and then renounce; or that she grant him a disposition, with a procuratory of resignation *ad remanentiam;* in his option. *Vol. I. Page* 602.

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1694. *February* 6. The EXECUTORS of GEORGE BROWN of HORN *against* DAVIDSON of BALGAY.

THE Lords repelled the first two objections against the compensation, and found it was materially *inter easdem personas,* and was liquid; but sustained the last ground urged against the compensation, *viz.* that it was proponed *post sententiam,* contrary to the Act of Parliament 1592, albeit it was proponed in the former decreet, and there repelled *illo ordine;* which the Lords interpreted not to found a compensation in a suspension of that decreet, but that it might be free to them to insist in it by way of action. There were likewise sundry nullities proponed against the decreet itself, against which the compensation was sought; such as, that the commission for selling the gloves at Queen's-Bridge, with the confession of the party as to the price he received for them, are only proven by the assertion of the clerk, extractor of the decreet, without any other adminicle in write; and that the BECAUSE of the decreet bore, in regard the defender refused to subscribe a submission: but, seeing the Lords repelled the compensation *hoc loco,* there was no need of deciding thir nullities.

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1694. *February* 6. SIR THOMAS STEWART of GAIRNTULLY *against* THOMAS YOUNG.

ANSTRUTHER reported Sir Thomas Stewart of Gairntully's reduction of Thomas Young's decreet, liquidating the damage by Gairntully's selling other oak woods during the time theirs was cutting, contrary to a clause in their contract; and for his taking away sundry of the trees to his own use. The Lords would not loose the decreet now, after fifteen years, being in 1679; and did not think it a nullity that his oath of calumny was not advised, seeing that does not hinder the party to use another probation; and though his mandate in away-carrying of the trees was not proven by his oath, (as it was sustained to be so proven by the act of litiscontestation;) seeing the warrant arose, *ex evidentia facti,* from the testimonies of the witnesses, who proved that the trees were brought to his own house. And the Lords thought it unreasonable to enter upon decreets after so long a time, when Mackonachy (to whom the separate bargain was made,) was now dead. *Vol. I. Page* 603.

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1694. *February* 6. GREY of CREICHIE *against* UDNEY of AUCHTERALLAN and SIR RICHARD MAITLAND of PITRICHIE.

THE Lords found, though the father was still alive, and the son a profligate

debauchee, that he or Creichie, as assignee, might pursue exhibition of his mother's contract of marriage, that he might see what was provided to the bairns or heirs of the marriage. For, though the Roman law did reprobate *pactum corvinum de hæreditate viventis* as unlawful, yet, with us, one may sell his apparency of succession even while his father or other predecessor is alive; and, though the father may disown such a flagitious son, so as to exhereditate him, (farther than to aliment him,) and may give it to another, yet the Lords thought this could not hinder him to seek exhibition of the contract.

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1694. *February* 6. The COLLEGE of GLASGOW *against* JAMES WILSON and LINDSAY of MAINS.

IN the competition between the College of Glasgow, and Mr James Wilson, minister, and Lindsay of Mains, about the vacant stipend, the Lords found the Bishop's presenting, as patron, made it a patronate, but not a patrimonial mensal kirk, to fall under the exception of the Act of Parliament 1685, anent the disposal of vacant stipends to the Universities: but found the vacancy occasioned by the rabble's thrusting out ministers was *casus incogitatus*, and not foreseen or meant by the said Act of Parliament; and therefore that such vacancies did not belong to the College of Glasgow; and that Mr Wilson, proving he served at that kirk after the 13th of April 1689, (which was the date of the proclamation of the meeting of Estates,) he had right to that half year's stipend.

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1694. *February* 7. STEWART *against* GORDON.

ARBRUCHEL reported the case of Stewart against Gordon, for repaying fourteen dollars he had given him in 1683, (when prisoner in the Canongate tolbooth for conventicles, and banished to Jamaica,) to help him to escape, Gordon being then one of the jailer's servants; and that, though he was once down the tolbooth stairs, yet, by his contrivance, he was retaken, and sent to America, and now returned. The libel being referred to Gordon's oath, he deponed that he got the money, but gave it to Birrel, the turnkey, and disposed of none of it; that the pursuer was indeed seized on ere he had made his full escape, but not by his means or discovery, any manner of way. The bailies had found him liable on this oath; which decreet he suspended.

Some of the Lords were for finding the letters orderly proceeded, not so much on his oath, that it was an extrinsic quality that he gave away the money, and that it came not to his use, as that it was an unlawful action to take a bribe to let a prisoner escape. But the plurality found, where there was turpitude *ex parte utriusque, potior est conditio possidentis;* that the libel being only proven by his oath, you cannot divide the same, but take it complexly as it stands: