1740. *February* 10. PRINGLE *against* PRINGLE.

[See Elch., No. 15, *Mut. Cont.*; Kilk., No. 5, *Pror. to Heirs, &c.*; C. Home, No. 145.]

THE Lords found, That it was to be presumed that the father intended, by giving his land to his eldest son, to satisfy him for his share of the provision; and therefore preferred the executor.

N.B.—This carried narrowly, against the opinion of the President and Drummore.

1740. *February* 14. WALKER *against* ——.

A CONTRACT was reduced upon the head of fraud and circumvention; and Walker, the defendant, was condemned to pay £100 sterling, in name of damages and expenses.

The pursuer gave in a petition craving that the interlocutor might be so explained, that 300 merks, which Walker had given the pursuer in consideration of the contract reduced, might be deduced from the foresaid L.100 sterling; which petition the Lords having advised with the answer, found, That Walker could not retain the 300 merks off the L.100, but reserved him action as accords. Some of the Lords, particularly Arniston, doubted whether he could have any action for recovery of the 300 merks. Elchies thought he could have none. Others thought that by the reduction every thing ought to be brought back to the former state,—*restitutio enim ita facienda est ut unusquisque in integrum jus suum recipiat;* and so were for giving Walker retention of the 300 merks.

1740. *February* 14. —— *against* ——.

THE Lords found that it was an illegal and unwarrantable practice for the same person to officiate both as clerk and procurator before an inferior court.

1740. *February* 14. SIR HARRY INNES *against* CREDITORS of LUDOVIC GORDON.

[Elch., No. 14, *Arrestment;* Kilk., No. 8, *ibid.*]

THE Lords found that the arrestment was valid. Arniston thought it was so,

upon the general principle that any conditional debt might be arrested. Elchies put his opinion chiefly upon this specialty, that the arrestment was after the bill was accepted by the London merchant, who then was no longer debtor to Ludovic Gordon, but to his trustee; so that, if the arrestment could not be in the trustee's hands, it could not be at all.

1740. *February* 14. MERRY *against* INGLIS.

[See C. Home, No. 139.]

THE question here was, Whether, when lands are only declared affectable by a debt, but the proprietor not found personally liable, nor the debt constituted against him, an adjudication can proceed in terms of the statute 1672,—or at all?

It was argued against the adjudication, That there could be none upon the statute 1672, because adjudications upon that statute came in place of apprisings; now there could have been no apprising upon this debt, because there was no debtor against whom it could proceed, for the same reason that there could be no apprising where the heir renounced. Neither will any of the two adjudications in use before the year 1672, *viz.* adjudication upon the apparent heir's renouncing, or adjudication in implement, apply to this case. So that here there can be no adjudication at all, neither upon the statute 1672, nor otherwise, till the debt be first constituted. To this it was ANSWERED,—1*mo*, That a comprising was competent of old, without any regard to a personal obligation, as a comprising upon a decreet of poinding the ground for bygone annualrents, which proceeded though the proprietor was not personally liable. So that, as adjudications are come in place of apprisings, and it is said in the statute that no lands shall hereafter be apprised that were not apprised before, there is nothing hinders the lands in this case to be adjudged in terms of the Act 1672. 2*do*, Supposing there were any difficulty in point of law, yet this was a case of necessity; for it was very probable that the proprietor of the lands would not be found personally liable; the consequence of which would be, that the lands would be liable for the debt and yet affectable with no legal diligence for payment of it: that, in such cases, the Lords are in use *ex officio* to invent new forms of diligence to expedite the matter; thus, the two adjudications in use before the Act 1672 were introduced; and, since, there have been many instances of their Lordships using the same power, in cases exactly similar to this; *e. g.* in the case of bastardy, or *ultimus hæres*, the king is certainly personally not liable for the debts of the last fiar, and yet there is no doubt but an adjudication would be competent against the estate. The same in the case of forfeiture, neither the king nor his donatar is personally liable for the debts of the forfeited person, and yet the Lords have frequently allowed adjudications against the lands.

The Lords found, first, That an adjudication could not proceed; but, upon advising a reclaiming bill and answers, they found that it could proceed.