1741. *July* 16. Sir Robert Gordon *against* ———.

The Lords, in this case, found,—That the bailie of a Baron Court might give a decreet against a defender contumaciously absent,—fining him for a delinquency, and ordering him to prison till the fine was paid: and that, upon such a decreet, he might lawfully grant a warrant to commit him.

1741. *July* 20. ——— *against* Magistrates of Stirling.

The Lords found,—That minority was a legal incapacity, which hindered any man from being a councillor or magistrate in a burgh; and that, if a minor was by mistake chosen a councillor or magistrate, he might be removed by the other councillors and magistrates, *ex officio*, without any application from a private party: Notwithstanding it was pled, that this was in fact a reduction of his election, which was only competent before a higher court, and that the council had no jurisdiction over its members in so far as to remove them from their office. This the Lords refused to sustain in a case where the incapacity was so clear; but if it had been any statutory incapacity, or upon account of malversation in office, or for any other reason that was dubious, and might require a long discussion, in that case the Lords would have found otherwise.

1741. *November* 8. ——— *against* M'Leod of Genzies.

[Elch., Nos. 5 and 6, *Wadset.*]

This was the case of a wadset which contained an assignation to the reverser, proceeding upon a narrative of love and favour, of the haill kains, customs, duties, casualties, during the life of the reverser, he paying yearly four chalders to the wadsetter. It was contended, 1*mo*, That this paction was usurious; because, by the ordinary course of sale, that quantity of victual would yield more than the annualrent of the money for which the lands were wadset. This the Lords repelled; because the value of the victual was very little above the annualrent of the money,—and the wadsetter was bound to pay the cess.

2*do*, It was contended that this wadset was improper: and therefore the wadsetter, if he entered to the possession, behoved to be accountable; for there is here a back-tack which is the characteristic of an improper wadset, by which the creditor does not take the hazard of the fruits of the land for the interest of his money; and in this case, though the back-tack was only for a time, yet that did not alter the nature of the wadset, which, being once improper, could not afterwards become proper.

To this it was answered,—1*mo*, That this was no back-tack, but only a concession upon the part of the wadsetter, which the reverser might make use of or

not as he thought proper; for he was not bound to enter into possession, and, if he did enter into possession, might relinquish when he pleased: whereas, by the nature of the tack, the tacksman is obliged to possess and to continue the possession all the time the tack lasts. *2do,* Supposing it were a back-tack, yet it is only for a term of years, which may perhaps be very short; whereas, the characteristic of an improper wadset, is a back-tack during the time of the not-redemption. That shows manifestly the intention of parties to be, that the wadset shall be no more than a right in security; whereas, when the tack is only for a time, it is doing no more than any proprietor would do with his lands.

N.B. This was the reasoning of Elchies, who seemed to allow, that if the wadset was once improper by a back-tack during the not-redemption, although the irritancy of this tack, for not paying the rent in two years, was incurred and declared, yet that would not alter the nature of the wadset, which, being improper in its original constitution, would still continue so.

The Lords found the wadset proper. *Dissent. Arniston.*

1741. *November* 10. HELEN HUNTER *against* JAMES BLAIR.

[Elch., No. 5, *Warrandice;* Kilk., No. 1, *ibid.;* C. Home, No. 179.]

THIS decision carried by a narrow majority, against the opinion of Arniston and Drummore; and while a reclaiming bill was preparing, it was compromised.

1741. *November* 14. CHISHOLM *against* LORD LOVAT.

THE Lords found, in this case, that an adjudication, with a charge against the superior, was the first effectual adjudication: notwithstanding, that neither a charter nor a year's rent was offered. This they found sufficient in competition with another adjudication; but, had the question been betwixt the adjudger and the superior, they would have found otherwise.

1741. *November* 24. JOHN SEMPLE *against* ANNABEL EWING.

THE question here was about the effect of diligence upon an obligation of cautionry, within the seven years; whether it only *secured what fell due in that time,* (these are the words of the Act 1695,) or if it perpetuated the obligation as it was at the beginning, and so, if it was a subject bearing annualrent, made it still continue to do so even after the seven years. It was argued that dili-