been the act 1696,—that did not affect foreign effects,—but the general ground of fraud, in preferring one creditor to another by collusion; but others took it upon the footing of the act 1696, as comprehending all effects, whether Scots or foreign; and though it is true that as the act cannot limit the judges, or affect the laws of another country, and therefore, that the assignation would have been sustained in England, yet it would be competent on the act 1696 to make him repeat who had drawn in virtue of it; and were there a difficulty in that, in case he had recovered the effects upon a judgment, there can be none, where, as in this case, he has recovered them on voluntary payment."

1758. *July* 21. CREDITORS OF AUCHENBRECK *against* LOCKWOOD.

THE circumstances of this case are stated in the *Fac. Coll.* (*Mor.* 14,129.) It was reported to the Court by Lord KILKERRAN. The following is his report:—

"I am to report a question that has occurred in the ranking of the creditors of Auchinbreck.

"In the ranking of the creditors of Auchinbreck, the interest produced for Richard Lockwood and the executors of Edward Gibbon, was a decreet of adjudication on the 28th July, 1737, for the accumulate sum of L.480, 2s. 6d. Sterling, and another decreet of adjudication on 17th July, 1738, for the accumulated sum of L.180 Sterling, and that is not disputed, but that those adjudications fall to be ranked *pari passu* with the adjudications produced for the other creditors.

"But it appears by the oaths of those creditors on the verity of their debts, that on the 30th March, 1739, they received, by a furthcoming on an arrestment out of certain funds belonging to the common debtor, a partial payment of L.340, 8s. 4d. Sterling.

"And the question which thence arises in the ranking is, whether these two adjudications should be ranked to the full extent of their accumulate sums, so as to draw along with the other adjudgers in proportion to that whole sum, ay and while they shall draw their full payment? Or whether the L.340, 2s. 6d. should be discounted, and the two adjudications ranked only for the remainder?

"It is said for Lockwood, 1*st*, in general, that however uncouth it may at first sight appear, that an adjudger should be ranked for more than the creditor would be entitled to draw or is due, yet this seeming incongruity will fly off when it is considered that when that rule is followed which they contend for in the ranking, the adjudger does not draw one farthing more than what is justly due to him. His debt in this case must at any rate suffer a considerable defalcation, as there is not fund for paying the whole creditors, so that the question in effect comes to this, whether the other creditors shall be entitled to a share of what the adjudger received by his arrestment out of another subject, which should be the case, should the sum so received *pro tanto* restrict his adjudication, as thereby the fund of the other creditor's payment should proportionally be enlarged.

"After saying so much in general, Mr. Lockwood proceeds to state the principles in law on which he pleads his cause.

"And, in the first place, it is for Lockwood observed, that an adjudication is a judicial disposition of lands in security and payment of the debt in the adjudication, redeemable within the legal, on the payment of the whole accumulated sum, and therefore, considering it only as a right in security, the last farthing of the debt as well as the first has the whole adjudication for its security and payment. And the consequence of this is, which is an established principle in the law of Scotland, that if any part of the sum remains due when the legal of the adjudication is expired, though the adjudger had received nineteen-twentieth parts of his debt, the whole lands adjudged become the property of the adjudger. Nor can it be otherways, says Mr. Lockwood, when the nature of a right in security is attended to, for whether a right in security is voluntary or legal by adjudication, the whole subject is impignorated as a security for the whole debt, the consequence of which is, that the security does not diminish as the debt diminishes, but remains invariable over the whole fund, till the whole debt is extinguished.

"And several cases are supposed for supporting this argument, which your Lordships have distinctly stated in the memorial, to which I shall refer, as it should be disagreeable to your Lordships *verbatim* to repeat the memorial.

"And it is said for Lockwood, that in a parallel case between the Earls of Loudon and Glasgow on the one part, and the Lord Ross and other creditors on the other part, in the ranking of the creditors of Galstoun, the individual point was determined, and found that the adjudger who had recovered the partial payment out of the debtor's separate funds, ought to be ranked for the full sum in his adjudication *pari passu* with the other adjudgers in order to recover payment of what remained due after the said partial payment.

