

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,