here *penuria testium*; and, though the process be in Aberlady's name, yet it is for Salton and Blackbaronie's behoof, who were his curators, and liable ultimately to make up this to the minor; and the tenants were nothing to the curators, and so receivable. Yet the Lords still rejected them; but declared, if the process had been at the curators' instance, they would have admitted them. Some were for receiving them *cum nota*. *Vol. I. Page* 583.

1693. *December* 23. JAMES DICKSON *against* ANDREW DUNCAN'S CHILDREN.

JAMES Dickson, pursuing the children of Andrew Duncan, skipper in Borrowstowness, for a debt, they repeated a reduction, that he was furious when he made the transaction; and a mutual probation being led, the Lords laid most weight on the instrumentary witnesses in the bond; who deponed, That they thought him then rational and sober. And, though others declared that, for ten years, he was reputed mad, and used to run naked to the streets, and threaten to burn the house, yet the Lords found the contrary probation more pregnant, that it was done in a lucid interval; especially seeing it depended on an anterior cause; and there was a decreet of the Admiral's for it, though then suspended; seeing he got down, and paid him no more for his share than he had compounded for with Bonhard and others, partners. *Vol. I. Page* 584.

1693. *December* 26. ANN DOUGLASS *against* JAMES LANGLANDS, her Son.

MERSINGTON reported Ann Douglass against James Langlands, her son. The Lords repelled his first defence, *viz.* that he was only heir to his brother, Mr George; and the rest of his brethren were the executors, and they were first discussable in law: For they thought the mother, as creditrix, by her son Mr George's back-bond, might insist against both heir and executor, or any of them, as she pleased; reserving their relief among themselves, as accords. The Lords also repelled the second allegeance, That the mother was denuded in favours of her children; and so, they being fiars, were bound to relieve him instantly in this process; and for which he produced a nomination by the mother, dividing the 5000 merks equally amongst the rest of her children: for the Lords considered the mother still as fiar, having, by the back-bond, power to assign it to whom she pleased; and that her nomination was but of the nature of a destination, and *donatio mortis causa*, and so revocable by her; and that it did not appear to have been a delivered evident, seeing it was recovered, by an incident, out of her agent's hands. *Vol. I. Page* 584.

1693. *December* 26. WILLIAM MAIN *against* Mr JOHN DALLAS and his WIFE.

MERSINGTON reported William Main, son to Mr David Main, against Mr John Dallas, and his wife. The Lords inclined to repone her against the decreet *in*

foro, where her defence, upon her first husband, John Colvil's anterior right, was competent and omitted; she making faith that it was *noviter veniens ad notitiam*, and did not then consist with her knowledge; and thought her husband's homologation of the second right would not import a renunciation of the first against the wife, who could not be prejudged thereby, (whatever it might have operated against the husband himself.) But the Lords considering, that if the son was not infeft upon the first right which was made to him in 1649, that then the father's second right, in 1652, would be preferable, seeing infeftment had followed thereon; therefore they ordained the reporter to try that point, if the first right was completed by infeftment; as also, to call for the contract of marriage, to see if it proceeded upon the first or second right, or if it was general, without relation to either. *Vol. I. Page 584.*

1693. *December 26.* LORD MONTGOMERY *against* BLAIR and CARSELANDS.

THE objection was against the pursuer's active title, that the warrant for the seasine was not produced; for the charter given out did not bear the precept engrossed; being before the Act of Parliament 1672, requiring they should be inserted in the charter.

The Lords found it sufficient against thir defenders, who produced no right to the lands; but if they did, it then would be time for them to crave the precept, as the warrant of the seasine to be produced.

Then they ALLEGED, It was not his own, but his grandfather's seasine: but it seems the *jus apparentiæ* is good enough against them, unless they have a right. *Vol. I. Page 584.*

1693. *December 27.* CAPTAIN CASSIE, Slater, *against* JAMES BAIN, Wright.

THE Lords found the discharge granted by Cassie to Sir William Binny, of the 4000 merks he owed James Bain, was good, and his application of it to the account Bain was then owing him, must subsist; unless he can prove, that the order he gave to Sir William to pay it to Cassie, bore expressly, (whether verbal or in writing,) that he should only pay it in part of the bond bearing annualrent, and not of the subscribed account, which bore none; in which case he could only recur against Sir William, and not against Andrew Cassie: for though, in the case of indefinite payment, the debtor has the application, and it should be ascribed *in duriorem sortem*, to extinguish the debt that is heaviest to the debtor; yet where the creditor has expressly applied it already by his discharge, that must be the rule; and, even in the general, the *durior sors* does not always take place, for it defaulks *primo loco* from the annualrents, and only *secundo loco* from the principal sum, though that be unquestionably the *sors durior*. But what seemed severe in this interlocutor was, that James Bain himself was not the payer, nor accepted of the discharge so qualified and applied, (in which case there would have been no doubt but it would have bound him,) but the same is made by a third party by his direction; his fault only was, that his