to the other from the time only of the survey of the jurisdiction. Or it is the same case as if there were two co-heiresses of an heritable bond, and the one was minor and the other not; the prescription would run with respect to one of them while it stood still with respect to the other.

1767. *February* 19. CAMPBELL of OTTER *against* WILSON.

THIS was the question of prescription which was mentioned before, 6th August 1766; and this day the Lords adhered to their former interlocutor concerning the liferented lands, although there was produced a charter following upon the Earl of Argyle's disposition, which charter bore no reservation of the maills and duties of the liferented lands, but only excepted them from the warrandice, and therefore I think the decision was wrong, as the charter was undoubtedly a title to possess the liferented lands; *dissent.* Coalston and Stonefield.

1767. *February* 26. COLQUHOUN *against* CHEESLY.

A MAN was served and retoured heir in general to his father. A creditor of the father brought a process of constitution against him, in which he libelled upon all the passive titles, and particularly that of being served and retoured. The defender was personally cited, and decreet in absence was taken against him in common form; but the extractor omitted in the extract to say that he was holden as confessed upon the passive titles, for as to the grounds of debt they were produced. This decreet was made the ground of an adjudication, which being produced in a ranking and competition of creditors, it was objected that the decreet of constitution upon which it proceeded was void and null, because there was no proof of the passive title. It was said that it was as necessary that the passive title should be proved as the debt; that in this case it might have been proved by producing an extract of the retour from Chancery, or by holding the defender as confessed, which no doubt might have been done, as he was personally cited, not otherwise, unless he had been out of the country: That, in such cases, the custom of old was that the libel bore a reference to the oath of the party, and he had a day assigned him for deponing, upon which, if he failed to appear, he was very properly held as confessed; but in modern practice this is extremely abridged, for the defender is not cited to depone, no day is assigned for him to depone, and neither in the minute, nor in the decerniture of the Judge, is he held as confessed, but, in the extract of the decreet, this is put in by the extractor. Now, though in this manner the practice has become very irregular and slovenly, yet it would be departing still farther from the ancient form if the Court should dispense even with the operation of the extractor.

The Lords found the adjudication and decreet of constitution null and void, though some few examples were produced of decreets extracted in the same way;

dissent. Coalston *et* Gardenston, who thought it was better, either to return to the ancient practice, which was proper and regular, or to give up the modern practice altogether, and to hold, that, where the decerniture is personal, the simple decerniture is sufficient to hold him as confessed, without the operation of the extractor, for which there is no warrant from the Judge.

1767. *July* 3. KAY *against* SIR ROBERT GORDON.

THIS was a question concerning the proving of the tenor of a right to land, in which the Lords found:—1*mo*, That where the right consisted of a contract of alienation and a charter from the granter following thereupon, it might be proved by parole evidence, without any adminicle in writing, that the contract contained a procuratory of resignation. This I thought a dangerous decision, as those old contracts of alienation (for this was in the 1675,) do not ordinarily contain a procuratory of resignation, and the charter following upon it to be held of the granter, according to which the possession has been ever since, is a presumption that it did not.

2*do*, That the charter being proved by a written adminicle, viz. the sasine upon it, which sasine did not bear the holding, it might be proved by parole evidence that the holding was blench, especially as the possession had been accordingly.

3*tio*, There being a deed of settlement of the same lands upon certain heirs, with clauses irritant and resolutive, and there being a written adminicle of the deed with the substitutions, but no such adminicle of the irritant clauses, the Lords found that the deed was proved without those clauses, as the defender had no interest in them. And, lastly, The Lords found that a clause of pre-emption in a contract of alienation might be proved by witnesses singly, without any adminicle in writing; but this I think was a most dangerous judgment, and, as it was of little or no importance to either party, was not sufficiently considered by the Lords.

1767. *November* 13. The TOWN of LINLITHGOW, &c. *against* CHARLES ELPHINSTON.

THERE is upon Charles Elphinston's ground a collection of water, partly from the higher grounds, which are marshy, and partly from one small spring, which appears at one end of the loch, and it is probable there are some more springs, though they do not appear. Out of this loch Mr Elphinston and his predecessors had brought water by an *opus manufactum*, and contrary to its natural course, to a mill of his, and after serving that mill it ran into the water of Avon, out of which there were above 30 mills supplied. And besides this water which came from Mr Elphinston's mill to those mills, when at any time the loch overflowed, the water in its natural course ran into the water of Avon; but with respect to the water which came from Mr Elphinston's mill, in the forced channel abovementioned, his miller