1755. *June* 18. LORD KILKERRAN *against* BLAIR.

THIS was a question about the extent of a thirlage of lands, that had been feued out by the abbacy of Crossreule, with a clause of astriction in these words, "*reddendo inde annuatim multuras et sequelas dictarum terrarum.*" In order to fix the extent of this thirlage, a proof was taken of the custom, by which it appeared that the tenants had been in use to carry all their corns to the mill, and to pay about an eighth part by way of multure; but these corns at that time were no other than oats and bear, and no more than were sufficient for the consumption of the tenants' families. Hence it was contended by the defender, 1*mo*, That this heavy thirlage should be restricted to these grains, so as not to comprehend pease, wheat, &c. 2*do*, That it was only of what was necessary to be grinded for the use of the tenants, and would not go the length of *omnia grana crescentia*. The Lords unanimously overruled both these defences, and found the restriction to be of *omnia grana crescentia*. It is believed they would have given the same judgment, merely upon the words constituting the thirlage, without any proof at all of the custom, because an astriction of the lands is an astriction of the corns growing upon the lands, as Spottiswood hath explained it under the words *milns* and *multures;* and so it is said in the papers to have been explained by the Lords in the noted case of *Waughton*, where a charter, in general words, astricted, to the mill of Linton, *terras de Ford*.

1755. *June* 20. CREDITORS of LORD CRANSTON *against* SCOTT.

THE said Scott had a tack from my Lord Cranston, upon which he was in possession, and of which he got a prorogation three years before it expired. Soon after this prorogation my Lord Cranston's creditors adjudged his estate, and upon their adjudications obtained a sequestration, and possessed the estate by their factor before the new tack could take place. The question was, whether this new tack was good against the creditors?—And the Lords decided this general abstract point of law, that a tack without possession is not good against a creditor adjudging and entering to possess before the tenant; and they farther found, that the possession upon the old tack could not be ascribed to the new, and that there could be no possession on the new till the old was expired; contrary to what had been formerly decided.

1755. *June* 26. ——— *against* ———.

[Kaimes, No. 88.]

THE question here was, Whether bygone feu-duties, due by the vassal, be-

longed to the heir or executor of the superior? And the Lords unanimously found, *dissent. tantum Præside,* that they went to the executors. They thought that a feu-duty was no more than a perpetual tack or location, executed after the feudal form; and therefore that bygone feu-duties were to be considered as bygone tack-duties.

Kaimes laid down this general principle, that, in the matter of a succession, every thing that was due was, in the eye of law, considered as paid; and therefore, the feu-duties, being due, were to be considered as in the pocket of the defunct superior,—in which case they would no doubt have been the property of his executor.

In the year 1718 the contrary was found, or, which was the same thing, it was found that the byrests of feu-duties were a burden upon the vassal's heir, without relief against his executor. But this decision the Lords paid little regard to; and Kilkerran informed the Court that it proceeded upon report of my Lord Royston, who, observing Mr Dundas of Arniston at the bar, asked him if he was in the cause? And upon his telling him that he was not, my Lord next asked him what he thought of the question? He answered by asking his Lordship a question, Whether he had ever heard that when a man purchased lands holding of a subject-superior, and got a charter from that superior, with a *novodamus,* there ever was a question betwixt that purchaser and the executors of a former superior about the bygone feu-duties? This hint Lord Royston immediately communicated to the Lords,—upon which the decision went unanimously in favour of the executor.

1755. *June 27.* Sir Michael Stewart *against* Executors of Sir John Houston.

[Kaimes, No. 90; *Fac. Coll.* No. 181.]

In this case there was a hearing in presence, and the thing was considered in several views:—1*mo,* Rents of lands unuplifted, whether they belong to the executor of the apparent heir, or to the next heir entering? 2*do,* Annualrents of heritable bonds, whereupon infeftment has followed; 3*tio,* Annualrents of sums heritable, not by infeftment, but *destinatione*; and, 4*to,* Annualrents of sums that were *in obligatione,* as was the case here, but the obligation not implemented.

As to rents of lands, the President was of opinion, that by our law, as laid down by Stair in the title, *Rights Real,* there is a great difference betwixt the right of property and right of possession, not only in lands but in moveables: that the right of property in both did not transmit from the dead to the living without service or confirmation, but the possession transmitted without either; nor was there any fact or deed required of the person in whose favour they transmitted, nay not so much as the *animus;* and therefore the right of possession went to infants, idiots, and persons out of the country, for whom it was usual for the Lords to name factors to uplift the rents of estates devolving to