

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.

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*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 tail-ye, 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,

and of the £80,000 bond, and to carry on the count and reckoning against him; and that he should, out of the first end of the rent, furnish money for determining these processes, and bringing them to a period. And ordained him to find caution to pay the Laird's annuity of 6000 merks yearly; and not to suffer the adjudications on the estate to expire, but to redeem them within two years before the legal, that the Lady may not be cut off from a terce.

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1693 and 1694. MRS PURDIE and JOHN DALGARDNO *against* MR WILLIAM and SIR PATRICK MAXWELL of SPRINGKELL.

1693. *January 4.*—THE Lords found,—Though Springkell produced more ancient rights, yet, they being only general, and not of thir roums in particular, and only offered to be proven to be part and pertinent; *2do*, not being connected by a progress, nor he showing any conveyance of these rights;—that therefore Purdie ought to have certification *contra non producta*; seeing the Lords refused to suffer them to debate the reasons till the production was closed, and a certification extracted. But, as was done in Biggar of Wolmet and Lauderdale's case, *7th December 1668*, though all the terms be now run, yet they gave him the 1st of February next, as a farther diet, to produce all the other writs; with certification, that what should not then be produced should never be admitted thereafter; and gave him a diligence for recovery thereof, to be concluded in that time.

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1693. *December 22.*—The Lords advised the debate between Mrs Purdy and Dalgardno, against Sir Patrick and Mr William Maxwells of Sprinkell. The Lords having weighed the presumptions and evidences on both hands, whether the lands of Smelholme and Chapel of Logan be Temple-lands, or temporal lands, and a part and pertinent of the barony of Logan, formerly belonging to the Earls of Nithsdale, and now to Sprinkell;—they found the express infestment of Sommervel, Purdy's author in thir lands, preferable to the probation adduced by Sprinkell, that they were only part and pertinent; and that, by the tract of presumptions and probabilities adduced, there was as much evidence as could be got, *in re tam antiqua*, that they were truly Temple-lands, though it was not instructed that Mr Robert Williamson, who gave a charter of them, in 1611, to Sommervel, was infest therein himself; seeing he was known to have stood in the title of many of these lands for Torphichen's and the Earl of Haddington's behoof, and that they were in the old lists and rentals of the Temple-lands, and produced in the Templar-courts, though not marked as produced in the King's Exchequer; and that it was no adminicle against their being Temple-lands that they lay environed and in the midst of another barony; which was very customary in the pieces given off to the Knights-Templars. Neither did the Lords regard that the decret against the Master of Maxwell was in absence, seeing he never sought to be reponed in his own lifetime, and it is now fifty years ago; and, though it was not proven that Sommervel's base infestment from Williamson was clad with possession, seeing the libel he raised at the Privy Council against the Master of Maxwell bore he was dispossessed. Then the Lords found Sommervel's seasine had a sufficient warrant, albeit the