1739. *November* 20. EARL of ABERDEEN *against* CREDITORS of SCOT of BLAIR.

[Elch., No. 13, *Arrestment*; Kilk., No. 6.]

This affair we have taken notice of before, December 12, 1738. This day there were two questions debated:—1*mo*, Whether an arrestment in the hands of an apparent heir was valid and preferable to a posterior arrestment in the hands of the same heir after he had entered?

The Lords found it was; upon this principle of law, *Qui hæres aliquando extitit, a morte testatoris successisse videtur.* Arniston was even of opinion that if the apparent heir had died without being entered, that, notwithstanding, the arrestment would have been good. But the majority of the bench did not seem to be of his opinion.

The second question was, Whether an arrestment could be laid on, and a summons of forthcoming executed thereon at the same time; or whether a summons of forthcoming could first be raised and signeted, then the arrestment upon which it proceeded laid on, and immediately after the summons of forthcoming executed?

It was alleged that this method saved time and expense to the lieges, and had no bad consequences, and besides, it was the practice. The Lords had no occasion to decide this point, the affair being determined by the decision of the first; but they seemed to be of opinion that it was a very irregular practice, and it was denied from the bar that it was the practice save in the Admiralty Court, which the Lords did not much regard.

1739. *November* 20. WALTER STUART of URCHILBERG *against* JOHN STUART of URRARD.

IN the year 1556 the Earl of Athole feued the lands of Urchilberg, *cum molendinis, multuris, et earundem sequelis,* in the tenendas of the charter; and, in the reddendo, there are mentioned eight bolls of multure-victual, with the clause *pro omni alio onere.* In the year 1667 the Earl of Athole grants a charter of the mill of Auldlune, *cum servitiis et sequelis* of several lands, and particularly of the lands of Urchilberg. The question comes betwixt Walter Stuart, proprietor of the lands, and John Stuart, proprietor of the mill, about knaveship and service, which John Stuart pretended the lands of Urchilberg were obliged to pay to his mill. For the proprietor of the mill it was said, 1*mo*, That the clause *cum molendinis*, &c. being only in the tenendas, and not in the dispositive clause of the charter, was not a sufficient immunity from the thirlage altogether, but only a liberation from multures. 2*do*, That the tenants of Urchilberg were in the constant practice of coming to the mill, and grinding their corns there; which, together with the infeftment in the mill, *cum servitiis et sequelis*, was enough to constitute prescription, and establish a servitude of paying sequels and services, to which the thirlage in this case only extended.

To this it was answered, That the clause *cum molendinis*, &c. even in the tenendas, was a sufficient discharge of thirlage, according to the opinion of our most eminent lawyers, and numberless decisions; and especially in this case, where there is so much due by the reddendo for multures. As to the charter of the mill, *cum servitiis*, the Earl of Athole had no power to grant these services, having discharged them so long before in the charter of the lands. *2do*, As to the prescription, their coming to the mill was *meræ voluntatis*, the mill being conveniently situated for the tenants of Urchilberg, and their corn ground there as cheap, or cheaper than it could be any where else, for they payed no outsucken multure, but only the hire of the servants; so that no prescription could be inferred from thence.

The Lords seemed to think there was no astriction in this case, and could hardly conceive a thirlage of sequels and services without multures; but, at the desire of the pursuer, before answer, they allowed a proof, whether the tenants of Urchilberg were in use to perform services to the mill, such as repairing the mill-dam, carrying millstones, &c. which the Lords thought could not be presumed to be *meræ voluntatis*, and so might remove the objection to the prescription.

1739. *November* 21. CRAWFORD of MINORGAN *against* ———.

[Kilk., No. 1, *Ranking and Sale.*]

IN this question, the Lords found, That a judicial purchaser of lands could not buy in a debt that had been omitted in the ranking, and, in right of that debt, compete with the rest of the creditors, and retain part of the price, though at the sale he had given his bond for the whole; they thought such a bargain was *contra bonos mores*, and that there was a presumptive fraud in buying in a debt which could serve for nothing but to vex the creditors and protract their payment, the purchase being secure enough without it.

N.B.—In this question it was supposed, that, after the ranking is finished, and the certification gone forth, yet, while the subject is *in medio*, and the scheme of division going on, any creditor omitted in the ranking may compear and give in his claim, because the process of division is a sequel of the ranking, without which it is reckoned complete.

1739. *November* 27. LORD TORFICHEN *against* FEUARS of ———.

LORD Torfichen's feuars had a dispute with the vassals of another superior,