fell short, then found, that he had recourse to affect the bygones, to make up the deficiency; though some contended, that it behoved to be interpreted *singula singulis*, that each year's rent should pay that year's current annualrent.
Vol. I. Page 614.

1694. *February* 23. JAMES LIVINGSTON, Merchant in Edinburgh, *against* ROBERT and WILLIAM WOOD, and FISH.

THE Lords found the certification null against Mr William; because, though, in the decreet, Mr William Beton compears as procurator for both William and Robert, the father and son, yet, by the warrant, it appears he only took a day for Robert; and, therefore, they reponed Mr William: for, though a certification be a most sacred tie, and one of the greatest securities of the lieges, with a decreet *in foro*, yet, if there be a nullity, it may be loosed. But it is no reason because it is in absence; for then one would never compear and produce, but let certification pass. *Vol. I. Page* 615.

1694. *February* 23. LYON *against* WILLIAM HOUSTOUN and JOHN HEPBURN.

MERSINGTON reported the competition for the stipend of Orr, near Kircudbright, between Mr Lyon, the late episcopal incumbent, and Mr William Houstoun, suspected to be a papist, who preached sometimes there, and Mr John Hepburn, the field Cameronian preacher, who claimed it by a call of the people, and an act of the presbytery of Dumfries, and his serving there.

The Lords preferred him, notwithstanding that the presbyterian church was threatening to excommunicate him as a schismatic, it being instructed that he was one of the presbyterian communion. *Vol. I. Page* 615.

1694. *February* 23. SIR HUGH CAMPBELL of CALDER *against* The MARQUIS of ATHOL and the EARL of DINMORE.

SIR Hugh Campbell of Calder against the Marquis of Athol, and the Earl of Dinmore, his son, for re-delivering his bond of £10,000 Scots, as *causa data non secuta*, and as annulled by the Act of Parliament 1690, rescinding fines and forfeitures; in so far as it was granted to get a deputation of lieutenancy from Athol in 1685, for trying his own vassals and tenants in the Isle of Ilay, who had risen and joined with Argyle in his invasion; whereon arose two questions. The *first* was, If this case fell under the compass of that Act of Parliament; and, *secondly*, What should be the manner of proving it. As to the *first*, the Lords found, that if it could be made appear that it was granted for that cause,

to save his own people from being fined and forfeited, then it fell under the compass of that act, ordaining all compositions or bonds given for such forfeitures and fines to be restored; for, though the act speaks only of parties componing for their own fines and forfeitures, yet it was thought equitable to extend them to a master transacting for his tenants. Which would not sustain nor operate, if a stranger had made any such transaction. And, as to the *modus probandi*, they found it relevant to affect this bond, though assigned to Sir John Oswald of Fingleton for onerous causes, to prove, by his oath, that either he had retrocessed the Marquis, or some other to his behoof; or that he had this assignation only in corroboration and further security, and that he was *aliunde* secured for his money, beside this; and he deponing in thir terms, which will bring the right of the bond in the Marquis's person, (though some alleged, that, being granted for the cause foresaid, it was a *labes realis* that followed it through all the singular successors.) Then a new question arose, whether the true cause of the bond, (which bore in its narrative borrowed money,) could only be proven by the Marquis's oath, that it was granted on the account of his right of deputation to Calder, to cover these people, or if it was for any other cause; or if they would, *ex officio*, in this case, examine the writers and witnesses, not only of the bond, but of the assignation and deputation foresaid, to see if the one was the cause of the other: for, though this was called irregular, and tending to take away writ by witnesses, yet it was minded, that, in trusts and the like, witnesses were often examined contrary to the tenor of the writ; and that, in January last, a bond was annulled, given by Winram of Eyemouth to Daniel Nicolson, on the testimony of witnesses;—(but there fraud was proven.) But, in regard the bond and deputation were both of one date, before the same witnesses, and by one writer, therefore, this determined the plurality of the Lords to allow the writer and witnesses, before answer, to be examined *ex officio* anent the true cause of the bond. Which met with a struggle among the Lords, as a dangerous preparative; some proposing, rather, that the Marquis's oath should be taken in presence of these witnesses. But that confrontation was doubting the Marquis. Then it was found relevant to deduce, off this bond, whatever profits the Marquis should instruct that Calder made by that commission; though, in strict law, that benefit should not accrue to the Marquis, but to the tenants from whom it was exacted, and who have naturally a right to it, by the plain words of the Act of Parliament 1690, and are more clearly founded in the repetition of it than Calder, the master, is. But they are not claiming it. *Vol. I. Page* 615.

1694. *February* 23. THOMAS WYLIE, Merchant in Edinburgh, *against* WALTER CHIESLY, there.

THOMAS Wylie, merchant in Edinburgh, against Walter Chiesly, there, for paying his proportion of the gross averages he had been decerned in by the Admiral Court of Roan, at the ship-master's instance, for reparations of the ship after it was disabled by a storm at sea; and Mr Chiesly being an owner, as well as he, his share came to £100 Scots.