the sums contained in the decreet-arbitral, till Agnew of Galdinoch, the charger's cedent, did implement and fulfil his part of the decreet-arbitral, by giving Sir Andrew a general discharge of the tutor-accounts, and of all his claims, except only the said sum of 5000 merks, decerned to him in full thereof; for this were to draw the money out of Sir Andrew's hands, and yet leave him to the hazard of Galdinoch's quarrelling the said decreet-arbitral, who assigned Stewart in general to the count and reckoning, but did not homologate the decreet-arbitral. And, though it was not conceived conditionally, and the one made the cause of the other, yet the Lords thought it was implied; and, therefore, found the letters orderly proceeded; the charger obtaining his cedent's general discharge to Sir Andrew, of all clags and claims he had to lay to his charge, except the sum decerned in the said decreet-arbitral. *Vol. I. Page* 580.

1693. *December* 21. The MAGISTRATES of the TOWN of GLASGOW *against* ROBERT GIBSON, their Tacksman.

THE Lords found the payment to the Provost unwarrantable, seeing the tack made it payable to the Town-treasurer, who only should receive the Town's money; and that it was not sufficient that the Town was owing Walter Gibson, their Provost, a greater sum, because then he should have got an act of council warranting him to pay it; and the Provost may yet pursue the Town: And as to the twenty shillings on the boll of malt, find him liable for the same, unless he subsumes that he was interrupted and debarred from the uplifting of it, as an illegal imposition; seeing he uplifted some: which the President thought not sufficient to make him any further liable than for his actual intromission: but the generality of the Lords found *ut supra*. *Vol. I. Page* 581.

1693. *December* 21. CHARLES JACKSON and his CHILDREN *against* SIR JAMES COCKBURN of that ilk.

THE Lords found the fitted account betwixt Sir Hary Wilkie, on the one hand, and Sir James Cockburn and Sir William Seton, on the other hand, produced, stating the balance to be only £4,217 Scots, not to be the rule or standard by which Charles Jackson was bound to count; seeing it appeared, by the decreet of preference which Charles had obtained against Peter de Grave as creditor and assignee by Sir Hary Wilkie, that it was not produced by him, but by Sir Hary and his assignee; and, though he insisted for that balance *primo loco*, yet it did not hinder him to make a further additional charge against Sir James. But the Lords did not find the count stated between Sir James and Andrew Houston of Garthland to be the rule either, till Sir James was heard whether it was *res inter alios acta*. And as to the *second* point, whether it was *bona fide* paid to Sir Hary Wilkie and his assignee, the Lords found he had no right to the said balance, and therefore found the payment unwarrantable: seeing it was not instructed that Sir Hary was a partner in the tack of the customs and excise with his brother, David Wilkie, and that his assignation thereto from Mr Archibald, as executor confirmed to his father David, was *a non ha-*

bente potestatem ; seeing this sum was not confirmed by Mr Archibald, but by his sister, Rachael Wilkie, wife to the said Charles Jackson, and executrix-dative *ad omissa ;* and any eik that was made by the said Mr Archibald was afterwards improven as false. The Lords also repelled that defence, That he had paid Sir Harry upon a *probabilis ignorantia juris,* thinking that, because Mr Archibald, his cedent, was confirmed executor, therefore he had right, seeing it was not given up in the inventory. But it occurred to the Lords that he might be not only executor-nominate, but likewise universal legator, which would give him right to this balance without a specific confirmation. But they considered that the ground of Rachael Wilkie's confirmation was as creditor to her father in a bond of 4000 merks of tocher ; and she had proven that her father had continued in a solvent and responsal case to his death, so she would be preferable to the universal legacy ; but restricted Charles Jackson and his children's claim, to the said ground of debt, and the annualrent of it. *Vol. I. Page* 581.

1693. *December* 21. The Earl of Nithsdale *against* The Duchess of Buccleugh.

[See the two prior parts of this Report, Dict. p. 545, 546.]

The Earl of Nithsdale, against the Duchess of Buccleugh, on the £5000 minute. The first defence was against Nithsdale's title, That it was not *in bonis* of Earl Robert, the philosopher, and so cannot fall to his executor ;—that the sum was heritable, as *surrogatum* in place of lands, and so fell not under confirmation and executry ;—and that the Duchess was not bound to pay till the Earl of Nithsdale fulfilled his part of the minute ; it being a *synallagma,* consisting of mutual prestations, and the Duchess is not yet secured in the barony of Langholm. Answered.—This sum was moveable, it neither excluding executors nor bearing a destination of infeftment ; and so belonged to him as executor confirmed to the Earl, who entered into the minute ; and as to the disburdening the lands of incumbrances, the Duchess was sufficiently secured by an adjudication she had led, and a certification she had obtained in an improbation.

The next point was as to the annualrents.

Alleged.—The minute bore none, and they were only due *ex lege et pacto.* Answered.—Here it is due by law, being the price of lands. Replied.—It is but a consideration and gratuity given for the Earls of Nithsdale their good-will and kindness ; seeing they had irredeemable right, and paid the price before ; and so could bear no annualrent.

The Lords thought fit to hear this case in their own presence.

Vol. I. Page 582.

1693. *December* 22. Rory Dingwall *against* Murray of Polrossie.

Some of the Lords were clear that the reason of suspension was just and relevant, *viz.* You have discharged one of the co-cautioners, and so cannot exact