1765. *February* 15. LORD ELIBANK *against* CREDITORS of DORNOCK.

DOUGLAS of Dornock, father and son, granted a disposition, to certain trustees, of the lands of Dornock, for behoof of themselves and their creditors contained in a list referred to, in which the particular creditors and the sums due to them are set down; and the disposition contains a plan of management for the trustees, directing them to cut the woods, to set leases for so many years, &c., and, among other things, it empowers them to give heritable security to the creditors contained in the list, or to sell lands for their payment. Upon this disposition the trustees were infeft, but all that they did upon this disposition was to feu out some lands, after which some others of the creditors of Dornock adjudged the estate from the father and son, for payment of their debts; and then some of the creditors contained in the list, likewise adjudged, and upon these adjudications the estate was brought to sale. The question occurred betwixt the creditors in the list and the Creditors afterwards adjudging, those in the list pretending to be preferable upon the trust disposition; for although they admitted that their debts were not a real burden upon the trust-disposition, not being specially enumerated in that disposition, nor the list referred to recorded in the register of sasines, yet they said their debtor was denuded by the disposition to the trustees who held the estate for their benefit. The Lords were all unanimous that the disposition gave those Creditors no preference; but upon various reasons. The true principle is this, that, by the law of Scotland, there can be no indefinite burthen upon lands, that is, no burthen, the extent of which does not appear from the proper register, *viz.* the register of sasines; and if such burthen could not be constituted directly in favour of the Creditors, neither can it be constituted indirectly by the intervention of a trustee: That the only use the Creditors could have made of this disposition, they have not made,—which was to have got heritable securities from the trustees, or to have got the lands sold for payment of their debts: That no man is denuded of his estate by a disposition to trustees with certain powers, unless so far as the trustees execute those powers; and, if they never execute them, the disposition falls as if it had never been granted.

N.B. A question still remains, what the effect would be of heritable bonds to be yet granted by the trustees to the Creditors in the list.

1765. *February* 19. LORD BREDALBANE *against* ———.

IN this case most of the Lords declared their opinion that a warning was necessary in a tack of fishings, in order to remove the tenant, as well as in lands, because Queen Mary's statute mentions fishings, together with mills and lands. It was alleged that it was not the practice to use warnings either in fishings or mills; but this the Lords did not regard. Some of the Lords thought that

any intimation, forty days before the term, was sufficient, but others thought that it should be in terms of the statute, or by process.

1765. *February* 21. SIR WILLIAM DOUGLAS of KELHEAD *against* His Father's CREDITORS.

THERE were here two questions concerning entails not completed by infeftment. The first was, when the heir made up his titles neglecting the entail, either by service, as heir of the investiture, and infeftment thereon, or by an adjudication in the name of a trustee, as it happened in this case, together with a charter of adjudication and infeftment, and then contracts debts upon which the creditors adjudge the estate, but do not complete their right by infeftment. The question is, Whether the next heir will not be preferable to the Creditors upon this ground,—that adjudgers can only take the estate with the burthens affecting it. There were specialties in the case, but the Lords took it up upon this general point, That no entail can be effectual against a purchaser, creditor by heritable bond, or adjudger, unless completed by infeftment, which they thought was the sense of the Act of Parliament 1685; and, accordingly, they found unanimously that the adjudgers in this case were preferable.

The second question was altogether abstract without any specialties; and it related to the case where the heir of the personal deed of entail, and who also was heir of the investiture, as in the former case, possessed the estate without making up any titles. The creditors charged him to enter heir in special of the investiture, and then adjudged the estate; and the Lords found unanimously, likewise upon the words of the statute 1685, that the Creditors were preferable to the next substitute.

N.B. The debtor in this case was the first institute of the entail, so that he had no occasion to make up his titles by service, but only to execute the procuratory of resignation. Nevertheless the Lords seemed to think that his title of possession was rather as apparent heir of the investiture than as institute of the entail, and therefore that the creditors were *in bona fide* to contract with him.

1765. *February* 26. BARBARA M'KAY *against* ALEXANDER LAWRIE.

BARBARA M'Kay, by a postnuptial contract, dispones her heritage to her husband and the heirs of the marriage, whom failing, to the husband's heirs and assignees whatsoever, reserving her own liferent; but with this proviso, "that thir presents are granted under the burthen of all the just and lawful debts due, or that shall happen to be due, by the said spouses at the time of the dissolution of the marriage; but, in case there shall be no child or children of the marriage existing