Then, *2do.* ALLEGED,—It was excepted out of his right, flowing from Abraham Thomson, then rector of Auchterdiran.

ANSWERED,—That was only a right of the east half of Balgreigie, whereof this roum was no part; therefore, it was justly excepted: but afterwards he acquired the west half, whereto it did belong.

The Lords repelled the defence in respect of the answers.

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1695. *January* 17. DOUGLAS of KIRKNESS *against* AYTON of INCHDERNY.

DOUGLAS of Kirkness against Ayton of Inchderny, in an exhibition *ad deliberandum.* The Lords were clear, that an apparent heir might call for inspection of the moveable estate, as well as the heritable and real; because, otherwise, he could not deliberately know whether it was *hæreditas lucrosa* or *damnosa;* and that *quoad* all writs granted to the defunct, and all granted by him to his wife, children, servants, and others *in familia,* but no further: as was solemnly decided, *6th December* 1661, *Telfer* against *Sornbeg.* But, in regard the defender clothed himself with a simple and absolute disposition from the defunct, therefore they refused process, the defender producing that right, which totally denuded the defunct; but, if it bore any reservations, conditions, or qualities, it would be otherwise. *Vol. I. Page* 660.

1695. *January* 17. JOHN ROBSON *against* ROBERT BURNET, Writer to the Signet.

PHILIPHAUGH reported John Robson against Robert Burnet, writer to the signet. This was a reduction of a disposition *ex capite lecti.* The ANSWER was, You, the apparent heir, have ratified.

REPLIED,—I have raised a reduction of that ratification on fraud and circumvention.

When this was first called, the Lords allowed the writer and witnesses in the disposition to be examined upon the matter of fact; which was done; and Robert Burnet urged to have their depositions advised. But the other party craving a farther probation, on the various circumstances and qualifications of the fraud, and that the first probation was only *ad specialem effectum,* to see if he had malversed in his trust as a writer, and was before answer; the Lords allowed both a mutual probation, on the points alleged by them, before they would conclude the cause. *Vol. I. Page* 660.

1695. *January* 17. DAVID SPENCE, Writer, *against* DAVID DONALD of SHANGIE.

THE objection against the title was, That, being subscribed by two notaries,

there were only three subscribing witnesses. ANSWERED,—This was no nullity before the third Act of Parliament 1681; because, there were four witnesses inserted in the body of the writ, which was all then required by our law; subscription being only introduced for fixing the witnesses' memory, as appears by comparing 80th Act 1579 with third Act 1681. They had other two allegeances, but there was no need of determining them.

The *first* was, That the three witnesses were at least good for £100 Scots; but it was urged, the Lords had refused to restrict, in a late case in 1691, between Sir Robert Colt and Aikman.

The *second* was,—The cautioner subscribed for himself; so two witnesses were enough for him. To which it was ANSWERED,—If the principal obligation be null, the fidejussory must fall in consequence as an accessory. REPLIED,—Cautioners are all principals, *et correi debendi*, by our law; and so the cautioner's obligation may subsist without the other; as was lately found in *John Callender's pursuit* against *George Alexander*, brewer in Edinburgh. But, determining the first superseded the need of considering thir two last points.

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1695. *January* 18. MR RORY MACKENZIE of PRESTONHALL and MACLEOD of APPIN *against* JOHN DRUMMOND and GEORGE WATSON, Merchants.

CROCERIG reported Mr Rory Mackenzie of Prestonhall, and Macleod of Appin, against John Drummond and George Watson, merchants, for £900 Scots of salvage, given by a written contract, for saving some shipwrecked goods from the country-people's plunder, and wherein the Admiral had decerned: Against whose decreet this iniquity was objected, That he had made them answer summarily on a petition. ANSWERED,—1*mo*. It is usual to table processes before the Admiral by way of complaint; 2*do*. They passed from this declinator, by proponing other defences, and taking out a commission for trying the quality of the goods delivered, and if they were conform to the inventory. REPLIED,—That the defending before a court is no homologation, or passing from a prior defence; being *actus necessarius*, and involuntary.

The Lords repelled the strangers and their factors. *Vol. I. Page* 660.

1695. *January* 18. The EARL of TWEEDDALE, Chancellor, *against* DURY of CRAIGLASCAR.

MERSINGTON reported the Earl of Tweeddale, Chancellor, against Dury of Craiglascar. The question was,—He, being a vassal of the regality of Dumfermline, if he was liable in the sheriff-fiars as the price of his teinds, or in the regality fiars, which are much dearer. The Chancellor founded on a decreet he had obtained against Fotheringham of Halhill. ANSWERED,—This vassal, Craiglascar, is in another case; because he has a decreet of the Commission for