1694. *February 5.* MR DUNCAN ROBERTSON *against* MR PATRICK SMITH.

THE Lords advised part of the debate between Mr Duncan Robertson and Mr Patrick Smith, about the assignation which Mr Duncan gave of the inventory of the executry; whether it was a consigned evident, or delivered in obedience to the decreet, though the receipt did not bear borrowing, but delivery.

The Lords having examined the clerks, with the extracter and Ordinary, they found there was no warrant for giving it up as a delivered evident, but only to lie in the process till the suspension were discussed; and, therefore, found that Mr Patrick Smith had unwarrantably taken it up, so as to make use of and registrate it. But the Lords thought, third parties who had transacted with Mr Patrick on the faith of that assignation, (as my Lord Stair had done,) were secure; this not being a *vitium reale*, but only striking against Mr Patrick himself. However, that point fell not in upon this process. *Vol. I. Page* 647.

1694. *Nov. 23 and Dec.* 6. DAVID HEPBURN of HUMBY *against* The VISCOUNT of KINGSTON.

November 23.—HE, pursuing for maills and duties on two adjudications disponed to him by his sister the Lady Whittingham, they raise a reduction on thir grounds:—1*mo*. The adjudication is null; because it is from ——— term of her annuity, to ——— term; and all then due did not extend to the sum adjudged for. 2*do*. The advocates craved it only for the 2000 merks of annuity; and yet they also adjudge for the penalty. The Lords repelled thir two, as of no moment; for it was not instructed by discharges that the preceding terms were paid: and the Lords thought, where procurators crave a decreet for an annuity, that the failyie followed as an accessory consequence, unless he had restricted the libel.

The *third* reason was also repelled, *viz.* That the party called in the decreet of poinding of the ground being dead, and the terms there resting being now paid, there behoved to be a new decreet obtained for constitution of the debt. For the Lords found, That, though both master and tenants were changed, and though the lands should go through twenty hands, yet the first decreet of poinding of the ground subsisted against all successors.

But they demurred on the *fourth* nullity, *viz.* That the Viscount of Kingston, not being the granter of the liferent-infeftment, but only apparent heir to him, he should have been charged to enter heir before any adjudication could proceed against him; which the Lords had found was necessary in comprisings, *25th February* 1627, *Earl of Cassillis;* and *29th January* 1635, *Moncrief.* The Lords were divided on this: some thinking it a nullity to restrict the adjudication to the principal annuity, and to cut off the accumulation of its bearing annualrent; which was all the extent for which the objection was urged: and others, thinking there was no need for a previous charge, because the apparent heir, being cited *pro interesse*, the ground was the direct party-contradictor, and the

style run in all decreets of poinding of the ground, that, failing moveables to poind, then to apprise the ground-right and property; though some doubted how the apparent heir could be divested of his property without a previous charge to enter. However, the Lords desired to hear the case argued in their own presence; but seemed clear that the failyies, not being here due by a clause in the body of the real right, but only by a personal obligement, the adjudication might be restricted *quoad* these, there being no charge, and that they ought to be cut off and defaulked. *Vol. I. Page* 644.

December 6.—Between Humby and Lord Kingston, mentioned 23d November 1694. The Lords thought fit to decide the general point in that debate, for ascertaining the writers to the signet in such processes, Whether, in adjudging from an apparent heir upon a decreet of poinding of the ground, there needed any other constitution of the debt, or a previous charge to enter heir, either general or special. Besides what is already marked, the 106th Act, Parliament 1540, was urged; and Sir George Lockhart's opinion, in his *Compend of Dury's Practiques*, where he says, that *non transit sine difficultate;* but the act was thought to relate only to personal debts. On the other part, it was OBJECTED,—What if the ground out of which the annualrent was due be sold to a third party?—must he or his heir be charged?

The Lords, by plurality, found the adjudication formal, and that the want of a charge imported no nullity. But, by a second vote, the decreet of adjudication being null, through adjudging for the termly failyies, which are personal and not real, that this was sufficient to annul it as to the exorbitancies of the expired legal, or the accumulations of annualrents; for, not only he that *dolo et lata culpa* adjudges for more than is due is restricted so as to subsist only for a security, but also where, *per ignorantiam juris*, they have omitted a necessary solemnity in law; for, *quoad* the penalties, a charge behoved to have preceded. *Vol. I. Page* 648.

1694. *December* 6. RATTRAY of RUNNAGUILLIEN *against* HUNTER.

IN a petition given in by Rattray of Runnaguillien, against Hunter, it occurred to the Lords what was the remedy where one creditor had *paratam executionem*, and so immediately adjudged;—another was put to constitute his debt, and to prove sundry points, which, ere they came in by the course of the roll to be advised, the year and day was expired; and so he lost the benefit of *pari passu*. If it occurred by the debtor's colluding with one creditor and opposing another, there must be reason to bring them in; but if it arose from the nature of the right it had the more difficulty. Some thought they might adjudge on their peril, though the debt was not constituted; but this was denied to *Sir Alexander Forbes of Tolquhon* against *Irvine of Drum's Estate*. Others thought the Lords, in such an extraordinary case, might summarily advise the probation without abiding the course of the roll; especially if done in an afternoon, whereby the roll would not be prejudged. A third thought a protestation, taken that they were not *in mora*, but prosecuting their right, should salve the inconveniency,