"It is on the other hand said for the other creditors, that every payment that is made by a debtor, or is recovered out of his effects is *eo ipso* an extinction of the debt *pro tanto*, whereby the creditor continues to be a creditor in no more than the balance remaining due, as payment is an extinction of the debt.

"And if the debt be in part extinguished by a partial payment, the consequence must be, that the security for the debt might in like manner be restricted, *or pro tanto* extinguished, because a right in security is but an accessory of the debt, and must stand or fall with the debt itself, whereof it is the accessory.

"That the case is the same in all securities, be they voluntary or legal, they cannot be securities of a nonentity, or which is the same thing, of a part of a debt which is paid and extinguished.

"And whereas it is said for Mr. Lockwood, that were his security to be restricted to the balance remaining due, it would be to give the other creditors the benefit of his separate diligence, that is said to be fallacious; every creditor is entitled to plead payment or extinction of his competitor's debt, both in the right of the common debtor, and for his own benefit to increase the fund of his payment, and though he thence reaps a benefit, as it does increase the fund of his payment, yet that is a legal benefit, which his competitor cannot find fault with.

"And as to the argument from the nature of an adjudication, that it remains as a security till the full debt is paid, the creditors do admit the proposition to be in some sense true, yet the conclusion thence drawn will not follow, for a judicial disposition in security can be governed by no other principles than a conventional disposition in security would be, that is, it must be dependent on the debt secured, and therefore must be diminished or totally extinguished, according

to the changes that are made on the debt secured; and though it may be admitted that a right in security, be it legal or conventional, subsists till the whole debt is paid. Yet the question is not whether the security subsists till the whole debt is paid, which is not denied; but the question is, to what extent of debt it subsists, and to that extent, and that only, can the security subsist.

"*July* 21.—Find that payments made, does not restrict the adjudication, but that the same is to be ranked for the whole, till what remains due be paid.

"It was considered that had a diamond been given in pledge, the pledge would be entire for the last farthing."

1758. *July* 28. WILLIAM EARL of HOME, *against* The OFFICERS of STATE.

THIS case is reported in *Fac. Coll. (Mor.* 10,777.) Lord KILKERRAN has the following note of what was said by the Judges.

"*July* 28.—It was argued by Kaimes with his usual ingenuity and accuracy, that patronages were not capable of prescription; but to this I could not agree, as it is a matter on which our law writers seem to agree, and there is no pulling up that by ingenious arguments, that it had been more reasonable to be otherwise, nor is even that plain. Who doubts but a right to a burial place may be acquired by prescription? and the arguments against it are the same, or rather stronger, as in the case of patronages. There are other acts of possession, *viz.* with respect to the teinds; nevertheless I should have a great doubt, that an incumbent's possessing on one act of presentation, would amount to a prescription. A second point was argued by *Affleck, and Colston, and Kaimes*, that the right in the crown to lands, and the right of the crown to patronages, were so far different, that the King was presumptive proprietor of all lands *jure coronæ*, but otherwise in patronages, as is fully argued in the petition; that the rule in these is
but nevertheless had this been the question, I should have been of opinion that the *jus coronæ* would have been a sufficient title; but neither of these questions are now to be determined, for that the third point seems to admit of no answer, that there was no possession here to infer a prescription, as the crown had right to present *per vices*; and therefore had right to present in two of the three
for the crown; and the vote being put *July* 28, 1758, the Lords altered and preferred the Earl of Home seven to six.

1758. *December* 14. JOHN PHILIP, Auditor of the Revenue in Scotland, *against* The EARL of Rothes.

THIS case is reported in *Fac. Coll. (Mor.* p. 15,609.) The following is Lord KILKERRAN'S note of the opinions of the Judges.

"The questions here stated are chiefly, 1*mo*, Whether the tailyie is effectual,