writ. The nullity against the seasine was,—that it contained three witnesses, and only one of them was designed; in so far as it bore Thomas Miller, and James ————, servitor to Pyeston. Now Miller had no designation, and James ————, who is called servitor to Pyeston, had no surname, and so *habetur pro nullo et non adjecto.* The Lords thought this nullity yet suppliable *quoad* Thomas Miller, (being before the Act of Parliament 1681.) But the question occurred to the Lords,—What if he designed a dead man? the mean of improbation *comparatione literarum,* or otherwise, was perished, seeing witnesses in seasines did not then subscribe. Others thought it alike, *in re antiqua,* whether the party designed was dead or alive; but the Lords, before they would determine whether it was suppliable or not, desired to see the decisions, how the current had hitherto run in such cases. See *7th February* 1672, *Stuart* against *Kirkhill.*

The Lords, at last, thought it of dangerous consequence to allow the designation of dead witnesses, where they are not subscribing. Yet here, before answer, they allowed a proof to either party; the one to prove that Miller was then Pyeston's servant, and the other, that he was tenant in Hilton, conform to the designation given him, in another charter, of a creditor on the same estate. See *15th July* 1664, *Colvil; 24th January* 1668, *Magistrates of* ———— against *Earl Finlater.* *Vol. I. Page 755.*

1697. *January* 19. CARMICHEL of BONYNGTON *against* WILLIAM BAILLIE of LAMINGTON.

I ALSO reported Carmichel of Bonyngton against William Baillie of Lamington; who, being charged on his bond of corroboration, suspended, that he ought to have an assignation to the first original bond granted by his curators, because it proceeded on a narrative that it was borrowed to pay a debt of his grandfather's to Mr Watson, which debt cannot be made appear; and he consigned it on that condition in Mr William Hamilton's hands, then Bonyngton's factor; which he offered to prove by his oath, or by his accounts given in to Bonyngton.

ANSWERED,—No such probation can be taken against his bond; neither can he be obliged to assign in prejudice of those whom Lamington is bound to relieve.

The Lords found Bonyngton had no prejudice to assign; and reserved all Lamington's curators' defences against him, when he should insist on the assignation. *Vol. I. Page 757.*

1697. *January* 20. THOMAS FOTHERINGHAM of POWRIE *against* SIR JAMES OSWALD and CHARLES MURRAY of HALDEN.

PHESDO reported Thomas Fotheringham of Powrie, against Sir James Oswald and Charles Murray of Halden, for holding count to him for the price of 300

bolls of malt, and of the copper and other brewing looms intromitted with by them, and belonging to Mrs Lawrie, and James Rait her husband, whereunto Powrie had right, both by disposition from them and as donatar to James Rait's escheat. Their defence was, That they being then tacksmen of the King's excise, and so owing them a considerable sum of bygones, they had lawfully poinded the same towards their payment.

ALLEGED,—This poinding was not in the terms of the Act of Parliament imposing the excise in 1661, which appoints that all poindings shall proceed upon decreets of the Commissioners, and be appreciated at the next parish church: Which method was not followed here; but a summary order by Halden's son, their sub-tacksman, to some soldiers to go and secure the said James Rait's readiest goods, &c. which was no sufficient warrant whereon to poind; and, though the Act of Parliament dispenses with the solemnity of carrying the goods to the head market-cross, yet it requires that they be apprised at the nearest parish-kirk;—all which was omitted.

ANSWERED,—The rules prescribed by that Act 1661 were observed so long as the Commissioners of Excise stood bound to make up the deficiency in each shire; but, after the Acts 1681 and 1685, whereby the country was liberated of that, it became the ordinary practice for the tacksmen to issue out these summary warrants; and the tacks set to them by the treasury seemed to give them a general allowance.

Some of the Lords were for trying what had been the custom, seeing the manner of in-bringing the King's revenue is more summary and privileged than ordinary debts: Yet the plurality found the poinding illegal and unwarrantable.

The next defence was, That the malt was voluntarily delivered to them by Mrs Rait for payment of the King's dues; and she, being *præposita negotiis*, might do it without her husband's special warrant, being for payment of such an onerous debt, and prior to Powrie's disposition.

ANSWERED, 1*mo*.—He offered to prove much of the victual was delivered and sold off posterior to his disposition; 2*do*. Her being *præposita* to the brewery might well empower her to manage and administrate, by selling out the drink, or what of the malt she could spare; but not to destroy and consume the hail subject, by giving away the whole malt, with the very cauldron and other instruments of brewing.

The Lords found, This was no regular deed of administration; and inclined to prefer Powrie on his double title of the disposition and gift of escheat. But it was started by some of the Lords, That the tacksmen's diligence of securing the malt, prior to the disposition thereof made to Powrie, might at least be equivalent to an arrestment; after which James Rait and his wife could make no conveyance or right of the same to another creditor to the prejudice of the excisemen. Which point neither being debated nor reported, the Lords recommended it to the Ordinary to hear the parties on the same. *Vol. I. Page* 758.

1696 *and* 1697. JOHN HOG *against* GEILS DOUGLAS, Relict of JAMES HAMILTON.

1696. *June* 20.—JOHN Hog, messenger, being deprived by the Lord Lyon,