

to any of them, but subducted from the years of prescription ; which is odious. But, in regard the preparative was of importance, it was ordained to be farther heard.

*Vol. I. Page 621.*

1694. *June 22.* PRINGLE of RENNISTON *against* JAMES RAIT, Merchant in Edinburgh.

IN the charge, at Pringle of Renniston's instance, against James Rait, merchant in Edinburgh, and his bill of suspension, reported by Crocerig, the Lords repelled this reason, That he offered to prove he entered all his goods at Kelso, and yet the *transire* he got did not contain the whole, whereby the goods, not mentioned, were seized by the waiters at Edinburgh ; and the bond being for the custom of these goods, he ought to have deduction effecting to his damage.

The Lords refused to pass the bill, and found it not probable by witnesses, but only by Renniston's oath or writ.

*Vol. I. Page 621.*

1694. *June 23.* LORD JOHN HAMILTON *against* SIR HUGH CAMPBELL of CALDER, &c.

THE Lords having rejected an article of 5600 merks, alleged paid by Calder, as cautioner, in regard it was instructed that the principal tacksman had paid it before ; and he being only a cautioner, should have known that, and not have paid till he had informed himself, or got an incident diligence for proving it ; and the principal was not obliged to intimate his having made payment to him : a bill was given in against this interlocutor, by Calder ; and, founding upon the common law, *l. 42. D. de R. J.* that *fidejussores eorumque hæredes justam ignorantiam allegare possunt* ; and *l. 29. D. mandati* is positive that the debtor ought to have acquainted his cautioner that he had paid, that he might not be ensnared ; and *Mavius, Decis. Lubec. anno 1655*, shows it was so decided there.

The Lords adhered ; reserving his recourse against Dumfermline, who received twice payment, as accords ; seeing the cautioner's second payment could not be said to be *bona fide* made.

*Vol. I. Page 621.*

1694. *June 26.* ANDREW CHALMERS *against* ROBERT KER.

MERSINGTON reported Andrew Chalmers, against Robert Ker, in Dysart. The Lords adhered to their former interlocutor, and found the minute of contract obligatory ; and that the craving the pursuer's oath of calumny supplied the nullity of the not-designation of the writer and witnesses, if he acknowledged the subscription ; and that a minor, with his curators, might lawfully dispone lands, unless he could subsume lesion.—See Durie, *2d February 1630, Hamil-*

*ton.* And found, that the reference in the minute to my Lord Kinglassie, was not a submission, but only anent the extending of the securities; and he being dead, the Lords now come in his room, *tanquam boni viri*, to arbitrate the differences between the parties. And referred to the reporter to hear the parties' procurators farther, if the bargain could be yet perfected, or was become implestible: as also, what warrandice he was to get for the lands disposed; and, if it was needful, to ordain Ker to give him real warrandice out of the lands of Strathoar, which was the remanent of their debtor's estate.

*Vol. I. Page 622.*

1694. *June 26.* JAMES CUNNINGHAM *against* The BAKERS of the CANONGATE.

THE reason of advocation was, That it was a competition of heritable rights, and so not competent before any inferior judge. ANSWERED,—*Imo.* That it was below 200 merks; and so, by the Act of Parliament, belonged to the inferior courts. *2do.* They had compeared and proponed peremptory defences, without declining the judge; *et primus actus judicii est judicis approbatorius.*

REPLIED to the *first*,—Though the yearly duty acclaimed was within the Act of Parliament 1672; being but £5 Scots; yet, being sought for forty years by-gone, the whole exceeded it.—But, in such cases, *quot articuli tot libelli.* And, to the *second*,—The compearance was officious, by a procurator without a mandate.

But the Lords found he was producing their writs, which imported his being employed; therefore, they repelled the reasons of advocation, and remitted the cause.

*Vol. I. Page 622.*

1694. *June 27.* LADY BOIGHALL *against* The EARL of MURRAY.

LADY Boighall against the Earl of Murray, for payment of £400 sterling, of legacy left, in Lady Murray's testament, to Catharine Mansfield, the pursuer's mother, and which was in the Earl of Cleveland's hands; in which there had been first a decreet against his father in 1652, and an act of transferring against himself in 1656; and now the cause was again awakened.

Murray ALLEGED,—No respect to the decreet, seeing it was unsubscribed; for it appeared, by ocular inspection, that William Downy, the clerk's name, was worn away by length of time and much using; but it was marked on the back by Hary Hope, then receiver, and it could be supplied by the registers, and a new extract taken. *2do.* He objected against her title, That the testament was not produced, nor the decreet-arbitral.

The Lords would not allow him now to quarrel her active title, after an act of litiscontestation, wherein he had offered to prove, that Cleveland was in as good condition now as at the time when the assignation should have been granted; but reserved this to the Earl, by way of reduction, as accords.

*Vol. I. Page 622.*