1687. *December.* JAMES ROOM *against* ROBERT CLELAND.

JAMES Room, of London, having charged and denounced James Weir, his debtor, from whom James Cleland got, after the denunciation, an assignation for a debt due before the horning, and Room having, some months after the assignation was intimated, procured a gift of escheat upon his own horning, there arose a competition between him and the assignee. Alleged for the donatar, That, although the Lords have preferred assignees, and the receivers of voluntary rights, where they recovered payment, or got the debt innovated by a new security in their own favours, the competing assignee here can claim no preference, in respect the debt assigned is still unuplifted, and no innovation of the former security made. Answered, There is no rational difference, whether the sum be uplifted or not; for, *jus est plene quæsitum* to the assignees, and the cedent's property altered by the intimated assignation; nor can consumption alter the case, seeing the subject is as much extant, after a new bond, as if the old had remained; 2. Whatever might be pretended, had the donatar prosecuted his horning with ordinary diligence, yet, he having lain off two years before he obtained his gift, it were a disturbance to commerce to find, that, during so long a time, persons might not contract with the rebel, and receive payment of their debt, even by voluntary assignations; and here the donatar could not, as a stranger, pretend ignorance of the horning, which was his own deed. The Lords, in respect of the donatar's so long negligence, preferred the assignee to him. And, if the donatar had insisted upon the Act of Parliament 1621, the same defence of negligence would have been obtruded. *Vide* No. 91, [John Chancellour against Major Baitman, February 1687;] and No. 153, [Laurence Gellaty against Stuart, 3d February 1688.]

Page 118, No. 439.

1687. *December.* THOMAS FENDER *against* The MAGISTRATES of HADDINGTOUN.

IN a subsidiary action at the instance of Thomas Fender against the Magistrates of Haddingtoun, for the escape of a prisoner;—Alleged for the defenders, That Claverhouse's troop, who kept guard in the tolbooth, having, upon the king's birth-day, called for the prisoners to drink his Majesty's health, the prisoner had slipped out in the midst of the noise and confusion, *causa improvisa*, but was searched for and retaken before the pursuer knew of his escape. Answered, If such an excuse were sustained, magistrates might elude all actions of this nature, and creditors would have no security; for the design of imprisonment is, that debtors may be induced to pay, *squalore carceris*. The Lords sustained the defence.

Page 193, No. 682.

1687. *December* 6. The TOWN of INVERKEITHING *against* The TOWN OF BURNTISLAND.

THE town of Inverkeithing being erected into a burgh-royal by King Robert

I, with the privilege of the customs of a certain bounds, within which three or four other royal burghs are erected, they pursued reduction, improbation, and declarator against Burntisland and others of these towns; and the defenders having made a production, the pursuers craved certification *contra non producta.* The Lords refused to grant certification; but ordained the pursuers to insist in their declarator.

Page 159, No. 574.

1687. *December* 17. MOIR *against* MOIR.

A BROTHER being pursued on his bond of 1000 merks, due to his sister, his defence was, That, after the bond, he obliged himself, in her contract of marriage, for a greater sum; and *debitor non præsumitur donare.* Which defence the Lords found relevant.

Page 49, No. 216.

1688. *January.* DR GAIRN *against* TOSCHOCH of MONIVAIRD.

ARRESTMENT of goods in the debtor's own possession found to affect, and to be a *nexus realis,* as well as if it had been in the hands of a third party.

Page 18, No. 93.

1688. *January.* CLELAND and PATERSON *against* WILLIAM WILSON.

ONE having apprised lands, after expiring of the legal of a former apprising thereof for the same sums; the first apprising was alleged to have been passed from, in so far as the second was an innovation, at least that the legal of the first was current; just as if, after expiring of the legal, a creditor should receive annualrent of the sums apprised for. Answered, The second apprising was but a corroboration of the first; and, as a wadsetter might [use] requisition and apprise, and yet recur to his wadset, so here the first apprising is not prejudged by the second. The Lords found the first apprising had a current legal, and did not sustain accumulation of annualrents till after the second apprising. *Vide* No. 334, [Lord Yester against Lord Lauderdale, February, 1688.]

Page 80, No. 332.

1688. *January.* COLVILL *against* WILLIAM HALLY.

IN a reduction of an apprising, upon this reason, That, though the bond which was the ground thereof, was payable the next term after the mother's death or the daughter's marriage, the charge was given, and the apprising led, before the