1693. *February 22.* Mr ROBERT LINDSAY, Schoolmaster at Newburn, *against* The PATRONS thereof.

THE Lords found his deprivation, not being by the legal minister and elders, unwarrantable; and sustained his reposition to this place, by the present presbyterian minister and elders: all of them had only one vote; else, by creating ten or twelve elders, they may soon out-vote the heritors in every case: and thought, albeit the patrons, by virtue of the mortification, had the sole power of putting in and out the schoolmaster, and that he, by his accepted call, was only presented for a year, and longer, if the patrons pleased, yet this *arbitrium et beneplacitum* was not *despoticum*, but *rationale*, so as they could not remove him without some plausible ground. *Vol. I. Page* 564.

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1692 *and* 1693. JAMES MUIR, Writer in Edinburgh, *against* PRINGLE of LEYES.

1692. *December* 9.—THE Lords found it was not true by a delivered evident, but consigned in the deceased Mr Walter Pringle, advocate, his hands, on conditions; and that Mr George Gibson, being then *obæratus*, though he had not fled, nor *cesserat foro*, he could not give up the absolute and irredeemable right he had on the lands of Leyes, and, by a clandestine transaction, re-dispone them to Leyes, on promise to give him new security for what after count and reckoning should be found due by Leyes to George; and, therefore, they found the said re-disposition fraudulent, and done by George *in necem creditorum;* not on the Act of Parliament 1621, which requires diligence against the debtor before his disponing, but on the common law reprobating all frauds and doles, though they could not be all expressed in the statute 1621; and that Mr George Gibson's creditors were not bound to instruct what debts Leyes was owing to Mr George, but that Leyes' estate must lie open to all Mr George's debts; seeing he had once an absolute right, and could not, to their prejudice, renounce it, and take his debtor's obligement to give him another security, unless Leyes will offer caution for all Mr George's debts to his creditors, without putting them to instruct how far Mr George was creditor to him; which is impossible for them now to do, and unless Leyes will prove, *scripto*, that Mr George's first right he had on his estate, though irredeemable in his person, yet was but a trust: And found, seeing he had never moved in it for all the time, since the said depositation, in 1678, to Mr Walter Pringle's death in 1685, nor for many years after, That the said disposition by Mr George to him ought not to be given up to him, but ought to lie still in the clerk's hands; being a contrivance, for any thing yet seen. *Vol. I. Page* 529.

1693. *February* 23.—Mersinton reported again the case of James Pringle of Leyes against James Muir, mentioned 9th December 1692; and the Lords adhered to their former interlocutor; and not only found it a fraudulent contrivance by the common law, but also, that his retrocession, being only a personal right, and the terms of the depositation wanting witnesses, Mr George Gibson's creditors were preferable, seeing he was publicly infeft; and, there-

fore, they declared they would hear him in June, if he would find caution for his intromission with the rent 1692, and remove at Whitsunday, and cede his possession to the creditors; and if not, then reduced his right.

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1693. *February* 23. PATRICK HALYBURTON *against* ALEXANDER ABERCROMBY.

IN the pursuit, Patrick Halyburton, bailie of Edinburgh, against Alexander Abercromby, vintner, the Lords sustained this defence of compensation,—That you are debtor to me, in so far as you have drawn a precept on the Duke of Hamilton for an account, and made it payable to me; I presented it, and the Duke refused, and I protested: though Bailie Hamilton alleged, you should have pursued the Duke. For the Lords found him liable in no farther diligence but to protest for non-acceptance. *Vol. I. Page* 564.

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1692 *and* 1693. The EARL of TWEEDDALE, Chancellor, *against* WILLIAM ERSKINE.

1692. *November* 16.—IN the competition between the Earl of Tweeddale, Lord Chancellor, as lord of the regality of Dumfermline, and admiral within that bounds, and Mr William Erskine, depute to the admiral, anent the right to a whale that ran in at the port of Limekilns; the Lords, *ex officio*, ordained either party to adduce what probation they pleased, for instructing who first attached the whale and attained the first possession of it. Skeen, *de Verbor. Significat. voce Wreck*, shows, by the English law, whales are *inter regalia*. And the Chancellor repeating a probation, led before the Lords of Secret Council, that he apprehended the first possession, the President thought that it might be advised by the Lords; but others were of opinion, that such of the witnesses as are alive ought to be reëxamined before the Lords. Which is true *quoad* probation taken by the sheriffs and other inferior courts; but not as to supreme judicatories, where the brocard, *testibus et non testimoniis est credendum*, takes not place. *Vol. I. Page* 518.

*December* 6.—In the question between Mr William Erskine and the Earl of Tweeddale, about the whale, mentioned 16th November last, the Lords having considered the reference of the Privy Council, they would not premit the question of possession to the point of right, but would take them both in together; especially seeing they proponed *peremptorie* on the Duke of Lenox's right of admiralty, from whom Sir William Erskine derived a deputation by progress; and that it should be found better than Tweeddale's.

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1693. *January* 26.—The debate between the Earl of Tweeddale, Lord Chancellor, and Mr William Erskine, about the whale, mentioned 6th December 1692, was advised; and the first question was, Whether they should consider the point of right, or possession, first, or if they were to take them jointly and