if he had declared that the lands of Corrowa should only belong to the heirs of line, it would undoubtedly have excluded the heirs of conquest. He has done the equivalent; for, having provided the lands to Archibald, and his heirs whatsomever, he does, by a posterior explicatory clause, declare, that, if Archibald died without heirs of his body, Alexander should be Archibald's heir therein, notwithstanding of any law or custom to the contrary; which can have no other meaning than that, notwithstanding by the law, John, as heir of conquest, would succeed to Archibald, wanting heirs of his own, yet Alexander, the younger, who would be heir of line, should succeed; which is as much as to say, that this provision should belong to Archibald's heirs of line, and not to his heirs of conquest; and, consequently, having made no mention of Alexander's heirs, he did also mean Alexander's heirs of line, who is the pursuer Thomas; and the case is so much the more favourable, that, if this failed, Thomas hath neither provision nor aliment. The Lords, considering that both parties were infants, and that, if Archibald should die, Thomas would get all, superseded to give answer anent the heritable right of succession until both parties were major; and, in the mean time, allowed Thomas to possess the profits of the lands, who had no aliment nor provision.

Vol. I, Page 691.

1671. *February* 14. GEORGE BAIN *against* The BAILIES of CULROSSE.

GEORGE Bain pursues the bailies of Culrosse for payment of the debt of a rebel, whom they had suffered to go free up and down their streets; whereupon he had taken instruments against them, and protested that they should be liable for the debt,—seeing *squalor carceris* is justly introduced against debtors that will not pay their debt, and the magistrates of burghs may not take it off in whole or in part; and produced a practick observed by Durie upon the 27th of March 1623,—Smith against the Bailies of Elgine,—where the prisoner being suffered to walk freely upon the streets till he obtained a charge to set to liberty, the magistrates were found liable. The defender alleged Absolvitor; because he offers to prove that this prisoner's going out was necessary, *viz.*—he, being a person altogether indigent, was permitted sometimes to go and mendicate his bread, and once to go to the burial of a child of his own; and immediately thereafter, the pursuers having taken instruments, the rebel was put in ward, and continued there till he died. Which the Lords found relevant to liberate the burgh.

Vol. I, Page 719.

1671. *July* 18. The COUNTESS of CASSILS *against* The EARL of ROXBURGH.

THE Countess of Cassils, in her contract of marriage with the Lord Ker, being provided to £5000, he did, *stante matrimonio*, provide her to an annualrent of 10,000 merks further during her lifetime. And, upon his deathbed, he made two testaments of one date: By the one he nominated his father tutor to his

