1694. *July* 12. Mr Thomas Rae, Minister at Dundurras, *against* James and John Mans.

Mr Thomas having married his daughter to James Man, and contracted 1000 merks of tocher with her; before the year and day that it became due, he lent 700 merks of it to his goodson's brother, on his letter, that, either the money should be paid, or else allowed in the fore-end of the said tocher. The marriage dissolves within year and day, and so there was no tocher due in law. He pursues now for repetition of the 700 merks, against the heir of his son-in-law, who is also now dead. The defences were, *first*, He was minor, and *non tenetur super hæreditate paterna.*

Answered,—This does not touch heritage, but only repetition of a sum. The Lords repelled this first defence.

The *second* was, The letter was not holograph, and so not probative. The Lords sustained the letter, in respect it was adminiculated by the contexture and whole tract of the affair.

3tio. It was alleged to be alternative, either to allow it in the fore-end of said tocher, or to retire the bond; and, *in omnibus obligationibus alternativis, electio est semper debitoris;* and he choosed to deduce from the tocher *pro tanto.*

Answered,—That member of the alternative proceeded from a supposition that the tocher would fall due, if the marriage subsisted year and day; or else on his ignorance that he had right to it *quomodocunque:* but *ita est* the marriage so dissolving, the term of payment of the tocher never came, but it returned to the giver; and so there was no alternative.

The Lords found, this member not existing, it could not be chosen by the debtor; and, therefore, decerned him to refund the money.

Vol. I. Page 630.

1692 *and* 1694. Milne of Clackmannan's Creditors *against* Alexander Milne of Carridden.

1692. *December* 21.—The Lords found, that old Carridden did not fully clear, by his oath, how his heritable bond of 83,000 merks Scots was made up, and particularly Kennoway's bond; therefore, they ordained this Carridden, his son, yet to search amongst his father's papers, and depone if he can find any of the grounds or instructions of that debt; seeing the other creditors had reason to take all manner of expiscation anent the verity of the co-creditors' debts, that simulated or paid sums may not be kept up on the estate: but thought it hard, on that pretence, to keep up his annualrents, whereof formerly he was in possession; and, therefore, removed the stop formerly laid on by them.

Vol. I. Page 535.

1694. *June* 28.—The Lords advised the debate in presence between the Creditors of Miln of Clackmannan and Miln of Carridden; wherein they craved to reduce his bond of 83,000 merks, as granted by Clackmannan, then a bankrupt, at least *in meditatione fugæ*, at least that you knew him to be insolvent when he granted you that security; in so far as umquhile Alexander Miln of

Carridden, the defender's father, in his oath taken on his death-bed, did acknowledge that Clackmannan bid him expede his infeftment speedily, lest he should be prevented. *2do.* That the onerous causes of his debt were not borrowed money, but contracts for victual and coals, and other such bargains, as he declares in his oath; and so he ought to produce these contracts, and the other grounds of his bond. The Lords resolved to begin first with that point, If he was obliged to instruct or adminiculate the grounds of his debt farther than by his father's oath. If he had declared it to have been borrowed money, it is like the Lords would have sought no farther astruction; but, he confessing it was made up of other transactions, the Lords thought it reasonable he should give some farther document and evidence of it. But the question arising, Whether it was referred to his oath by the creditors;—for, if it was *juratum deferente adversario*, they behoved to stand to his oath;—the Lords found it was taken *ex officio*, before answer, and for expiscation, he being then *moribundus*, and not on the act of litiscontestation; therefore the plurality found that Carridden behoved to astruct the onerous causes *aliunde* than by the narrative of the bond and his father's oath allenarly; not but they might contribute with others, but that they were not in this case, when the party was just breaking, sufficient instructions *per se*. *Vol. I. Page* 623.

July 13.—The Lords advised the further debate in the reduction pursued by the Creditors of Clackmanan against Alexander Miln of Carriden, mentioned 27th June 1694; wherein it was urged that he behoved to condescend on the onerous causes that constituted his debt; seeing he knew Clackmanan was then insolvent, and could not gratify or prefer one creditor before another, and that he had shunned to depone on some of the interrogatories. The Lords thought it hard precisely to tie creditors to astruct the narratives of the onerous cause of their bonds; but, in a suspicious case like this, they allowed both parties, before answer, to adduce what probation they could on the matters of fact,—the one for astructing the bond, and the other for evincing his participation of fraud or knowledge; and particularly to examine James Hay, the writer, in whose hands the first bond was depositate, and Andrew Crawfurd, who examined him on the commission, whether he had his qualified oath drawn up in writ before, and if he offered to answer any other interrogatories they pleased. *Vol. I. Page* 630.

1694. *July* 13. The Creditors of Baillie of Hardington *against* Bailie William Menzies.

Westshiels, and the other Creditors of Baillie of Hardington, against Bailie William Menzies, about the extinguishing a comprising by intromission. The Lords found, seeing there was another apprising led by one Brown, within year and day of Hardington's, in 1669, that, if Brown pleased to require it, the first appriser ought to account to him for a proportional part of the maills and duties, they coming in *pari passu:* but, if they intended to suffer the whole intromission to be ascribed to pay, satisfy, and extinguish the first comprising, they might do it; because the expiration of the legal was odious, and that cal-