counts, and other probable evidences produced, to instruct there were other grounds of debt owing by Robert to David, at the time of these payments, to which they were rather to be ascribed than to the bond, which he never acknowledged: but the Lords observed, there was one receipt of £14 Scots, prior to any debt due by Robert to him, except the bond of provision; and that it was most unfavourable in him to shun this, when he had taken course with all the rest, whose bonds were holograph as well as this; therefore, *super tota materia*, they decerned, and found the presumptive subscription on deathbed elided by the contrary presumptions of homologation; though some of the Lords thought this was too much of a Chancery equity, albeit he was unnatural to his brother, and ungrateful to his father's memory. *Vol. I. Page 583.*

December 29.—The case of Burnet, against his brother Robert, mentioned 22d current, was reconsidered on a bill, and the Lords adhered. Robert cited sundry decisions about homologations; as that it cannot be a homologation in him, who did not then know the right or its defects;—*Vid. 6th July* 1661, *Taylor. 2do.* That the homologation must have some relation to the writ homologated, which is not here;—*9th February* 1672, *Pilton.* And *3tio.* That a deed cannot be said to be a homologation, where it may be attributed to another cause;—*12th December* 1665, *Barns.* See also *Mr David Thoirs* against *Ramsay, eodem tempore.* But the Lords went on the grounds above mentioned.

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1694. *January* 2. AGNES BURNET, and YOUNG, *against* Mr RODERICK MACKENZIE of PRESTONHALL.

THE main question was, To what right he should ascribe his entry to the possession of the lands of Bogehouse. Agnes ALLEGED, It behoved to be, to extinguish the adjudication led by the late Archbishop of St. Andrew's, his father-in-law; because, in a competition between this pursuer and him, for the maills and duties, the bishop was preferred, and either did possess, or might have possessed.

ANSWERED,—That the bishop did never possess during his lifetime; because the lands were full by a liferentrix, who had an unquestionable preferable right to them both; and he did not enter, till she, being straitened by her creditors arresting the rents, ceded the possession to Mr Rory, on his paying the debts, and securing a yearly aliment to her; so he neither did, nor could enter to the possession by the adjudication, so long as the liferent stood in the way. And though it was contended, that he ought to have entered on the decreet of preference, till he was legally debarred by the liferentrix, having a better right, yet the Lords found it sufficient, that she was actually in possession, and that her right is clearly preferable; seeing she compeared, and Agnes Burnet was not able to debate with her, who had only caused adjudge on a bond granted by herself, as apparent heir, and she was infeft long before the bishop's adjudication, and would have evidently excluded him; and did not think it just, that he should have wared out the expenses of a process to debate with an uncontroverted right, where he would certainly succumb; besides the unfavourableness of the said Agnes her right. Yet several of the Lords thought it a general concern,

and of dangerous importance, if creditors were allowed to invert their possession, and ascribe it to any other cause than that by which they entered: but all concluded, that it would extinguish the adjudication *pro tanto*, aye till they agreed with the liferentrix, and entered by her right, if Agnes proved that the bishop was in possession; for it was to be presumed that Mr Rory's possession was only a continuation of the same in his lady's right, who was one of the heirs-portioners to the archbishop. *Vol. I. Page* 587.

1694. *January* 3. MATTHEW CAMPBELL of WATERHAUGH *against* ELIZABETH NEILSON.

ON bill and answers, between Mr Matthew Campbell of Waterhaugh, and Elizabeth Neilson,—the Lords found a forfeited person, being debtor in an annuity of victual to a widow, he had the benefit of the act rescissory of fines and forfeitures, granting them a *supersedere* of their debts and annualrents during the time of their being dispossessed of their estates; and though it related to no *sors*, or principal sum, yet there was the same parity of reason for it as for principals bearing interest; and, therefore, found it comprehended in the act; though it was argued, that this being a correctory law, contrary to the common law, it was to be strictly interpreted, and not to be extended beyond its precise words. Then the next vote was, Whether the charge of horning was warrantable for the annuities preceding the forfeiture. And the Lords found it was; conform to their decision in Cavers's case against Lord Polwart, *supra*, December 14th 1693. *Vol. I. Page* 587.

1694. *January* 4. PRINGLE of TORWOODLEY *against* The VISCOUNT of STRATHALLAN.

PRINGLE of Torwoodley against the Viscount of Strathallan, for restoring the forty-five thousand merks of composition he paid for obtaining a remission to his father and a right to his forfeiture. ALLEGED,—He had no title to seek repetition of it, seeing he was neither heir nor executor to his father. And remembered the interlocutor of Parliament against the Earl of Argyle, that he could not pursue his father's judges without a title.

ANSWERED,—That he had, besides the general rescissory act, likewise a special Act of Parliament, appointing it to be paid back to him *nominatim*; and that he himself, and not his father, was the payer of the money, and his act was excepted out of the act *salvo jure*.

REPLIED,—It was only payable to him as son and heir; and if he had not a title to discharge, another might afterwards enter, and confirm it, and seek it over again; and though he paid it, yet it was out of his father's means and estate.

The Lords decerned; but withal ordained Torwoodley either to enter heir or executor, as the defender should desire, for his security, and as the nature of the deed required; which Torwoodley offered to do.

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