bente potestatem ; seeing this sum was not confirmed by Mr Archibald, but by his sister, Rachael Wilkie, wife to the said Charles Jackson, and executrix-dative *ad omissa ;* and any eik that was made by the said Mr Archibald was afterwards improven as false. The Lords also repelled that defence, That he had paid Sir Harry upon a *probabilis ignorantia juris,* thinking that, because Mr Archibald, his cedent, was confirmed executor, therefore he had right, seeing it was not given up in the inventory. But it occurred to the Lords that he might be not only executor-nominate, but likewise universal legator, which would give him right to this balance without a specific confirmation. But they considered that the ground of Rachael Wilkie's confirmation was as creditor to her father in a bond of 4000 merks of tocher ; and she had proven that her father had continued in a solvent and responsal case to his death, so she would be preferable to the universal legacy ; but restricted Charles Jackson and his children's claim, to the said ground of debt, and the annualrent of it. *Vol. I. Page* 581.

1693. *December* 21. The Earl of Nithsdale *against* The Duchess of Buccleugh.

[See the two prior parts of this Report, Dict. p. 545, 546.]

The Earl of Nithsdale, against the Duchess of Buccleugh, on the £5000 minute. The first defence was against Nithsdale's title, That it was not *in bonis* of Earl Robert, the philosopher, and so cannot fall to his executor ;—that the sum was heritable, as *surrogatum* in place of lands, and so fell not under confirmation and executry ;—and that the Duchess was not bound to pay till the Earl of Nithsdale fulfilled his part of the minute ; it being a *synallagma,* consisting of mutual prestations, and the Duchess is not yet secured in the barony of Langholm. Answered.—This sum was moveable, it neither excluding executors nor bearing a destination of infeftment ; and so belonged to him as executor confirmed to the Earl, who entered into the minute ; and as to the disburdening the lands of incumbrances, the Duchess was sufficiently secured by an adjudication she had led, and a certification she had obtained in an improbation.

The next point was as to the annualrents.

Alleged.—The minute bore none, and they were only due *ex lege et pacto.* Answered.—Here it is due by law, being the price of lands. Replied.—It is but a consideration and gratuity given for the Earls of Nithsdale their good-will and kindness ; seeing they had irredeemable right, and paid the price before ; and so could bear no annualrent.

The Lords thought fit to hear this case in their own presence.

Vol. I. Page 582.

1693. *December* 22. Rory Dingwall *against* Murray of Polrossie.

Some of the Lords were clear that the reason of suspension was just and relevant, *viz.* You have discharged one of the co-cautioners, and so cannot exact

the whole from me, but must deduce his share and proportion; because you have precluded me of my relief against him *pro tanto*. But the generality of the Lords thought, that if it was only *pactum de non petendo*, and a discharge without any other onerous cause but favour, he could not be hindered to exact the whole from the other *correus debendi;* but if it was on payment, or receipt of sums of money, more or less, that he could not exact double payment; but thought a gratuitous discharge could not cut off the other's relief. See 10th July 1680, *Leith*.

The Lords, before answer, ordained the discharge to be produced, that they might see whether it proceeded upon payment or not. *Vol. I. Page 582.*

1693. *December 22.* The ADMINISTRATORS of HERIOT'S HOSPITAL *against* ROBERT HEPBURN of BEARFORD.

THE Lords found the pursuer's infeftment, in a ground annual out of the tenement called Robertson's Inn, was a sufficient title whereon to call in a reduction and improbation for the rights of property; seeing it was only to this effect, To remove all impediments out of the way why they might not poind the ground for his annualrent. But, whereas the Hospital insisted for production of his progress of writs in that tenement from the Bishop of Dunkeld, whom he disclaimed to be his author, the Lords found he was obliged to produce no writs, for satisfying the production in the reduction, but those that flowed from their common author. But, *quoad* the improbation, it was not a good defence that his rights flowed from the Earl of Crawford, as donatar to Crighton's bastardy; and so not from the Bishop of Dunkeld, the mortifier of the pursuer's annualrent; which Bishop he denied was ever heritor of this tenement: for, seeing they offered to improve them as false and feigned, he behoved to produce all upon his peril, else certification would pass. And as to the declarator, sustained it, as accords. *Vol. I. Page 583.*

1693. *December 23.* FLETCHER of ABERLADY *against* The HEIRS of MR WILLIAM FLETCHER, Advocate.

IN a pursuit by Fletcher of Aberlady, against the Heirs of Mr William Fletcher, advocate,—witnesses being adduced by Aberlady to prove that Mr William held courts, and decerned the tenants; and it being OBJECTED, That the witnesses were moveable tenants to the adducer, and so not receivable:—It was ANSWERED, 1*mo*. That objection was introduced when they could be removed without previous warning; but now, since the Act of Parliament, they having time to provide for themselves, they were not liable to so much impression as before. The Lords repelled this answer. Then ALLEGED,—They had got tacks; and, though it be since their citation to be witnesses, (for it might be more dubious if it were only after their citation in the cause,) yet it puts them out of the hazard of being removed; and so were receivable. The Lords thought it very suspicious, and therefore refused them. 3*tio*. ANSWERED,—There is