the defunct interposed, and craved to be preferred to him in the office of executor; and accordingly the Commissaries did recal the decreet dative in favour of the disponee, and decerned the nearest of kin executor, because they considered the general disposition as giving a right only to the goods, and a claim of debt against the heir *in mobilibus*, but not the office of executor; but thereafter the cause being advocated, and the bill of advocation reported by my Lord Prestongrange, the Lords found, without a vote, *dissentiente tantum* Drummore, that the nearest of kin could not in this case confirm, for these reasons: 1*mo*, Because he had no interest in the matter, seeing that the whole moveables belonged to the disponee; and it was not sufficient that he had a right if he had not also an interest, and the law would not give him an office which was entirely unprofitable to him: this was my Lord Kaimes' reason. 2*do*, Because, as the law stood now, a man without confirmation got a right to the moveables by possession, and to the debts, by uplifting them from the debtors, if they would pay him, without the necessity of a confirmation: but if in this case the nearest of kin could confirm, the disponee would be obliged, whether he would or no, to be at the expense of a confirmation, which of necessity must come out of the whole head, whereas the law gives him the option to confirm or not as he thinks proper; and this was the President's reason. 3*tio*, For that the inconveniencies to the disponee would be very great, because the nearest of kin, by virtue of his confirmation, might seize upon the moveables at the value stated in the inventory, and apply them for the payment of debts: Now the disponee might choose not to part with these moveables, or might think them too low valued in the inventory; in which last case he would have no remedy but a confirmation *ad male appretiata*; and this was my Lord Huntington's reason. The Lords seemed to be of opinion that a confirmation of a disponee as executor-creditor was an absurd kind of confirmation, and that he should be rather confirmed as an executor and universal legatar.

N.B. In the case of a testament naming an universal legatar, but not an executor, it is likely the decision would be the same; so that now there is no difference betwixt the nomination simply of an universal legatar and of an executor and universal legatar.

1755. *January* 28. NEILSON.

[Kilk. *February* 8, 1755.]

IN this case the Lords decided a very general point of law, and of considerable consequence: They found that if a sale of lands was fraudulent upon the part of the buyer, though the right was completed in his person by charter and seasine, before any challenge brought, yet his creditors adjudging the subject from him, and noways in the knowledge of the fraud, were liable to reduction *ex capite doli*, and that without distinction, whether the adjudgers had completed their right by infeftment or no; for the Lords thought that an adjudger

could only take the subject *tantum et tale* as it stood in the person of the debtor, that is, liable to be evicted upon his backbond or other personal deed, and also for his fraud, in the same manner as an arrestment gives the subject, just as it was in the debtor's person; for which reason it is that an arrester is not considered as an ordinary assignee, but the oath of the debtor in the debt arrested proves against him as well as it would have done against his debtor.

This judgment the Lords gave unanimously; and the President said it had been before so adjudged in a case which he mentioned; *dissentiente tantum* Kaimes, who said he could not make the distinction betwixt a voluntary disponee and a legal disponee or adjudger; and he thought the case of an arrestment was not similar, because an arrestment did not give the property of the subject as an adjudication does. But there seems to be some difference in the nature of the thing betwixt a purchaser who lays down his money and buys upon the faith of the records, and a creditor, who, for a debt not contracted upon the faith of the lands, adjudges from the creditor what he can get. If a creditor in such a case will have the security of the records, he should take an heritable bond upon the lands; and that, it is believed, would make him as safe as a purchaser.

1755. *February* 19. AITON *against* MONYPENNY.

THIS was a question concerning the prescription of a deed of entail, against which the negative and positive prescriptions were objected, the estate having been possessed above forty years, and no document taken upon the entail; and the Lords were unanimous in sustaining the prescription, upon the authority of the decision in the case of the estate of Kirkness, February 2, 1753, *Douglas* against *Douglas*.

1755. *February* 24. JEAN ALEXANDER *against* ———.

THIS was the case of a bill drawn among illiterate rustics for no great sum of money, with the mistake of 2000 years in the date, without any drawer's name in the body, and signed by two initials, but accepted by the debtor's name at large. The sheriff, before whom the process at first came, allowed this bill, defective as it was, to be supported by a proof of all facts and circumstances. The cause coming before the Court of Session, the Lords, upon advising the proof, sustained the bill, although there was no proof that the party whose initials these were said to be was in use to sign by initials: but the Lords made a distinction betwixt the drawer and acceptor.
