of £100 sterling, yet that he was, by the subsequent agreement, only bound to grant a real right out of the lands of Ayton; though *novatio non præsumitur.* But, in regard he had not as yet given that infeftment, they found the Earl personally liable for the bygones, since the date of the contract in 1683, and in time coming, until he offer the said real security; and that, in regard he has, by his oath, acknowledged that he has possessed these lands, worth 5000 merks *per annum,* and that the rights condescended on neither excluded himself from the possession, nor could have debarred Kymergham, if he had been infeft, seeing they are not real burdens affecting the lands of Ayton; and though there was a provision in the tailyie, burdening the heir with all the debts, yet that did not make it real. And as for Muirie's bond, it was only conditionally conceived, and made payable in a year after Ayton, the granter's death, if so be he had wanted heirs of his own body: but *ita est* his daughter succeeded, was served heir, and possessed; and so the bond was extinct; not being like a tailyie, where the clause *quibus deficientibus* has *tractum temporis successivum,* so that, *quandocunque* the heir fails, the next member of the tailyied succession takes place. Some moved, that the interlocutor, making the Earl liable for bygones, should only begin from the time that Kymergham performed his part of the articles, by delivering up the papers to my Lord; but they found there was neither *mora* nor *culpa* on Kymergham's part, and, *esto* my Lord had been lesed through the want of them, yet *sibi imputet* since he had not required them. *Vol. I. Page* 591.

1694. *January* 12. Sir Donald Bayn of Tulloch *against* Ross of Balnagowan.

Sir Donald Bayn of Tulloch pursuing a spuilyie against Ross of Balnagowan, and several of his tenants, he, by a petition, craved the Lords would grant him an edictal citation against the depredators: seeing he was content to cite Balnagowan himself personally; but for his men, they skulked in the Highlands, *ubi non erat tutus accessus,* and that no messenger would undertake to execute it against them.

The Lords considering if this were once granted, every one would pretend the same necessity; and so there would be no more citations to parties, either personally or at their dwelling-houses, in the Highlands; and that citations at the next market-cross could not certiorate them; they refused the desire of the bill, unless it had been in time of war or outbreaking among them. And yet there are some parts where, in the most peaceable times, messengers dare not adventure amongst them. *Vol. I. Page* 591.

1694. *January* 16. The Sisters of Scot of Broadmeadows, Petitioners.

The sisters and apparent heirs of Scot of Broadmeadows gave in a petition, craving a factor might be named, to intromit with the father's and brother's moveables, and sell them; and to set the land and lift the rents, until they get fuller information of his death in Jamaica. Some were against it, seeing they

might meddle upon their hazard; and whereas it was pretended the tenants would not pay them, not having a right, how many apparent heirs in Scotland intromit, and continue their predecessor's possession? Yet the Lords, considering that nobody had prejudice by it, they allowed a factor to set the lands, and uplift the rents, (he finding sufficient caution,) but noways to intromit with or dispose upon moveables; because, even a factor could not do that without making inventory; and remembered they had allowed such factories in the case of the Lord Kingston, before he came home, and in the lands of Dirup, &c.

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1694. *January* 4 *and* 17. LUMSDEN of CUSHNEY *against* LEITH of LEITHHALL.

Jan. 4.—THE Lords advised the long debate between Lumsden of Cushney and Leith of Leithhall: and having read the charter granted by Gordon, elder and younger of Kirkhill, to Leith, in 1635, bearing both to be disponers jointly, and to be bound in absolute warrandice; they found it accresced to the father, and validated his right, which was formerly improven by a certification; and so that the father's right was better than the son's; and consequently, though the son's right might be a probable coloured title to defend him against a passive title, yet it was not sufficient to free him from restitution *in quantum* he was *lucratus* by his intromission. *Vol. I. Page 588.*

January 17.—In the question between Cushney and Leithhall, mentioned 4th current, the Lords having allowed a reëxamination of some witnesses, in respect they not being able to write themselves, it was alleged that the Sheriff of Aberdeen had set down their depositions otherwise than they had truly sworn; yet now, on a bill given in against it, the Lords recalled that warrant, in regard these witnesses had given declarations before the ministers and elders, retracting their former depositions, and alleging they were wrong marked: for the Lords thought them suspicious, and that it might be of dangerous consequence to reëxamine such witnesses, who probably were corrupted in it; and that all witnesses who could not write might always pretend that the judges, or clerk, had otherwise worded their oath than they did themselves.

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1694. *January* 18. IRVINE of MURTLE *against* FORBES of BALLOGIE.

RANKIELER reported the debate anent the factory on the estate of Irvine of Drum, whether it should be given to Irvine of Murtle, the nearest heir of tailyie, or to Forbes of Ballogie, who was a disinterested person, and beyond exception responsal, and willing also to find caution.

The Lords thought the apparent heir, who had most interest, would be most careful in preserving the estate; and therefore, preferred Murtle: but, in respect of the suspicion that he would not count for his father's intromissions, &c. they appointed a curator *ad lites*, to insist in discussing the reduction and improbation, that was depending against Murtle, of his substitution of the tailyie,