Arniston, and Tinwald: All the rest for it,—only Leven and Kilkerran absent. The next question put, was upon bonds and bills in the mother Christian Ramsay's name, and which did not appear *ex facie* to be the proceeds of the farm, brewery, &c. unless the mother's nearest of kin bring evidence that they arose from other funds;—and it carried "presumed." *Con.* were Strichen, Arniston, Murkle, and Tinwald;—and we remitted to the Commissaries to proceed accordingly;—and 19th June and 9th July adhered as to the two first, but remitted the third as to bonds and bills having no relation to brewing or coal driving;—remitted to the Commissaries to hear parties upon the presumption or evidence on either side.

No. 20. 1751, Feb. 20. SPENCE *against* CREDITORS of ALCORN.

SPENCE's wife being decerned executrix to her grandfather, made over the debts to herself and husband, and they sued Alcorn in the inferior Court, and he having corroborated his former bonds in their name, they after raising inhibition on the depending process produced the corroboration in that process and obtained decreet, there being no opposition, which they extracted without confirming,—and thereon adjudged.—Then in a competition of Alcorn's creditors they were preferred on their inhibition. But the wife afterwards dying, the creditors objected, not only that all the diligences were inept, but also that Spence the husband had no right to the debt, because his wife had not confirmed,—and Minto found the diligence void and null. But on a reclaiming petition and answers, I observed that though the interlocutor was agreeable to our ancient practice, yet the act 1690 discharging charges to confirm, and our practice since, has made a great alteration. That now by our judgment in the case of M'Whirter and several others, possession by their nearest of kin without confirmation vests the property in them. That the case of *nomina debitorum* was not then determined, because it might be of bad consequence to make the naked possession of a bond transfer the right. But I had no doubt, and believed it had been so found, that a nearest of kin could effectually receive payment and discharge a bond without confirmation, which after his death could not be quarelled by the next successor,—and if he could receive payment and discharge, I saw no reason why he might not take the debtor's obligement in his own name;—and if in this case Spence's wife might have discharged the old bonds, and taken a new bond in her own name, I could see no reason why a bond of corroboration should not be equally effectual to her and her assignees. The President was clear of the same opinion, and argued strong,—and in the end we altered the interlocutor almost unanimously, and found that the diligences are not void, that the petitioner has sufficient right to the debt, and therefore preferred him. There came in a reclaiming petition in June, but 4th June we refused to receive it, because after the reclaiming days.

No. 21. (1752) 1753, July 23. SIR A. GRANT *against* MRS BURROWS, &c.

CAPTAIN WILLIAM BURROWS, deceased, and Sir Archibald Grant had many great dealings together, and in September 1733 settled accounts together, whereby the balance in Burrows's favour was L.3800 sterling; but as Sir Archibald disputed sundry articles of the accounts, Burrows accepted in satisfaction an heritable bond by Sir Archibald on his lands in Scotland for L.2000 sterling,—and subjoined to the account there is a mutual

