respect there was an interlocutor of an Ordinary, not reclaimed against, regulating the thirlage in manner above expressed. So that the general point remains yet undetermined.

1740. *January 25.* LADY HOUSTON *against* SIR JOHN SHAW.

THE *species facti* here was, Titius acquired right to a bond upon which an adjudication had been led, but without infeftment. His son serves heir in general to him, and then makes up titles to this bond by confirmation, upon which he leads a second adjudication of teinds belonging to the debtor, and, upon the title of this adjudication, uses inhibition of teinds against the tacksman. *Quere.*—Whether tacit relocation was thereby interrupted?

In this question, the Lords were all of opinion,—1*mo*, That there was nothing to hinder a creditor to adjudge twice for the same debt, provided he had not entered into possession upon the first adjudication; and it was affirmed, that this happened, every day in practice, when either the first adjudication had some nullity in it, or did not extend to all the debtor's lands. 2*do*, That an heir, served only in general to his predecessor, may use inhibition of teinds, notwithstanding it be in many respects similar to a warning to remove, which it is certain cannot be used by an heir not infeft.

The Lords seemed to go upon this principle, that teinds were not properly *tenementum*, nor a subject passing by infeftment, although by custom sasine has been introduced even in them.

As to the question, the difficulty lay in this, that the inhibition proceeded upon a null title, *viz.* an adjudication led upon an heritable bond taken up by confirmation. The confirmation of the heritable subject was null,—the adjudication led upon that title was likewise null, and by consequence the inhibition following upon the adjudication.

For the validity of the inhibition it was argued, That though it proceeded upon an erroneous title, yet there was a true title in his person who used it, *viz.* the general service: that, if so, there was no occasion to allege any title, no more than in removing of tenants in land; and by consequence there could be no harm in alleging a false title. 2*do*, *et separatim*, Supposing a warning could not be prosecuted upon a false title, yet the inhibition, in this case, proceeded upon a valid title, *viz.* the adjudication; which, though it proceeded upon an erroneous title, *viz.* the confirmation of an heritable subject, yet, as the same person was both heir and executor, nobody had a right to quarrel the title, and so the adjudication was valid.

To which it was answered, 1*mo*, That, in removings, the tenant is obliged to object to any defect of title in the pursuer; otherwise, if he should remove at the instance of a person who was not the true proprietor, he would be liable to the true proprietor for the rents, and therefore as the tenant is not safe to remove, at the instance of a person who shows no good title in his person, he is not for that reason obliged; and supposing afterwards the pursuer should produce a true title, yet the tenant would not be liable in violent profits, but

for the terms subsequent to that production. *2do*, That, as to the second defence, there was no difference betwixt an adjudication led upon no title and an adjudication led upon a wrong title.

The Lords found, That the inhibition, in this case, did not interrupt the tacit relocation.

N.B.—This carried by a narrow majority. There were five against five; but, by the President being of the opinion contrary to the decision, the other carried.

1740. *January 25.* INNES *against* FORBES.

[Kilk., No. 7, *Arrestment.*]

THERE had been a competition betwixt an arrester and indorsee, about a bill due to their common debtor, in which the arrester prevailed. The question now came about the arrester's expenses. It was allowed that they could not come off the subject arrested, which could only be affected by the debt which was the ground of the arrestment; but *quære*, Whether the arrester could not retain, for his expenses, a bill due to the common debtor, which had been indorsed to him for security of the debt now satisfied by the arrestment, and which, for that reason, the other creditor, *viz.* the indorsee, contended should be given up to him.

The Lords found the arrester might retain the bill for his expenses, in respect that it was hypothecated to him for security of his debt, that is, principal, interest, and expenses; and that he was obliged only, *ex gratia* or *æquitate*, to give it up to the other creditor, to whom he lay under no obligation.

1740. *February* 1. ARCHIBALD URE *against* JAMES MITCHELSON.

THIS was a reduction of an election of an assay-master of the incorporation of goldsmiths of the city of Edinburgh. There were two reasons of reduction; the first was, That it was not in the power of the electors to alter the constitution of the incorporation, so far as to make this officer for life, or *ad culpam*, who before was only chosen for a year, in the same manner as the deacon, who formerly discharged that office, and whose depute the assay-master was. *2do*, This election was made by surprise, in so far as one half of the incorporation was absent and had no previous warning that a thing of so great importance was to be gone about.

The Lords unanimously reduced the election, upon the second reason. As to the first reason, they had no occasion to give a decision on it; but several of the Lords were of opinion, particularly Arniston, that constant use and im-