

1693. *December 22; and December 27.* JAMES FITHIE'S CHILDREN *against* The EARL OF NORTHESK.

LORD Rankeiler reported some objections against Mr George Johnston, minister at Saline, why he should not be admitted a witness in the cause pursued by Mr James Fithie's children against the Earl of Northesk, about the taking a bond out of the charter-chest, and delivering it up. The objections were: That he was uncle to the children; that he had come ultroneously, at least his citation was after the day in the diligence; that he had betrayed his testimony, by writing a letter, containing what he could say in the cause; and that he had a *cessio bonorum*, or general suspension, against all his creditors. Some urged that he might be taken *cum nota*; seeing, in such clandestine conveyances as this, domestic servants, and witnesses otherwise inhabile, were receivable. But the Lords, before answer, ordained the *bonorum* and the letter to be produced.

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*December 27.*—The Lords having heard the debate, on the objections stated *supra*, 22d current, against Mr George Johnston, as a witness; they found there was no ground to receive him: yet, seeing there was nothing of a transaction proven, between the tutors and Northesk, whereby the bond is alleged to have been delivered up to him, for some small gratuity and consideration; therefore they superseded to declare whether they would receive him or not, till there were farther evidences of the breaking up of the cabinet, and taking out this bond, and giving it to Northesk.

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1693. *December 29.* BROWN *against* The LADY GIRVANMAYNS.

LORD Whitelaw, probationer, reported Brown against the Lady Girvanmayns, about the nullities of a horning, whereon a declarator was craved by him, as donatar to the escheat.

The Lords laid most weight on this, That the extract produced out of the register, bore but one witness to the denunciation; whereas the principal horning, marked, registered, and produced, had two witnesses; and which of the two was to be most credited? In the parallel case of a seasine, the extract is probative by the Act of Parliament 1686. But here the Lords, before answer, ordained the Sheriff of Ayr to inspect the register there, and report how it stood recorded in the books.

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1693. *December 29.* WILLIAM GORDON *against* THOMSON and GORDON.

CROCERIG reported William Gordon, in Buchlaw, against Thomson, and Gordon his assignee. The Lords considered the tack was null, wanting a tack-duty; and though the bonds did not relate to the tack, yet, being of the same date, and an obligation for victual, it was for the duty of the lands set in the tack; and that the taking a bond apart, presumed that he was to pay that en-

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.

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

HALCRAIG reported Carnegie against Blair of Kinfauns, 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.

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

HALCRAIG reported Robert Sandelands, merchant in Edinburgh, against Gabriel Rankine of Orchardhead. 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 infest ; 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 infest 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.

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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-