No. 16. 1752, Nov. 29. RALPH DRUMMOND *against* EWING.

THE Lords found, *nemine contradicente*, that an assignee to a liferent due to a third party dying, the liferent descends to his heir and not to his executor.

HERITAGE AND CONQUEST.

No. 1. 1736, Dec. 16. GREENOCK *against* GREENOCK.

IN the competition betwixt the heir of line and of conquest for the teinds, the Lords preferred the heir of line, who succeeded in this case likewise to the lands, and though teinds may no doubt go to heirs of conquest as well as lands, (I mean rights conquest of teinds of other mens lands) yet several, *inter quos ego*, thought in general, that where one purchased the teinds of his own lands, they both behoved to descend to the same series of heirs, unless the contrary were specially provided. But that general point was not determined, because of a specialty in this case, that, by the disposition of the lands, the *reddendo* could not be performed by any other but the heir in the lands.

No. 2. 1738, Dec. 21. CREDITORS of MENZIES of Lethem.

THE Lords refused John Menzies's petition without answers, and found this heritable bond conquest though no infeftment followed upon it. The President differed from the interlocutor. Arniston thought, were the question entire, that heritable bonds should not at all be accounted conquest, but as that point is settled by a course of decisions, he thought the not taking infeftment made no difference.

No. 3. 1740, Jan. 8. EARL of SELKIRK *against* DUKE of HAMILTON.

IN this question concerning the late Earl of Selkirk's succession, the Lords adhered to all the interlocutors I had pronounced, and refused both reclaiming bills, I think unanimously, except as to the bond of corroboration, (as to which I believe there were two or three on the other side of the Bench who differed) and after full hearings for three days;—whereby it is settled that the law of conquest extends to all right on which infeftment may follow, though the defunct was not actually infeft; and 2dly, that it extends to rights of annualrent, and even heritable bonds as well as rights of lands; 3dly, that it extends to lands taken in trust in third parties' names, though the trust is not *in gremio juris*, nor in any back-bond, but a mere proper trust depending on the faith of the trustee; 4thly, that bonds secluding executors go to the heir of line; 5thly, that a corroboration of such heritable bonds and also of moveable bonds, which corroboration contained no clause of infeftment but secluded executors, does not alter the nature or succession of the former heritable bonds, agreeably to sundry precedents,—but that so much of that bond of corro-

boration as was composed of heritable bonds went to the heir of conquest, and the rest to the heir of line, agreeably to the decision in 1676, Waugh against Jamieson, Dirleton's Decisions, 342, (DICT. No. 21. p. 5453.) There were sundry ingenious conjectures about the origin of our law of conquest. Arniston thought that it was probably older than even the feudal law itself with us, and he seemed to think it was never our law that conquest or *feudum novum* returned to the superior failing descendants. The President thought it probable that we had it from England, and that it was by some misapprehension or some blundering judgment that it was given not to the oldest brother as in England, but *gradatim* to the immediate elder brother. I own I thought Mr Craigie's, (one of Selkirk's lawyers) account of it, the most probable, that that part of the feudal law did take place with us, whereof I think our *feuda dignitatis*, our titles of honour, are still the remains and vestiges. That after it became usual to purchase feus with money, we have adopted the laws of neighbouring countries, which failing descendants, allowed of the succession of collaterals *in feudo novo*, instead of returning to the superior, and adopted it as we found it preferring the elder brother. What sort of propriety we had in lands before the introduction of the feudal law, and Malcolm the Second's days, I know not, and will not easily be discovered; but I could not imagine, that if it had ever been our law in the collateral succession *in feudo novo*, to prefer the younger brother or heir of line, how that ever would have been altered. And I imagine if there was any blundering judgment in either of the laws, it has rather been in that of England, for if the rule is that conquest ascends, then it ought to ascend *gradatim*, in the same way as heritage does when there is no brother younger than the defunct; and what fortifies this much, and seems also to prove that we derived our law not from England but directly from Normandy, was a book brought up from the library *Les Costume de Normadie*, whereby it appears that our law exactly agrees with theirs in this particular, and as with us so with them, after conquest has once ascended it is deemed heritage and then descends. But as these were no more than conjectnres, so even if this last one was true it concluded against the heir of line, Mr Craigie's client; for first, though there was sasine *in feudo novo*, it was admitted that the heir of conquest must succeed instead of the superior;—if there was no sasine, that is no *inductio in possessionem*, then by the feudal law it was looked on as *nudum pactum*, and did not go even to descendants; therefore, when succession in these was introduced, none could succeed but he who would have succeeded had their right been completed, that is, the heir of conquest, and the heir of line could not complain, since neither he nor any body else was prejudged by that alteration in our law, but only the superior. 3dly, As onerous fees, that is, such as were purchased with money, were equally governed by the rules of the feudal law as those that were true and proper benefices,—witness ward-holdings, and all other sorts of holdings to this day, and even rights of annualrent and heritable securities, are liable to non-entry, relief, liferent, escheat, &c. when not expressly renounced,—only the retoured duty in annualrents is regulated by a very late act of Parliament; the consequence is, that the superiors must have had the same interest in these if they were *feuda nova*, consequently the preferring the heir of conquest in these was no deviation of the law. But these things were too conjectural to found a judgment upon, and the true foundation was the invariable practice of the Court and opinions of our lawyers for about a century. In this we all agreed, and the President said, had he been a Judge in the year 1675 when

the decision in the case of Halkerton was given, he would have been of a different judgment. But Arniston said he did not now so much disapprove of that first decision as once he did. Arniston also thought as to the lands of Balgray and that there had been no express clause for consolidating the property with the superiority, and no procuratory for resigning *ad remanentiam*; that wherever a superior acquires the property, the presumption is, that it is in order to consolidate them and let them descend to the same heir. He was of the same opinion also as to the purchase of teinds, and even seemed to doubt, whether in any case teinds should go to an heir of conquest, because of their own nature they do not require infeftment.

HOMOLOGATION.

No. 1. 1744, July 20. LIDDLE *against* DICK.

AN heritable bond being granted for 10,600 merks, and sasine taken upon it; posterior creditors objected, That one of the witnesses in the bond was not designed. Answered, Homologation by an assignation to the maills and duties of the date of the bond, and relative thereto in all respects formal. Lord Kilkerran found the homologation not good to support the infeftment against the competing creditors; and we adhered, though we all agreed that it was a good homologation of the personal obligement against all mortals, and even of the heritable bond and infeftment against the granter.

HORNING.

No. 1. 1735, Feb. 1. A. *against* B.

LORD MILTON reported a bill of horning upon a decreet of scandal of the Commissaries against a wife for L.30 Scots, but assoilzieing the husband. The question was, Whether the horning should also go against the husband for his interest, and whether in point of form it would not be a nullity to charge a wife without charging her husband for his interest, in the same way as if it were an heritable debt of the wife's the husband behoved to be charged, or in the case of pupils and minors, the tutors and curators are charged for their interest, though not liable for the debt. We all agreed that neither denunciation nor caption should follow against the husband, and the President proposed that the horning should go against him, but qualified in that manner. Others thought the wife might be charged without charging the husband, so as both denunciation and caption might follow against her because the decreet was for a delict. I doubted that caption could follow against her during her marriage at any rate, because however it was originally a delict, now *devenit in alium usum*, it was become a civil debt, and diligence was issuing out of this Court for recovering it, though originally the Commissaries might as a part of the sentence have imprisoned her till payment. And I also