

1693. *January 12.* LADY COLVIL *against* MATTHEW FLEMING.

THE Lady Colvil against Mr. Matthew Fleming, for 500 merks, as the conventional price of the manuscript she lent him, being a list of all the mortifications dedicated by the Earls of Fife, to the Abbacy of Culross.

The Lords found this defence relevant, that Mr. Matthew produced it in process, and it was borrowed up by the deceased Lord Dirleton; and when it was sought back from him, he told it was burnt with his lodging, and so it perished *casu fortuito*. And ordained my Lord Newbyth, and the Clerk of that process, and others, to be examined thereupon. *Vol. I. page 544.*

1693. *January 12.* JOHN REID and JANET PENMAN *against* LORD POLWORT and JAMES DEAS.

JOHN REID and Janet Penman, his mother and tutrix, against the Lord Polwort, and Mr. James Deas, advocate, mentioned 22d December 1692.

The Lords found the assignation was not *donatio mortis causa*, and was three or four years before George Reid, the goodsire's death, and that the tutrix might uplift, seeing two of the overseers were dead, and the other two renounced by a writ under their hands: and that, though the debtor might refuse to pay where there was not an inventory of the minor's estate made; yet here they allowed it to be given in *cum processu*. Though the President thought that clause was only to remove the tutor as suspect, but not to hinder the pupil, with a curator assigned to him, *ad hanc litem*, to uplift without any inventory. But the Lords inclined to have an inventory made, else by a curator *ad litem* the said useful act of Parliament 1672, introduced in favour of minors, might be totally frustrated and evacuated. *Vol. I. page 545.*

1693. *January 13.* JOHN DORY *against* GUTHRIE of Corseback.

JOHN DORY against Guthrie of Corseback. ALLEGED, You cannot poind the ground on this infestment, because your father was factor, nominate by my tutors, and intromitted sundry years, and during the factory acquired in this right on my estate, who was your constituent's pupil; and none of them have yet counted; and so as it is presumed against tutors, that any debt they acquire against the pupil or his estate, during the office, is either to the pupil's behoof, or paid with his money and accresces to him, so the same presumption militates against their factor.

The Lords considered here, there was not only that extension, but also another presumption urged, that the factor's taking the right in name of one of his sons *in familia* made it be presumed that it was with the father's means; and that this was but a second son, and not his heir, and that he was not seeking up the

principal sum, but only a pointing of the ground for his annualrent. Therefore the Lords, in this circumstantiate case, repelled the defence, and decerned in the pointing.
Vol. I. page 545.

1693. *January 17.* AMBROSE COX and — JADDART *against* The EARL OF WINTON.

AMBROSE COX and Jaddart against the Earl of Winton. The Lords found the obligation for L.100 Sterling not penal, but due by contract, seeing he had liberty to have imported 800 veyes of salt for it, and they were damnified by not furnishing themselves, and depending on it, and so were disappointed ; but found the bond of L.500 Sterling penal, and that it could subsist for no more but alienarily for annualrent of the L.100 Sterling, and the expenses, and referred to my Lord Reporter to modify it.
Vol. I. page 545.

1693. *January 17.* DR. JAMES WEYMES *against* CAMPBELL of Calder.

DR. JAMES WEYMES against Campbell of Calder. The Lords repelled the 1st allegiance, of Haliburton's marrying without the consent of the friends, named by the father, both as *jus tertii*, and that being *in re antiqua* their consent was to be presumed, unless the contrary were alleged : but, as to the 2d, found the cautioner had any defences that were competent to Argyle, the principal, and that Argyle (though he had taken a special act of restitution) had also the benefit of the general rescissory act ; and that his being successor *titulo lucrativo* by his contract of marriage in a locality of the estate, was equivalent as if he had been heir, in which case the said rescissory law favoured him ; and therefore decerned for the annualrents due before Argyle's forfeiture, and due since the Revolution ; and remit the intermediate annualrents to the Commission of Parliament, conform to the express tenor of that act.
Vol. I. page 545.

1693. *January 17.* WATSON, Provost of Dundee, *against* GRAY of Innerighy and LORD CARSE.

WATSON, Provost of Dundee, against Gray of Innerighy, and my Lord Carse. The President, and sundry of the Lords, inclined, that the method prescribed in the contract was the rule of counting, and that the two extrinsic sums of 800 merks could not be brought in upon that fund : but the plurality found he might ascribe his intromissions as well for paying the annualrents of these two sums of 8000 merks, as of the 48,000 merks contained in the first contract ; seeing the parties, by a fitted account, had acquiesced in that method, and allowed these an-