1755. *November* 28. CREDITORS of SIR ALEXANDER MURRAY.

SIR Alexander Murray of Stanhope disponed his estate to his brother Charles, upon this condition,—that it should be liable for all his debts, and that preferably to the debts of his brother Charles. At the time of this disposition the estate was not near bankrupt, nor was Charles, the disponee, a bankrupt; but afterwards he contracted very large debts, for which adjudications were led against the estate conveyed to him by his brother: and the question was, Whether,—by the disposition above recited, qualified with those clauses and provisions concerning the preference of Sir Alexander's debts, which were all inserted in the procuratory, precept and sasine following upon the disposition,—Sir Alexander's creditors had any preference over the creditors of Charles, or whether both creditors were not to be preferred according to the common rules of law, that is, according to the priority of their diligence. And in the first place, it was an agreed point among the Lords, that there could be no reduction here on the Act of Parliament, for though the disposition was *omnium bonorum*, and to a conjunct and confident person, yet, as it was expressly with the burden of Sir Alexander's debts, and that the estate might have been, and was, adjudged by Sir Alexander's creditors, they thought the disposition was not *in fraudem creditorum*: indeed, if Charles had been *obæratus*, it would have been in prejudice of the creditors of Sir Alexander; because, let their diligence have been never so early, Charles's creditors would have adjudged along with them, and so coming in *pari passu*, there would not have been funds sufficient for them all, and therefore the Lords thought that the case would have fallen under the Act of Parliament. Lord Prestongrange said, that the preference of Sir Alexander's debts being a *modus* and *quality* of the right, inserted in all the steps of the conveyance, he did not see why it should not be understood to qualify Charles's right so that Sir Alexander's creditors should be preferable; which would be no more than if Sir Alexander had disponed his estate, reserving as much as was sufficient for the payment of his debts; in which case Charles could be reputed only proprietor of what remained, after paying Sir Alexander's debts. He thought the case was the same here, and for the same reason that Sir Alexander's creditors could adjudge an estate belonging to Charles, he thought their adjudications would be preferred to the adjudications of Charles's creditors; but the rest of the Lords were of opinion that *pacta privatorum non derogant jure communi*, and that this clause in Sir Alexander's settlement could not alter the ordinary rule of preference among creditors; and though Sir Alexander intended to give a preference to his own creditors, yet he had not taken the proper method to execute that intention.

N. B. In this case the Lords were unanimous that the adjudications led against Sir Alexander, after the feudal right was vested in Charles in manner foresaid, were valid and effectual; *dissent. tantum* Kaimes: and to this interlocutor they adhered, 11th December 1755.

Another question in this case was, Whether Sir Alexander having taken a gift of the mines upon his estate from the crown, and afterwards contracting

debts, and one creditor adjudging the lands simply, and another after him adjudging the lands and mines specially, which of these two was preferable as to the mines? And the Lords found that the adjudication of the lands carried also the mines; *dissent. Preside, Minto,* &c. who thought that mines, being *inter regalia,* were a *separatum tenementum* as much or more as teinds; and by the unprinted Act 1592, they were to be held of the crown feu, upon payment of a tenth part by way of feu-duty; so that, supposing the lands to hold ward or blench, the mines would hold by a different tenure, and consequently were a separate tenement. But to this it was answered, That mines of lead and copper, such as those in dispute, were not *inter regalia,* neither by the common law, nor by the statute of James I., although the Act 1592 does indeed speak generally of all mines, which by that Act are supposed to be in the gift of the crown.

1755. *November 29.* ——— *against* ———.

In this case the Lords sustained the proof of the tenor of the executions of an inhibition, without any other adminicle than the record of the executions, without any witnesses that had ever seen the executions, or any *casus amissionis* proved, other than that the house where the record was kept was burnt ten years after the letters were recorded, and it was said that the executions had been left at the record, and had been destroyed when the house was burnt, with a great many other papers. What moved the Lords to sustain this proof, although the inhibition was as old as the year 1725, was that there was an execution of arrestment produced, regular and formal, proceeding upon the same letters of inhibition, executed by the same messenger, and upon the same day and in the same place. *Dissent.* Preside et Kaimes, who thought it was dangerous to admit such proof *in re tam antiqua,* without any other adminicle than the record, and without any *casus amissionis* being proved.

The President said, that to admit the record to be proof, by itself, of any writing, was in effect repealing the Act of Parliament, that extracts shall not bear faith in improbations; and gives an opportunity to parties, if there be any flaws in their executions, which might be detected by improbation, to put them in the fire, and then prove the tenor of them: And as to the *casus amissionis,* though there was no occasion that it should be so special as in the case of a bond, yet he thought it was necessary to give some probable account how it came to be amissing.

Lord Kaimes said, that there was more hazard of admitting such a proof with regard to an inhibition than with respect to any other writing, because prescription was longer in running as to inhibitions than other deeds.

1755. *December 5.* Major Maitland *against* Creditors of Charles Maitland.

In this case the Lords found that an heir of entail was personally liable to the