LORD ELCHIES said he was as great an enemy as any man to such latent deeds, but he did not think this a latent deed. To obviate such inconvenience, I would propose, that a man having several rights to the same lands in his person, descendible to several heirs, should, by making up titles to only one of the rights, be deemed to repudiate the others, so far as concerns the line of succession, and to will and declare that his succession should be according to the destination of the right which he has completed, in the same manner as if he had expressly revoked all the other destinations. This would remedy the inconvenience, put the thing upon a clear and solid foundation, avoid all intricate questions about prescription, and save to every man all his different titles to lands to be used by him as there is occasion. These principles will apply to the present case, but not to the case of M'Kerston, where the party, being bound up by a strict entail, which he could have been obliged to execute, and could not afterwards alter, had no will in the matter.

It is also to be noticed that the Lords, in this case, were all of opinion that the inferior rights neither were nor could be cut off by the negative prescription, while the person who was in the right of them possessed the estate.

1751. *November* 26. ROBERTSON *against* Ross, &c. Creditors of Easterfearn.

[Elch. No. 5, *Heir-apparent.*]

A FATHER had right to a wadset: the son, after his death, purchased the property or reversion, but neglected to make up titles to the wadset by service to his father; thereafter a creditor adjudged the lands from him, and another creditor after that adjudged upon a charge to enter heir to his father, who, as said, was in right of the wadset; the question was, which of these two creditors was preferable, and whether the last creditor had not an exclusive right on the wadset? Upon this *species facti* the Lords unanimously determined this general point, that where a man has right to the property of an estate, and likewise to other collateral and subordinate rights, commonly called incumbrances, such as a wadset right, (which, though nominally a property, the Lords considered in this case as no other than an heritable bond,) infeftment of annualrent, or adjudication and chooses to make up his titles only to the paramount right, or right of property, neglecting the collateral rights, and leaving them, as in this case, *in hæreditate jacente* of the predecessor, it shall not be in the power of any creditor to rear up these rights so neglected against any other creditor or any other person come in right of the debtor. It was said by some of the Lords that a man in such circumstances had potentially in him all the other rights, though he only chose to complete his right to the property, (for so they considered the reversion in this case,) which being the nobler right swallowed up the rest. Others, and particularly Elchies, insisted upon the great inconveniences that might arise if such inferior rights might be reared up and made separate estates of, considering it is a very common practice for men to purchase in incumbrances in order to secure their estates, and then to let them lie in their charter-chests without ever thinking of making up titles to them. But this is an argument only from expediency

and it must be confessed that the forms of the feudal right make a good deal of difficulty in this case, which in my apprehension can only be solved upon this principle, That a man having several rights in his person, and choosing to make up a title to any one of them, is thereby presumed to renounce and repudiate the rest; as if in this case, for example, he had renounced and discharged the wadset, or used an order of redemption against himself, which was hinted from the bench; but to this effect, not to be used by any creditor or taken up by any heir, but not to be so extinguished as that they could not be used to defend the right upon which the title is made up against any prior or preferable right.

N.B. The Lords, in this case, had no occasion to determine the question of the succession dividing and the principal right going to one heir and the incumbrances to another; but it is believed, if the case were happening, the Lords would find that the heir to the principal right upon which the titles were made up would carry all. (Vide *Gray* against *Smith*, 8th November 1751.)

1751. *November* 26. DOUGLAS of DORNOCK *against* SIR ROBERT DICKSON.

[Kilk. No. 6, *Heritable and Moveable.*]

IN this case it was the opinion of my Lord President and some others of the Lords, that a charge upon an heritable bond conceived after the new fashion, did not make the debt moveable so as to go to executors; and the reason of the difference betwixt the old and the new heritable bonds is, that a charge upon an old infeftment of annualrent did resolve the heritable right *pro tempore*, till it was passed from, because a man could not have both the annualrent-right and the price of it; but it is otherwise in the modern heritable bonds, which being only a security for money, not a purchase of annualrent-right, a charge upon them does not alter their nature. But the other Lords put their opinion in this case upon specialties.

1751. *December* 4. CREDITORS of CASTLESOMERVILLE.

[Kaimes, No. 127.]

THE Lords in this case found that a *plurispetitio* in an adjudication, or adjudging the lands for more than was truly due, provided it was not done *fraudulenter vel dolose*, did not annul the adjudication *in totum*, but only reduced it to a security for principal sum and annualrents; and this was agreed to by the other party, so that it came to be a question of fact whether the *plurispetitio* in this case was fraudulent, or proceeded from ignorance or mistake.