release of all demands preceding the date. This bond Mr Burrows conveyed to his wife's father Mr Cartwright in January 1734, and he was infeft in March that year. Burrows is dead, and so is Cartwright, and Mrs Burrows and her two sisters daughters of Cartwright having served heirs to him sued Sir Archibald for the L.2000, whose defence was compensation by sundry debts due to him by or wherein he was engaged for Mr Burrows, and was forced to pay, and chiefly on account of a copartnery with sundry others in the Morven Lead Mines, wherein Burrows had a considerable share; and the other partners having failed, the creditors of the Company had recovered large sums from Sir Archibald, and he had also made large advances of meal to the Company. And on report 14th January last, the Lords found that the claims arising from these copartneries did not fall under the said general release,—but found it not competent to Sir Archibald after the general release to plead compensation or retention against Cartwright or his successors, not even for debts incurred before Cartwright's assignation or infeftment, (*renit.* Kilkerran, Leven, *et me.*) But found sufficient evidence that the bond was conveyed by Burrows to Cartwright for security and implement of the marriage-articles betwixt Mr Burrows and his wife for settling L.3000 for the use of both spouses, and the longest liver of them,—and found no sufficient evidence for Sir Archibald to plead compensation or retention to the extent of the annualrent of L.2000 during Burrows's life. Sir Archibald next insisted, that Mrs Burrows has as executrix administrated to her husband in England, and had possessed herself of effects to satisfy the L.3000, for security whereof this bond was conveyed to Cartwright, and therefore the bond was now *in bonis* of Burrows, and compensable with debts due by him;—and insisted that she should account for her intromissions, and this process be stopped till such account;—and on the other hand Mrs Burrows insisted that she could not be obliged to account in Scotland for an office she had in England. The Court was much divided upon this point. Against the accounting a judgment of the House of Lords was alleged in the case of the late Dutchess of Hamilton, and for the accounting a later judgment of this Court in July 1732, White against George Skene, (DICT. No. 54. p. 4844.) and therefore the Court delayed till either party should get the opinions of learned counsel in England, which was got, and printed copies given in to us. On the part of Sir Archibald by K. Evans and R. Hodson, and on the part of Mrs Burrows, by William Murray, Solicitor-General, and R. Wilbraham. Mr Murray's opinion was, that if such accounting should become necessary incidentally to a question before the Court of Session, he thought the enquiry might be made, making all the allowances which would be made in England. The rest in substance agreed with him; but the opinion of Sir Archibald's counsel was the notwithstanding of which the Court was much divided. Those against accounting, urged that that account behoved to be judged according to the English law, with which we were not acquainted, and did not know what debts had a preference in England and what debts had not, and that Mrs Burrows could not have the necessary compulsators for bringing other creditors or others having interest in the subject into Court. The other Judges again answered, That was no more than happened and behoved to happen every day where transactions or dealings in England or other foreign countries happened to become a subject of dispute here either by way of action or defence, or reply. However, it carried that she was not bound to account here, six and the President against five, in which last number I was. But then they

found that action here must stop for such time as Sir Archibald may sue her in England, and for that they allowed two years, and in this last I did not vote, because I doubted, if she was not bound to count here, whether we could have any regard to the defence?—10th July 1754, On a reclaiming bill for Sir Archibald, and answers, which were remitted to the Ordinary and reported, we altered the first part of the above interlocutor, and found the compensation competent, but adhered to all the rest.

FACTOR.

No. 1. 1734, July 4. WILLIAM CUNNINGHAM, *Supplicant.*

THE Lords remitted to the Ordinary on the bills, with power to grant the factory for the annualrents but not the principal sum.

No. 2. 1736, Nov. 30. EDGAR, Factor of Clouden, *against* CREDITORS.

THE Lords adhered to the interlocutor 31st July, finding that Edgar the factor ought to be charged with the annualrent of the money he received from former factors whether principal sums or annualrents from a year after the said payments were made; but remitted to the Ordinary to hear him on the allegeance that money was not paid him but only bonds assigned, which were not paid till 1721.

No. 3. 1737, Dec. 16. CREDITORS of ANDERSON *against* HANDYSIDE.

THE Lords found that this general factory which did not contain even a power to compound and transact, did not empower the factor to accept of this trust-disposition. They also, at least several of us, thought that if he was bound by his factor's acceding, that other creditors not acceding but reducing, would not have liberate him, though some of us seemed to doubt, but we found no occasion to give any interlocutor thereon.

No. 5. 1738, June 16. PRINGLE and PORTEOUS *against* KENNEDY.

THE Lords adhered to the Ordinary's interlocutor, whereof I doubted greatly in point of law, because the law seems to make no distinction between foreigners and natives as to their agents or factors being liable for them; 2dly, The practice of making foreigners find caution *de expensis* both in the Admiralty-Court and even here, supposes that the factor here is not liable. Kilkerran took it on the footing as if Pringle were in effect assignee though not *in rem suam*. But I doubted that an assignee suing *bona fide* on a bond whereof payment had been made to his cedent would be liable in expenses, and the interlocutor did not put it on that footing, nor did the rest of the Lords; and yet they seemed to agree, that one acting as an ordinary agent, if it were not upon a factory, would not be liable, which I did not well comprehend.