1757. *January* 28. GARDEN *against* LINDSAY.

IN this case the Lords sustained a payment made by a tenant to his master, after he was cited by an adjudger in a process of maills and duties, and a decreet taken against him in absence,—upon this principle, that a decreet of maills and duties does not put an adjudger in possession, nor make him liable to account for the rents: nothing but actual uplifting of the rents can do that: and therefore if, after taking decreet, he stands off, and does not charge, which was the case here, where the payment was not made till about fourteen months after the citation and eight months after the decreet, the tenant may conclude that the adjudger does not mean to take possession, and therefore may pay safely to his master.

The Lords went unanimously into this opinion, which was moved by the President, though they acknowledged it was new to them. For the same reason, the President said that an assignation in security to any subject, though intimated by the assignee, would not make him liable to account, if he did not uplift.

1757. *February* 4. PORTEOUS *against* BELL.

A WOMAN was heir of an estate, of which the superiority was in her grandfather, and the property in her father, who had infeft himself base, upon a disposition from the grandfather. She made up her titles by service to the grandfather, which carried the superiority; and she also served heir to her father, but she was not infeft upon a precept of *clare constat* from herself, so that the title to the property was not fully completed. Thereafter she died, and the question was, Whether her husband was entitled to the courtesy?

It was SAID,—That, having carried the nobler right, that swallowed up the baser right, like a man who gets a disposition, with procuratory and precept, and first infefts himself base upon the precept, then resigns the lands, and is infeft holding of the superior: that infeftment will swallow up the first one; so that there will not be two rights in his person to the subject. But the Lords did not think the cases parallel, in respect that here the last right was not completed, and therefore could not be said to be vested in the person of the lady, but remained *in hæreditate jacente* of the father; whereas, in the case put, both rights are completed, and there is nothing wanted to extinguish the base right but a renunciation *ad remanentiam* in the person's own hands, which the law does not think necessary. The Lords therefore decided the cause in favour of the husband upon another point, namely *bona fides*, with which he had possessed these lands, as having right to the courtesy, for several years without any challenge; and this notwithstanding there were other claims in his person against the estate, to the extinction of which, it was said, the rents he had uplifted ought to be applied.

Another point in this cause was, Whether a contract of marriage, written upon several sheets of stamped paper, without mentioning the number of pages in the testing clause, as required by the Act of Parliament allowing securities to be written bookways, was not null and void?

It was ALLEGED,—That the attestation of the notary, in sasines written bookways, required by Act of Parliament 1686, had only been dispensed with on account of the contrary practice long prevailing, which could not be said here; as the common, and almost universal practice, was to mention the number of pages in the last page. Nevertheless the Lords unanimously sustained the deed,—*first*, because it was a marriage-contract, and therefore more favourable than another deed; *secondly*, because the pages were numbered; and, *lastly*, there was a catch-word at the bottom of each page, so that it was impossible any thing could be foisted in. See *infra*, February 9.

1757. *February* 8. CREDITORS of EYMOUTH.

LORD HOME, as Lord of Erection, had right to sundry feu-duties, payable out of these lands of Eymouth, of which the crown, by the Act of Parliament 1633, was superior. The proprietors of these lands had sold parts of them, and the purchasers had taken charters from the crown for payment of a proportionable part of the feu-duty payable out of the whole, but without defining what that part was, by which means my Lord Home had a feu-duty that was formerly paid by one to seek from perhaps twenty, and without knowing what part to demand from each: the question was, Whether he could not poind any part of the ground for the whole feu-duty?—And the Lords unanimously found that he could, but that he could have no personal action against the several heritors who had been thus multiplied, except in proportion to the parts of the feu which they held, and with the rents of which they intromitted.

Lord Kaimes was of opinion, upon the general point, that if a feu was in this manner divided without the voluntary act of the superior, he would have a poinding of the ground for payment of the whole feu-duty out of any part of the divided feu; and he put the case of the superior being obliged to enter several heirs-portioners, or to enter several adjudgers of the feu; and he thought, in this case, that Lord Home, being superior so far as uplifting the feu-duties went, and the feu being divided without any act of his, he could have poinded any part of the ground for the feu-duty of the whole, even supposing the particular feu-duty payable by each of the purchasers had been mentioned in his charter; but in this the President differed from him, and put his opinion wholly upon the purchasers' neglecting to get the feu-duties specified in their charters.
