest. But the true way to prevent this loss to the buyers is, to ordain, that no sale shall proceed by roup till the creditors be first ranked.

The *second* point that occurred between these buyers and the creditors, was, There were 3000 merks of liferent annuities, payable out of these lands, and the creditors only allowed him to retain 50,000 merks of the price, as the principal sum corresponding to the said annualrent of 3000 merks; whereas he has bought the said 3000 merks at 22 years' purchase, the stock whereof is 66,000 merks; and, therefore, he ought to retain that sum, free of paying any annualrent for the same, during the liferenter's lifetime, else he will clearly lose the annualrent of 16,000 merks. But the Lords considered, that no such thing was proposed at the time of the roup, but great emulation who should be preferred; therefore they repelled this calculation, and found, that no more could be free of bearing annualrents but a stock answering to the liferent-annualrents, and not in relation to the years' purchase by which he bought it.

The *third* controversy between them was, The buyer craved some deduction of the price, because some of the lands held ward; which he did not know the