1693. *February* 15. BROWN of Thorniedykes *against* DAVID MAITLAND.

BROWN of Thorniedykes, present factor to the estate of Lauderdale, against David Maitland, the late factor. The Lords found, that David was not accountable conform to the tenor of the commission, but in the terms of the bond that he gave in to the creditors at his acceptance; and that it would regulate both the term at which his intromission was to begin, and the lands whereof he was to uplift the rent; unless they could prove he had entered upon the said commission before he qualified it by that accepted bond, because he uplifted the former term's rent by another title. *Vol. I. page* 560.

1693. *February* 15. ALEXANDER HAIGENS *against* JOHN CALANDER SMITH.

THE Lords advised the declarator of trust pursued by Mr. Alexander Haigens, advocate, against John Calander Smith, of the two dispositions of the lands of Craigforth. The Lords finding some weight in the adminicles and qualifications of trust, they, before answer, allowed him to lead what probation he could for ascertaining them. *Vol. I. page* 560.

1693. *February* 16. FOTHERINGHAME of Poury *against* MR. WILLIAM STIRLING, Writer to the Signet.

THE Lords found Poury could not quarrel Mr. William's rights on fraud and latency, on the act of Parl. 1621, as being brother-in-law; seeing his debts were contracted before Poury's debt, and that he was creditor to Francis Laury, the said Marion Watson's first husband; whereas Poury was only creditor to her, and Alexander Rait, her second husband; and any faculty she had to affect her husband's lands with 10,000 merks of debt was only from John Laury her son. And the Lords found the qualifications of trust or fraud against Mr. William's infeftment were not sufficient to reduce his right, but only to restrict it, the same being proven by his oath or otherwise. *Vol. I. page* 560.

1692 and 1693. BROWN *against* THOMSON in Kirkaldy, and HARVY, his pupil.

1692. *December* 28.—THE Lords found the declaration produced, designing him co-tutor, and offering to entertain the child *gratis*, was not such an acceptation of the tutory, and of the disposition where the nomination of the tutory was contained, as to infer he had homologated all contained in that nomination, and consequently that he had acknowledged the 500 merks wherein he was stated

debtor by that paper to the disponer; and that it was not a sufficient probation of the debt, especially seeing by a letter of the defunct's it appeared counts were not fully clear between them; but it had been his safest course, when he saw the nomination gave him up as a debtor in 500 merks, to have protested against it. The Lords also found, that though Thomson offered to aliment the pupil *gratis*, yet being removed as suspect for not concurring in upgiving the inventaries, he could not have the custody till he reduced the act removing him; but that regularly the pupil ought to be delivered up to the other tutor, though he made not the same *gratis* offer, unless he were the nearest in blood to succeed to the pupil; in which case, law denied him the keeping of his person, *ad evitandum votum captandæ mortis.* *Vol. I. page* 540.

1693. *February* 16.—The Lords, on the 28th Dec. last, had found, that Thomson had lost the tutory of Harvy, his pupil, and would not hear him against that act, without a reduction. He now insists on his reasons, *viz.* that all the reason of debaring me, was because I would not concur with the other co-tutor in giving up the inventaries; and I had reason to refuse, because he inserted me as debtor for 500 merks, which I denied to be just debt.

ANSWERED,—You might have protested against that article.

2do, The notary and witnesses, in the instrument requiring him to accept, were not examined.

The Lords thought, in such cases, the instrument was probative of itself, without adducing the testamentary witnesses, unless the other party would offer to improve it as false.

3tio, It was only his advocate, who renounced and gave over the office of tutory, who had no mandate or commission from him to that effect; and though in *actibus officii* he needs no other mandate but his gown, yet in quitting of rights, he should be specially authorised; as, in the renouncing to be heir, it must be subscribed under the client's hand. Yet Advocates frequently pass from such and such parts of the libel.

The Lords, in this case, allowed Brown the administration of the minor's affairs, but gave the custody of the pupil to Thomson, who was married to the child's aunt, and having no children of his own, offered to entertain him *gratis*, and to be otherwise kind to him; especially seeing Brown was either to succeed, or had the power of distributing the means by the father's appointment, in case the child died. *Vol. I. page* 561.

1693. *January* 13, and *February* 16. WILLIAM DENHOLM of Westshiels, *against* The EARL of BALCARRAS.

1693. *January* 13.—THE Lords found he behoved to deliver up the bonds as they were at the time of the decreet ordaining him to denude of them, and seeing they were then unregistrate, and that *lite pendente nihil est innovandum*, he ought not to have put them into the register, and that the offering of extracts was not an implement in obedience to the decreet; and, therefore, ordained him