It was OBJECTED, 1*st*. That John Watson, a real creditor by an adjudication, was not called. ANSWERED,—The Act of Parliament 1681 obliges the pursuer of the sale only to call real creditors who are in possession; for he cannot know others: And though there was a factor here, put in by the creditors, or the Lords for their behoof, yet that did not put him in possession; because *non constat* if, in the event of the ranking, he would fall to have any share. The Lords found there was no need of calling him.

2*do*. It was OBJECTED, that some pupils, called Leiths, who were infeft in an annualrent, and in possession, by getting payment of their yearly annualrents, were not cited, by the first diligence, to hear the probation of the rental led, which was the principal part of the process, but only cited on the act; and, even then, that only their father, as administrator, was cited, and not themselves; which was a nullity.

The Lords repelled this objection, and found the infeftment of annualrent, being a servitude, could not properly attain possession; and that the citing the father, as tutor, upon the second diligence, was sufficient, seeing he concurred in the roup: and, at most, the Lords thought the omission of not citing one creditor, could not annul the roup and sale *in totum*, but allenarly *quoad* that creditor's interest; and, if the buyer was content to stand to the bargain, with the hazard of that creditor's debt, the roup was not to be reversed; for they, turning now one of the most solid securities for conveyance of lands, they are not to be loosed nor overturned upon small informalities and omissions.

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1694. *June* 30. SIR JOHN HALL of DUNGLASS *against* SIR WILLIAM SHARP of STONYHILL.

IN Sir John Hall of Dunglass's process with Sir William Sharp of Stonyhill, the question occurred,—If a creditor singly, by warrandice in a disposition, before a distress, may pursue a reduction of a right, on the Act of Parliament 1621, as prejudicial to him, *declaratoria juris*, to take effect when the distress, or eventual eviction, shall exist.

The Lords remembered, that, in Robert Burnet's case, they allowed a cautioner, before distress, to adjudge, lest he should be without year and day; and so they found here he might pursue a reduction *declaratoria juris*. Sir George M'Kenzie, in his commentary on the said act 1621, is also of this opinion.

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1694. *June* 30. The EARL of CASSILLIS, Petitioner.

THE Earl of Cassillis gave in a bill, craving that Tarbet, clerk-register, might be ordained to give him an extract of an Act of Parliament he obtained in July 1690, declaring, that the inhabitants of the bailiary of Carrick, which jurisdiction belonged heritably to him, were not answerable to the Sheriff-courts of Air.

The Lords refused to meddle, or interpose their authority, in commanding

the register to give out any such extract:—1*mo*. Because it came in only by a bill; and Sir George Campbell of Cesnock, Sheriff of Air, was neither called nor heard. 2*do*. This act was not touched; and so the Lords thought they could not supply the royal assent, nor make it an act: and, though many private acts need not touching, yet this was voted; which ratifications are not. 3*tio*. The sheriffship being older than the bailiary, which lies locally within the shire, there did not appear any reason to give it a privative jurisdiction. But the Lords did not hinder the clerk-register to give an extract of it, if he thought he might safely do it.

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1624. *July* 3. ROBERT MILN, Writer, *against* MR RORY M'KENZIE of DALVENAN, Advocate, and BUTLERS, his Cedents.

THE Lords found, seeing the assignation which the Lady Kirkland gave to Mr William Clerk, in her contract of marriage with him, to her jointure, was with the express burden of the bond she had given to the said Butlers, her children of the first marriage, that this made it real; so as no creditor of Mr William Clerk's could affect it by arrestment, or otherwise, no more than he could have reached it himself, having, by that clause in his contract, preferred them: notwithstanding the bond made no specific application to her jointure, but was only a personal obligement upon her, and that it was alleged it might be paid, and the discharges abstracted. All which the Lords repelled, unless they would propone a positive defence of payment, or the like: but, if it had been inserted in the contract, only by way of reservation, the Lords would have found it only personal. But a clause, "with the burden," is otherwise.

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1694. *July* 4. ORROCK of BALRAM *against* KINLOCH and ALEXANDER CHAPMAN.

THE first question was, If the discharges produced under the hand of the two co-partners in the brewery were probative without witnesses. For though, in writs subscribed by sundry parties, each of the subscribers are witnesses to one another, yet that presupposes three subscribers; for then two are witnesses to each subscription; but it is not so in two. On the other hand, many writs subsist without witnesses,—as bills of exchange, precepts, discharges of rents, &c. And it was contended, that, being in a matter of a society, though dissolved, the partners' discharge was sufficient to their clerk. This being a sort of commerce, *in materia favorabili*, the Lords inclined to sustain the discharge as probative. But, in regard it was alleged that there was a paper of the same kind, and labouring under the like defect, produced in a former process by thir defenders, which was sustained, the Lords ordained their oaths to be taken for producing it and that process; for, if they obtained an interlocutor sustaining it, they could not reclaim now; *nam quodquisque juris in alium statuerit, ut ipse eodem utatur*, is a rule of natural equity. And, as to the former pursuit of Bal-