No. 11. 1737, Jan 14. FERGUSON of Auchinblain *against* MUIR.

THE Lords found the prescription competent for all preceding three years, unless the pursuer will prove resting owing by oath.

No. 12. 1737, June 17. SIR ROBERT DOUGLAS *against* SIR J. SCOTT.

THE Lords sustained the interruption of the prescription of the L.100 bond by the holograph receipt of annualrents, and found that receipt although holograph probative against Sir Robert Douglas the principal debtor as well as against the creditor who granted it and the cautioner who produced it. I doubted much of this interlocutor, for the thing appeared very suspicious; but there was no division on the Bench, and I being in the chair did not put it to the vote. 2dly, They sustained the defence against the 2500 merks bond assigned to Sir Patrick Scott in 1679, that Sir John could not sue upon it *ante redditas rationes*, notwithstanding of the prescription of the tutor-accounts. We did not think that the decision in the case of Mauldsley,* that compensation cannot be pleaded upon a prescribed debt, had any connection with this case, which is not compensation but payment, since the law presumes that the debt was paid *re pupilli*. Lord Arniston was also of this opinion, but he further differed from that decision, though it were a proper compensation, and said he would always doubt of it, till it were confirmed by a series of decisions.

No. 13. 1737, Jan. 19. MURRAY *against* COWAN.

See Note of No. 9, *voce* PACTUM ILLICITUM.

No. 14. 1737, July 14, Dec. 6. SIR JAMES DALRYMPLE *against* DUNCAN.

THE Lords adhered to their interlocutor in so far as it found Mr Edmonston's minority ought to be deducted. But found no occasion to determine the other as to Carnwath, and the reason of adding this, was a doubt Arniston had as to Carnwath's, who was not within year and day of the other adjudgers; though if that question had been put, the majority seemed of opinion of the interlocutor.

No. 15. 1737, Dec. 16. WALKINGSHAW *against* KNAPPERNY.

THE Lords were of very different opinions. Most part of us were for sustaining the answer of prescription, but upon different grounds. Some of us thought, first, that the compensation was not liquid within the years of prescription, and therefore it could not stop the prescription; and 2dly, that though it had been liquid, it would not have hindered the running of the prescription; and I was one of those that was of that opinion upon both grounds. *Vide* 18th January 1712, Herries against Maxwell, (DICT. No. 138. p. 2677.) Arniston was of the same opinion upon the last ground, but thought as to the first that the account produced by Walkinshaw proved it liquid within the years of prescription. But the President seemed to be against the prescription on both grounds, and Tweddale

* DICT. No. 139. p. 2677.

had difficulty as to the second ground, but was of the opinion upon the first ground that it was not liquid. But we gave no judgment, because Knapperny offered to prove by Walkingshaw's oath the verity of his grandfather's subscription.

No. 16. 1737, Dec. 23. KERR *against* CRICHTON, (or BRIGHTON.)

See Note of No. 17, *voce* ADJUDICATION.

No. 17. 1738, Feb. 9. CAPTAIN RUTHERFORD *against* SIR J. CAMPBELL.

IN this question between these parties concerning an account furnished in England to Sir James Campbell, Whether the prescription should be judged according to our law or the English statute of limitations? the effect of which was that if ours was the rule, then the debtors oath was still competent; but if the English then there did not lie any action; we gave no decision on that point, because it seemed to have been already determined by the Ordinary and adhered to in presence some time ago, that the English statute was the rule; and most of us seemed to continue of the same opinion, not only for the decisions quoted in the papers, but also another solemn one in the case of D. Hamilton, about the year I think 1721 or 1722. But Arniston thought that a debtor had the benefit of both statutes and might plead either of them that was most beneficial to him, which opinion seems to deserve consideration. But then Sir James Campbell having come to reside in Scotland before the time limited in the English statutes was elapsed, we found the action still competent by the acts 4 and 5 *Annæ* for amendment of the laws, &c.; though that act mentions only the debtors being beyond seas, which we found *ex paritate* included his coming to Scotland.

No. 18. 1739, Jan. 17. EARL OF GALLOWAY *against* THE FEUARS OF WHITEHORN.

THE Lords having in July last found even the annexed property prescriptible by the positive prescription, but that Earl of Galloway had actually acquired right by prescription; they this day unanimously adhered. The question was concerning the heritable office of Bailie of Regality of Whitehorn, comprehended under the general annexation in 1587, but disponed to Lord Garlies by the Crown in 1588. The cause was given for the Earl on several other grounds all separately determined, but this only I mention being a general point of law.

No. 19. 1739, Nov. 30. M'DOWALL *against* M'DOWALL.

THE Lords thought the not calling the summons within year and day was no objection to the interruption; but they found that the executing a blank summons was no interruption; and therefore adhered to the Ordinary's interlocutor, *renit.* Drummore, and Arniston, who mentioned a decision Earl of Hume against Earl Marchmont, but which Kilkerran said was not at all on this point.