

could procure a pass. Therefore, the Lords allowed them to prove that he sent them a pass accordingly, which was a farther ratification of the bargain; but reserved thir two points to be considered at the advising:—*1mo.* If Arnald's choosing Edward Marjorybanks was so personal as that he could not substitute nor assume his brother John, nor Bailie Graham. *2do.* Though the trade was designed for France, yet, seeing the cargo of herrings was too long in loading, that it could not reach France before Lent, if the merchants might not, for their best advantage, change the port, and send them to Stockholm. But the mystery of Arnald's refusing to adhere to the bargain was, the cargo came to a bad market; and so he would turn over the whole loss upon them, and keep himself free on this defence, That all he wrote was but resolutions and purposes.

*Vol. I. Page 599.*

1694. *February 1.* COLQUHOUN *against* COLQUHOUN of CRAIGTON.

PHESDO reported Colquhoun against Colquhoun of Craigton. Some of the Lords were for examining witnesses before answer, on the trust of the dispositions given by the pursuer's mother to Craigton, in respect of the pregnancy of the qualifications of trust; whereof the Lords took particular notice of one,—*viz.* that though he had an absolute disposition, without reserving her liferent, yet he suffered her to possess the land five or six years. But the plurality carried, that his dispositions could not be taken away, but by writ, or his own oath; but allowed the pursuer to adduce whom he pleased, to be present at his deponing, to refresh his memory with circumstances: and ordained him to depone on the onerous causes of his right, if they were adequate or not; for the Lords thought if it was a gift, then her son's right would be preferable to it.

*Vol. I. Page 600.*

1694. *February 1.* ROBERT JOHNSTON *against* HAMILTON of GAIREN.

PHESDO reported Robert Johnston, son to James Johnston, writer to the signet, against Hamilton of Gairen. The apparent heir of Gairen had got the possession, by buying in an apprising. Johnston, who had another right preferable to that apprising, pursues for maills and duties. Gairen offers to prove his apprising satisfied, and paid by intromission with Whitehead of Park's estate; which was also comprised for the same debt. Johnston finds it relevant, of consent; but alleged it was only proponed to retain the possession of the lands two or three years longer, during the dependence of the count and reckoning, wherein he would certainly succumb; and so these years' rents would be clearly lost; and, therefore, he offered to find caution, if Hamilton prevailed, to refund the rents.

The Lords thought this very equitable, if it were not to turn one out of his possession; and, therefore, they fell on this medium:—that Gairen should continue to possess, but find caution for one year's rent, in which space he might bring his account to a period, if he was serious in it, to be refunded to Johnston