tirely as a neat sum, and not to have any retention on the account of cess and public burdens; and, therefore, they found it relevant to be proven by the writer and witnesses of the bond, that it was communed at the time, that he should pay the cess; seeing, an ease of the rent was given him for that reason. Some were for trying the custom of that country; because, in some shires, the tenant is bound to relieve the master of the public burdens. But the plurality thought the other the shortest method. *Vol. I. Page* 586.

1693. *December* 29. CARNEGY *against* BLAIR of KINFAWNS.

HALCRAIG reported Carnegy against Blair of Kinfawns, his brother of the first marriage. The Lords found the tutory might be produced *cum processu;* and, if there were none, they could authorise a curator *ad litem.* And as to the second point, having perused the contract of marriage, they found it was not a provision to any heritage, but to a sum of money, and that it run to the heirs or other children of that second marriage; and, therefore, there was no need of a service; but that the word *heir* was inserted *designativè*, and meant no more but one who, by his right of blood, might be heir: and therefore sustained his title in this process. *Vol. I. Page* 586.

1693. *December* 29. ROBERT SANDELANDS, Merchant in Edinburgh, *against* GABRIEL RANKINE of ORCHYARDHEAD.

HALCRAIG reported Robert Sandelands, merchant in Edinburgh, against Gabriel Rankine of Orchyardhead. The Lords found, that the offering a progress of writs would not stop his total adjudication of the lands, or restrict the said Robert, his creditor, to a part of the lands, unless he was infeft; and that his ratification would not defend him, because the next heir might pass by him, and serve heir to the former; and, therefore, decerned the adjudication to be over the haill lands: superseding extract for a month, that, if the defender infeft himself betwixt and that time, the adjudication may be restricted to a proportional part, effeiring to his sum, and a fifth part more; but if not, then to go out against the whole. *Vol. I. Page* 586.

1693. *December* 22 *and* 29. DAVID BURNET *against* ROBERT BURNET.

MERSINGTON reported David Burnet, merchant, against Robert Burnet, writer to the signet, his brother. The Lords having balanced the case, whether the payments Robert had made could be ascribed to any other cause of debt than this 3000 merks' bond of provision, (which he quarrelled as null against him, being holograph, and so not probative of its date, and presumed to be made *in lecto;*) they sustained the ground of the homologation of this bond by the partial payments, though none of them related to this bond, and there were ac-

counts, and other probable evidences produced, to instruct there were other grounds of debt owing by Robert to David, at the time of these payments, to which they were rather to be ascribed than to the bond, which he never acknowledged: but the Lords observed, there was one receipt of £14 Scots, prior to any debt due by Robert to him, except the bond of provision; and that it was most unfavourable in him to shun this, when he had taken course with all the rest, whose bonds were holograph as well as this; therefore, *super tota materia*, they decerned, and found the presumptive subscription on deathbed elided by the contrary presumptions of homologation; though some of the Lords thought this was too much of a Chancery equity, albeit he was unnatural to his brother, and ungrateful to his father's memory. *Vol. I. Page 583.*

December 29.—The case of Burnet, against his brother Robert, mentioned 22d current, was reconsidered on a bill, and the Lords adhered. Robert cited sundry decisions about homologations; as that it cannot be a homologation in him, who did not then know the right or its defects;—*Vid. 6th July* 1661, *Taylor. 2do.* That the homologation must have some relation to the writ homologated, which is not here;—*9th February* 1672, *Pilton.* And *3tio.* That a deed cannot be said to be a homologation, where it may be attributed to another cause;—*12th December* 1665, *Barns.* See also *Mr David Thoirs* against *Ramsay, eodem tempore.* But the Lords went on the grounds above mentioned.

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1694. *January* 2. AGNES BURNET, and YOUNG, *against* Mr RODERICK MACKENZIE of PRESTONHALL.

THE main question was, To what right he should ascribe his entry to the possession of the lands of Bogehouse. Agnes ALLEGED, It behoved to be, to extinguish the adjudication led by the late Archbishop of St. Andrew's, his father-in-law; because, in a competition between this pursuer and him, for the maills and duties, the bishop was preferred, and either did possess, or might have possessed.

ANSWERED,—That the bishop did never possess during his lifetime; because the lands were full by a liferentrix, who had an unquestionable preferable right to them both; and he did not enter, till she, being straitened by her creditors arresting the rents, ceded the possession to Mr Rory, on his paying the debts, and securing a yearly aliment to her; so he neither did, nor could enter to the possession by the adjudication, so long as the liferent stood in the way. And though it was contended, that he ought to have entered on the decreet of preference, till he was legally debarred by the liferentrix, having a better right, yet the Lords found it sufficient, that she was actually in possession, and that her right is clearly preferable; seeing she compeared, and Agnes Burnet was not able to debate with her, who had only caused adjudge on a bond granted by herself, as apparent heir, and she was infeft long before the bishop's adjudication, and would have evidently excluded him; and did not think it just, that he should have wared out the expenses of a process to debate with an uncontroverted right, where he would certainly succumb; besides the unfavourableness of the said Agnes her right. Yet several of the Lords thought it a general concern,