1756. *January* 8. ——— *against* ———.

An account of furnishings to the defender's deceased husband being prescribed, it was referred to her oath whether it was resting owing, in terms of the Act of Parliament concerning the triennial prescription of merchants' accounts.

The Lords found unanimously that it was not sufficient for the widow to depone simply not owing, but she must answer special interrogatories, as, Whether or not it did consist with her knowledge that her husband had submitted the payment of this account to arbiters; and whether or not she did not hear him acknowledge that he had got the things stated in the account, but complained that the prices were too high? And, in general, the President laid it down as a rule, that the party was obliged to depone specially whether he had got the things, and, having got them, whether he had paid them, or how? And if he should allege, not payment but compensation, that would be an extrinsic quality in the oath, to be proved otherwise.

1756. *January* 20. Creditors of Kinminity *against* Lady Kinminity.

[*Fac. Coll.* No. 177.]

By contract of marriage the lady got a locality provided to her of certain lands, and by the acceptance thereof the husband takes her bound to pay to the heir-male of the marriage, (upon whom the estate was settled by the contract of marriage,) but to none of the husband's other heirs, 200 merks and 2 chalders of victual yearly. The husband, the party-contractor in this contract, died bankrupt, leaving a son of the marriage, who was charged by the creditors to enter heir to his father, but, having renounced, the creditors adjudged the estate. The question was, Whether or not that adjudication carried this provision made to the heir?

The question resolved in this, Whether or no the heir could take this provision in his favour without representing his father?

It was said for the lady and heir,—That he could; because this was a settlement made upon him by a third person, viz. his mother, which, therefore, he could take as *hæres designative* to his father, without actually representing him; that the father, by granting the full locality to his wife, was denuded of so much of the feudal right of the estate, and it was no concern of the creditors what personal obligations she became liable to.

On the other hand, it was said,—That as the husband took the wife bound to give this provision to his heir in the very deed by which he gives her jointure, by the acceptance whereof she is bound to make the foresaid annual payment, it is to be considered as the deed of the husband making a provision in favour of his own heir, to take place at his death, which, by the established practice

now, is always understood to be a succession; that this is a plain restriction of the jointure, differing only in the form of words, and the reason of the difference is, that, as she had a locality, it would have been inconvenient to have broken the farm, so as to take from her the precise sum it was agreed she should give to the heir; and therefore, instead of that, leaving her locality entire, they laid her under a personal obligation. But this was the opinion of the President single; all the rest of the Lords were of the other opinion.

[See *Dict.* tit. *Personal and Transmissible*, p. 77, and two decisions there quoted, 16th November 1665, *Watt* against *Russel*, and 14th June 1667, *Boyd.*]

1756. *January* 28. PRIMROSE *against* PRIMROSE.

[*Fac. Coll.* No. 133.]

IN this case the President said, and it seemed to be the opinion of the Lords, that, since the Act of King William regulating the reduction of deeds on the head of deathbed, it was not necessary, in order to exclude the reduction, even where the maker of the deed died within the sixty days, to prove that he had been at kirk or market, although in sundry cases the Lords had found so; but it was sufficient to show, any way, that the defunct was not then ill of the disease of which he died.

1756. *February* 10. CHRISTIAN CUMING, Claimant upon the Forfeited Estate of Asleid.

[Kaimes, No. 101, 113; *Fac. Coll.* No. 185.]

THE Lords, in determining this claim, determined a point of law of some consequence, viz. That a father settling his estate upon his son, and infefting him therein, with powers reserved to himself to sell and dispone, burthen, and impignorate, without consent of his son,—the consequence of such settlement will be, that the father may exercise the powers reserved to him by a personal deed merely, as by a disposition to another, without infeftment, which happened to be the case here, and such deed will annul and irritate the fee in the son; so that, even if the son had sold the estate and infeft the purchaser, or granted real security to his creditors before his father's revocation, yet all such deeds by the son would fall to the ground, by virtue of the maxim, *resoluto jure dantis, resolvitur jus accipientis;* and this was said to be the case of all resolveable rights, in general, such as wadset rights, adjudications, &c.

Against this there was a decision quoted, observed by my Lord Kaimes,