tack from the liferenter, he might set up that possession against the *dominus*. I think therefore the decision, if it be well founded, must rest upon the specialty of the exception; and it must be maintained, that by the disposition the disponee had no title to possess the liferent lands, and therefore the possession of these lands, during her life, was without a title from the disposition, like a man upon a bounded charter possessing any thing beyond the bounds. In short, it must be maintained that the liferented lands were not disponed, at least while the liferenter lived. See *infra*, 19th February 1767.

1766. *August* 7. JOHNSTON *against* ———.

IN this case the question occurred again, which had been decided in the case of Ewart two or three days before.

Lord Alemore said that the genius of our law was not to bring in creditors *pari passu*, but, on the contrary, every one was at liberty to get himself preferred by doing more timely diligence than another. That this was so far restrained by the statutes 1621 and 1696, which however only respected the deeds of debtors, but left the diligence of creditors to be governed by the rules of the common law. That he understood no fraud in a creditor who makes use of any information he can get to recover payment of a just debt. The debtor indeed may act partially and wrongfully who gives him such information, but that will not make the act of the creditor wrong who makes use of it: so far from that, he is entitled to ask his debtor what security he can give him for his debt, and where his effects are. If such investigations were to be allowed, and if it would annul the diligence if it were found out that it was the debtor who gave the information, a debtor might have it in his power to disappoint any creditor to whom he had an ill-will, by only telling him where his effects were, after which he could not arrest, at least to the effect of getting a preference, and, in the meantime, other creditors might step in.

These considerations appeared so weighty to the Court, that they superseded determining this point of the cause, and allowed a proof upon another point.

1766. *August* 7. GORDON *against* ———.

IN this case it was admitted to be now established law, that an arrestment, or any other diligence by the law of Scotland, was preferable to the assignees under the commission of bankruptcy in England, whether such diligence was prior or posterior to the bankruptcy; as had been decided in the case of *Thomson* and *Tabor*. And the only question was, Whether the assignation under the commission, being produced in process, was equal to an assignation intimated, so as to give a title to sue and uplift the effects in Scotland, not affected by diligence?

Lords Alemore, Coalston, and Auchinleck, thought that it ought to have no ef-

fect, any more than a commission of lunacy issued in England, or the probate of a will in the ecclesiastical courts there; but it was agreed to remit the matter back to the Lord Ordinary to be more fully considered of.

1766. *November* 18. ROSS *against* MONRO of NEWMORE.

[*Fac. Coll.* IV. No. 45.]

IN this case the Lords found that an heir of entail, who was obliged to bear the name of the family, under an irritancy, and who had wilfully given up that name and taken another, in order to qualify himself to enjoy another estate, entailed under the condition of bearing a particular name, and that only might be restored against the irritancy incurred, upon his offering at the bar, when the declarator of irritancy is insisted upon, that he was willing to reassume the name he had quitted; *dissent. tantum* Auchinleck, who thought that at this rate he might lay down and take up the name as often as he pleases, and whenever the irritancy was pursued against him he had no more to do but to offer to purge at the bar. And no doubt this would be the consequence if the law be that a conventional irritancy such as this may be purged at the bar as well as a legal irritancy. But I think the decision can only be defended on this principle,—that the Court has exercised its *nobile officium*, and interposed *ex æquitate*, to do, what indeed the Court has never done in any instance before, but which may appear equitable, namely, to forgive the first offence, though wilful and premeditated, without the least pretence of error or mistake. But several of the Lords declared that they would not have the same indulgence for a second offence.

1766. *November* 19. GORDON *against* FARQUHAR.

THE Lords in this case were all of opinion that a personal bond granted by a married woman was not null *ipso jure*, but only *ope exceptionis*, and therefore might be by her homologated.

The bond in this case was a bond of annuity for L.15, and the Lords found that it was homologated to the full extent by the payment only of L.10 sterling for some years. It was referred in this case to the oath of the creditor in the bond, whether she did not grant a deed of restriction of it to L.10 sterling, in case of her marrying a second husband, which accordingly happened. She acknowledged she did so, but she said the debtor in the bond did afterwards agree that the restriction should only take place during her, the debtor's, life, but should not be good to her heir. It carried by a narrow majority, that this was an extrinsic quality in the oath, and the same thing as if a man should acknowledge that he was debtor to another, by bond, in the sum of L.100 sterling, but, says he, the creditor, some time after,