tion for want of a title, yet her Majesty's advocate might insist to try the falsehood, *ad vindictam publicam.*

The Lords thought it might be a very dangerous preparative, if apparent heirs, (where they and their predecessors had been out of possession for a long time,) were allowed to open the charter-chest of the present heritor and possessor, under the pretence of falsehood; seeing that pretence might give a handle to apparent heirs to disturb peaceable possessors, where their predecessors have been clearly denuded, either by legal diligences or by voluntary conveyances; especially seeing they may reach their design by a more legal method, in granting a bond for a sum of money, and causing their trustee adjudge thereon, and he may pursue the reduction and improbation: neither will this be a passive title, unless he possess by virtue of that adjudication, when he has taken a right to it. On the other hand, it may be hard against apparent heirs, to debar them from proponing falsehood against such deeds, otherwise their ancestors' inheritance may be evicted from them by false and patched-up grounds. And as to what is said of the Queen's advocate insisting alone, that he cannot do, unless the writs were produced and in the field; else he cannot crave certification *contra non producta;* otherwise he might disquiet all the heritors of Scotland, and open their charter-chests.

The Lords, generally, thought an apparent heir could not pursue such an improbation where they had been long out of possession; but, in regard the point was new, they resolved to hear it first in their own presence, ere they made a rule. Dury indeed observes, that once the Lords sustained an apparent heir to pursue a count and reckoning, for extinguishing a debt of his father's by intromission, as being his father's trustee, 16*th March* 1637, *Home*; but Stair, *lib.* 3, *tit.* 4, observes this was not followed, as being unreasonable.

There was another question started among the Lords, Where one offers to improve a bond as false, by the witnesses inserted, what if, after a long time, they should depone that they do not remember whether they were witnesses adhibited or not, or whether that be their real subscription or not? Many thought that a witness's saying *non memini* would neither annul nor improve a writ, unless they positively depone that they were never witnesses to such a man's subscription; but this point fell not to be decided at this time. See Stair, *lib.* 2, *tit.* 2, where he gives an instance of this case; as also Balmanno's decisions, *voce* Improbation. *Vol. II. Page* 302.

1705. *December* 26. ROLLAND of DISBLAIR *against* The TOWN of ABERDEEN.

KATHARINE Rolland, relict of Doctor Guild, having mortified, for bursars to the College of Aberdeen, the lands of the mill of Murtle, and likewise the lands of Disblair, under certain conditions therein mentioned; Rolland of Disblair, her nephew, raises a reduction thereof upon the head of deathbed, and gets witnesses examined, to lie *in retentis;* who seemed to prove that she died shortly after, without going either to kirk or market.

In which process it was ALLEGED for the Magistrates of Aberdeen,—That he could not quarrel the said mortification; because he had homologated the same,

in so far as he had paid 1700 merks in prosecution of it, which was a clear owning and acknowledging the said mortification.

ANSWERED,—He had paid it, *qua* patron; and so it was ascribable to another title.

The Lords, in 1702, on the report of the Lord Phesdo, sustained the homologation as sufficient to elide the reason of deathbed and to exclude him from insisting therein.

This interlocutor being reclaimed against by Disblair, the Lords, upon bill and answers, gave them a new hearing; wherein it was ALLEGED by Disblair, —That he was not only patron, but was also left heritable chamberlain and collector of the rents, and the haill customs and casualties of the lands appropriate to himself; and what he paid was nowise in prosecution of the mortification, but in obedience to a charge; and though they be all contained *in unico contextu*, so that he cannot both approbate and reprobate the same writ, yet homologations are never inferred where they can be attributed to another right; as here he does. Yea farther: the paying one article of a decreet-arbitral has been found not to homologate other parts of it, nor to preclude him from quarrelling them in a reduction; *24th July* 1661, *Jack*; *22d November* 1662, *Primrose*; *27th February* 1668, *Chalmers*; where a minister's accepting a tack-duty of teinds did not hinder him to insist in a reduction of that tack, as if it had been homologated by him; and, *12th March* 1684, *Archbishop of St Andrew's* against *Beton*, it was found, That the Archbishop's accepting the canon or feu-duty of the charter granted by a former bishop, changing the holding, did not exclude the Archbishop from quarrelling that charter; and that his acceptance of payment did not infer homologation.

ANSWERED,—That there could not be a more positive and express deed of homologation, the 1700 merks being paid out of the specific lands of Disblair, as the discharge bears; so the application is as particular as if he had consented, under his hand, to the mortification; which would have elided this process *ex capite lecti*.

The Lords, by a plurality of seven against six, repelled the homologation as not sufficient to debar him from quarrelling the mortification, *ex capite lecti*; and altered the former interlocutor.

The Town alleged his paying *qua* patron could never defend him, seeing patronage is *jus indivisibile*, and must be ascribed to the whole right, and can never rescind from any part of it; and Disblair urged, that *nemo præsumitur donare vel suum temere jactare*, and therefore a dubious homologation ought to be so interpreted as not to infer his passing from his lands of Disblair, without some just, necessary, and onerous cause for the same. *Vol. II. Page* 302.

1705. *December* 29. JAMES SCOT *against* ALEXANDER BELCHES.

THE cause betwixt James Scot and Alexander Belches, the two sheriff-clerks of Edinburgh, was debated, but the decision of it was prevented by a transaction and agreement betwixt the parties; yet, the case being new and singular, I have shortly abridged the heads of the debate.

The said James Scot, being sheriff-clerk of Mid-Lothian, by a gift *ad vitam*,