children, and left to him the provisions of his wife and children: by the other he provided his lady to £5000 more than her contract, and named provisions for his children; but subjoined a clause, that if his father, who was then in England, returned and made use of the other testament, that this testament should be null. The Earl of Roxburgh his father did return, and was infeft as heir to his son, and did ratify his son's bond of provision of 10,000 merks; and, by his testament, did expressly mention his son's former testament; and, by virtue thereof, named tutors to his oyes; and, by a bond apart, gave different provisions to them from those appointed by their father's testament; and this Earl of Roxburgh, being heir of tailyie to him, did, in his contract of marriage, reserve the pursuer's infeftment of this annualrent, and did, many years, satisfy and take discharges of the same; and now she pursues the Earl, as controverting the payment for some years bygone, and in time coming during her life. The defender alleged, Absolvitor; because, the pursuer being competently provided by her contract of marriage, this additional provision was a donation betwixt man and wife; and so, by the law, is revokable at any time during the husband's life, even upon deathbed, or by his testament, not only by a direct revocation, but by any thing that might import a change of his mind; and accordingly he hath revoked the same by his testament produced, adding only £5000 to his lady's provision by her contract: and albeit thereafter the late Earl did ratify and acknowledge this additional provision, yet therein they were *errore lapsi*, not having known of this testament of the Lord Ker, at least not having understood that it imported a revocation of this provision; and therefore may justly now reclaim against it. The pursuer answered, That this testament imported no revocation which it did not mention; neither is the addition of £5000 therein an indirect revocation, which must ever be by an inconsistent deed; but both these conditions are consistent, albeit that, by the testament, it be *modo inhabili:* and it is very like that the testator, being taken with a great fever, did not remember of this provision, or added the other £5000 on this consideration that the former provision was only to take effect after the Earl of Roxburgh's death; so that the Lord Ker's meaning might probably be, to add £5000 during his father's lifetime. *2dly.* Though the testament could import a revocation, yet the testament itself being conditional, only to stand in case his father returned not to Scotland and made use of the other testament of the same date, all the tenor of it, and this restricting clause, is affected with the same condition; so that if the testator had said, that he had restricted his lady's additional provision to £5000 in case his father returned not, but, in that case, left her to his father's provisions, it would be truly a conditional revocation; which condition is purified by the father's return, and providing the lady by his ratification of this bond of provision: nor can it be justly alleged, that both this and that Earl were *errore lapsi*, seeing the testament is produced by the Earl himself, and was never in the lady's hands; and, doubtless, it hath been advised by the late Earl ere he ratified, who was a most provident man, and his ratification is dated at the Canongate, *ubi fuit copia peritorum:* and if ratifications should become ineffectual, or if *errore lapsus* should be relevant upon the ignorance or mistake of the import of a writ, ratifications should be of no effect; but any ground that might defend the ratifier before the ratification, might annul the same, upon pretence that he knew it not; and, therefore, *errore lapsus* is only understood *de invincibili errore facti*, but never *de ignorantia juris, quæ neminem*

excusat. The Lords found, That any revocation by the testament was only conditional, and became void by the Earl's returning and making use of the other testament; and therefore repelled the defence in respect of the reply, and had no necessity to determine anent the confirmation and error alleged.

Vol. I, Page 760.

1671. *July* 28. HADDEN *against* The LAIRD of GLENEGIES.

HADDEN, being donatar to the marriage of the Laird of Glenegies, pursues declarator for the avail thereof. The defender alleged Absolvitor; because, by an Act of Parliament 1640, it was declared, that whosoever was killed in the present service, their ward and marriage should not fall; *ita est*, Glenegies was killed, during the troubles, at the battle of Dumbar. It was replied, That the present troubles could not extend further than to the pacification *anno* 1641; after which there was peace till the end of the year 1643. *2dly*. The Parliament 1640, and all the Acts thereof, are rescinded. It was duplied, That the troubles were the same, being still for the same cause; and that the Rescissory Act contained a *salvo* of all private rights acquired by these rescinded Acts. It was answered, That this was a public law, and the *salvo* was only of particular concessions by Parliament to private parties. The Lords found, That the Act 1640 reached no farther than the pacification by which the troubles then present were terminated. The Lords demurred in this case, upon remembrance of a process before them, at the instance of the Heirs of Sir Thomas Nicolson against the Heirs of the Laird of Streichen, upon the gift of Streichen's ward to Sir Thomas, who died the time of the war, being prisoner by occasion of the war, and after pacification; that they might have seen what they had done in that case; but did not get the practick; and the parties being agreed, they decided in manner foresaid. Wherein this was not proponed nor considered,—that the foresaid Act was always esteemed an exemption after the pacification, during the whole troubles; and no ward for marriage was found due that time, though many fell during the war; and, if it had not been so esteemed, the same motives that caused the first Act to be made, *in anno* 1640, would have moved the renewing thereof after the pacification. And, no doubt, the King and Parliament, *anno* 1650, before Dumbar, would have renewed the same for encouragement in so dangerous a war, if it had not been commonly thought that the first Act stood unexpired.

Vol. I, Page 768.

1671. *November* 30. ANTHONY HAGUE of BIMERSIDE *against* MOSCROP and RUTHERFORD.

ANTHONY Hague, as having a gift of all goods and gear belonging to umquhile Mr William Hague, his goodsire, pursues his debtors for payment: who alleged No process; because the sums in question are heritable; and the pursuer's gift can only extend to moveables, proceeding upon Mr William's being called before the justice *in anno* 1633, for some scandalous speeches against the