of Rosehaugh, against Sir William Scot of Harden, of a caption taken out against him on the decreet of Parliament, ordaining him to restore the £1500 sterling of fine gifted to the deceased Sir George Mackenzie, his father, imposed upon Harden in the late times, because his Lady would not come to church. The reason was, That he, being a pupil only of nine years of age, both the common law and that of all nations exemed him from being imprisoned for his father's debt; because, restraint being penal, a pupil, who is not *doli capax*, cannot incur it during his pupillarity, which continues till fourteen; and, if this were allowed, then tutors, who are generally *proxime successuri*, might let their pupils be incarcerated, that, by its *squalor*, the child coming to die, he may succeed; and, if one of nine years old can be apprehended, why not one of two or three, &c.

The Lords considered this was a decreet of Parliament, which use not to be suspended by the Lords of Session except upon obedience; yet, having read the decreet, they found it did not ordain all sort of execution to pass, but only in common style; and this was not to suspend the Parliament's decreet, but only to regulate and explain the manner of executing the same, which they might do by adjudging, poinding, arresting, and all other sort of diligence; but the putting it to execution, by apprehending the child's person, was against the common law: therefore they found no such caption could pass against him during his pupillarity. But, to pay all just deference to the Parliament, they made it alternative that they sisted execution by caption till his pupillarity expired, or the sitting of the next session of Parliament, which of them first occurred; and, that they might proceed *causa cognita*, they ordained the time of his birth and age to be proven, that it might be known when this sist would expire by his attaining the age of fourteen. But, if the Parliament should happen to sit before that time, then they were to apply to them to stop caption against him during that time, wherein all laws gave him a personal privilege on the accounts foresaid, as also that the education of youth might not be impeded. See the case recorded by Haddington and Dury, *25th June* 1624, *Scarlet* against *Somerville*, where the Lords, on sundry specialties, stopped a caption against a girl minor, though past fourteen, and that for the space of a year, but prejudice of all other executions. *Vol. I. Page* 683.

1695. *December* 10. ANDREW HOUSTON *against* SIR WILLIAM MAXWELL of MONREITH.

A BILL being given in by Andrew Houston, against Sir William Maxwell of Monreith, complaining, That, though he had bought Sir Godfrey Mackulloch's lands at a roup, and that he was one of the preferable creditors for £7000, yet he refused to pay him, on the pretence that he had not got a sufficient progress of the rights and evidents of the lands delivered to him.

The Lords considering this as a general case concerning the whole lieges, and all purchasers by roups, they desired to hear it in their own presence; and accordingly, being debated this day, the inconveniences on both hands occurred

to the Lords. For, as no man should be compelled to pay a full and adequate price for lands where he gets not the writs of the same, and there may be better rights on the estate than what stood in the bankrupt's person; so, on the other side, neither the Act of Parliament 1681, anent such roups, nor the style in which they are conceived, oblige the creditors to give the buyer the charter-chest; but he gets some satisfaction as to the debtor's right before he offers at the roup; and he also receives the creditors' warrandice effeiring to their sums assigned,—though that may turn irresponsal and insufficient. On the other hand, a bankrupt, of purpose to obstruct the sale of his lands, may abstract and abscond his writs in such a manner that the creditors (who are strangers to him,) may not know where to seek them. Some proposed, that, if the buyer were not pleased with the security the creditors could make him, he was to cede the possession; for the paying their annualrents is not sufficient, seeing a man may stand in need of the principal sum. Others moved that he should renounce the whole roup in favours of the creditors. But then, a buyer, finding himself any ways lesed, might repudiate the bargain, and get himself reponed, and disappoint the creditors of their expectation of being paid; and might collude with the debtor to keep up the writs, and then pretend he saw no progress; and this would either bring it to a division of the land amongst the creditors, (which is very hard to be effectuated,) or expose it to a new sale at a less value, because of the lameness and defect of the progress; after which the bankrupt, by offering to discover where the writs were, might make a new bargain for himself, which would be so much of the price stolen from the creditors. However, the Lords saw no reason why a buyer should both keep possession of the lands and detain the price; but, if he would renounce, then it would be some check that he do it *re integra*, paying the annualrents of the price to the creditors, and not barely counting for the rent of the lands, which ordinarily is below the annualrent of the price. But, on the whole matter, the Lords desired information to be given them before they made a general rule in this case.

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1695. *December* 11. ALISON GOURLAY and MACMORRAN *against* URQUHART.

PHILIPHAUGH reported Alison Gourlay and Macmorran against Urquhart. A mother having alimented her son, who had an estate *aliunde*, and so not *ex pietate*, she and her assignee, after his death, pursue his nearest of kin before the Commissaries of Edinburgh, to cognosce and constitute the debt; and, probation being led, her oath is taken in supplement; and on this the heir is pursued for affecting the heritage.

ANSWERED,—That he denied the debt:—To which the decreet of cognition was opponed.

REPLIED,—He was not called thereto, and it was a known maxim,—*quod res inter alios actæ alteri non præjudicant;* and all parties having interest must be called; seeing I might have proponed defences against the debt, which the executor either knew not, or, by collusion, neglected.