style run in all decreets of poinding of the ground, that, failing moveables to poind, then to apprise the ground-right and property; though some doubted how the apparent heir could be divested of his property without a previous charge to enter. However, the Lords desired to hear the case argued in their own presence; but seemed clear that the failyies, not being here due by a clause in the body of the real right, but only by a personal obligement, the adjudication might be restricted *quoad* these, there being no charge, and that they ought to be cut off and defaulked. *Vol. I. Page* 644.

December 6.—Between Humby and Lord Kingston, mentioned 23d November 1694. The Lords thought fit to decide the general point in that debate, for ascertaining the writers to the signet in such processes, Whether, in adjudging from an apparent heir upon a decreet of poinding of the ground, there needed any other constitution of the debt, or a previous charge to enter heir, either general or special. Besides what is already marked, the 106th Act, Parliament 1540, was urged; and Sir George Lockhart's opinion, in his *Compend of Dury's Practiques*, where he says, that *non transit sine difficultate;* but the act was thought to relate only to personal debts. On the other part, it was OBJECTED,—What if the ground out of which the annualrent was due be sold to a third party?—must he or his heir be charged?

The Lords, by plurality, found the adjudication formal, and that the want of a charge imported no nullity. But, by a second vote, the decreet of adjudication being null, through adjudging for the termly failyies, which are personal and not real, that this was sufficient to annul it as to the exorbitancies of the expired legal, or the accumulations of annualrents; for, not only he that *dolo et lata culpa* adjudges for more than is due is restricted so as to subsist only for a security, but also where, *per ignorantiam juris*, they have omitted a necessary solemnity in law; for, *quoad* the penalties, a charge behoved to have preceded. *Vol. I. Page* 648.

1694. *December* 6. RATTRAY of RUNNAGUILLIEN *against* HUNTER.

IN a petition given in by Rattray of Runnaguillien, against Hunter, it occurred to the Lords what was the remedy where one creditor had *paratam executionem*, and so immediately adjudged;—another was put to constitute his debt, and to prove sundry points, which, ere they came in by the course of the roll to be advised, the year and day was expired; and so he lost the benefit of *pari passu*. If it occurred by the debtor's colluding with one creditor and opposing another, there must be reason to bring them in; but if it arose from the nature of the right it had the more difficulty. Some thought they might adjudge on their peril, though the debt was not constituted; but this was denied to *Sir Alexander Forbes of Tolquhon* against *Irvine of Drum's Estate*. Others thought the Lords, in such an extraordinary case, might summarily advise the probation without abiding the course of the roll; especially if done in an afternoon, whereby the roll would not be prejudged. A third thought a protestation, taken that they were not *in mora*, but prosecuting their right, should salve the inconveniency,

and bring them in *pari passu:* but this was to give too great power to an instrument.

The Lords came to no conclusion in this case, because he had delayed too long; but thought it deserved regulation by an act of sederunt.

Vol. I. Page 648.

1694. *December* 7. JOHN MAXWELL *against* The VISCOUNT of TARBET.

JOHN Maxwell, grandchild to the Bishop of Ross, having obtained decreet against the Viscount of Tarbet for some feu-duties of lands, now belonging to Tarbet, holding of the Bishop of Ross;—Tarbet's reasons of suspension were, 1*st*. The lands pertained to the Laird of Innes at that time, and he offered to prove he had paid these feus; 2*d*. *Esto* they were owing, the most he could crave was to poind the grounds; and cannot make him personally liable for any years preceding his possession and entry to the lands.

The Lords thought both the reasons relevant; but, in regard there was a decreet *in foro* against Tarbet for these feu-duties, they desired the reporter to consider the decreet, if these allegeances were proponed, and if Tarbet got a term to prove payment, and succumbed, so as the term was circumduced against him; for in that case he ought not to be reponed. And if, in the first summons, he was craved to be personally liable, and proponed not this defence against it, then it was *competent and omitted.* *Vol. I. Page* 648.

1694. *December* 7. WILLIAM SCOT *against* DOUGLASS of ARDIT.

WILLIAM Scot, son to Bristo, against Douglass of Ardit, on the passive titles, for payment of sundry debts contained in his predecessor's bonds. ALLEGED,—Robert Douglass, my predecessor, disponed to James Scot, your cedent, his whole personal and moveable estate, under a back-bond, bearing, That he, being paid and relieved of all debts, either then due or which afterwards he should acquire, he should denude himself of the remanent benefit of the debts and goods assigned in favours of the said Robert Douglass, his other creditors; and if there were any superplus after that, the same was to accresce to the said Robert, his heirs and representatives; and *ita est* the sums and goods assigned were much more than would have paid all the debts due to James Scot of Bristo; and therefore he either is paid, or might have been paid. ANSWERED,—William Scot, the pursuer, is content to hold account for all his father's actual intromissions, conform to his stated account left under his hand; but cannot be farther liable, especially for the debts in the account-book, whereof there was no instructions delivered to him. REPLIED,—Though James Scot's back-bond does not precisely tie him to diligence, yet, *inest ex natura rei*, when I assign you to my debts, and give up my account-books, it being a moveable subject, you ought not to suffer it to perish, but should have pursued the debtors in the count-