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:—1*mo*. If Arnald's choosing Edward Marjorybanks was so personal as that he could not substitute nor assume his brother John, nor Bailie Graham. 2*do*. 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

if he did not prove him paid. Some thought it hard to put one in possession to find caution. But it was better so, than to put the other, (whose right was unquestionably preferable, if not paid,) or to sequestrate the rents by placing a factor. *Vol. I. Page* 600.

---

1694. *February* 1. THOMAS ROME *against* JOHN IRVINE.

PHILIPHAUGH reported Mr Thomas Rome of Clouden, against John Irvine; where the like allegeance [as in the preceding case, *Johnston* against *Hamilton*,] being proponed, that he had possessed Netherwood's lands for many years, and so was paid, and craved a count and reckoning; the other was content to find the allegeance relevant, and to give him a term, and incident diligence to prove it; but shunned to enter into a tedious count.

The Lords, finding that it could not be otherwise expede, appointed a count and reckoning. *Vol. I. Page* 600.

---

1694. *February* 1. FOTHERINGHAM of POURY *against* ALEXANDER RAIT.

PHILIPHAUGH reported Fotheringham of Poury against Alexander Rait's *cessio bonorum*. The Lords sustained this defence to stop his liberation, That the jailer's testificate did not bear the time of his continuance in person; because they had a sham trick of getting such declarations on their coming into the tolbooth for a little time; and found it also relevant that he possessed some part of the brewery, &c. but thought it not sufficient that he carried money with him; seeing he must live, and this *beneficium cessionis* is *ex humanitate et miseratione*. *Vol. I. Page* 600.

---

1694. *February* 1. JOHN PATON *against* ARCHIBALD NISBET of CARFIN.

ARBUCHEL reported John Paton against Mr Archibald Nisbet of Carfin. The Lords found Paton's right preferable to Nisbet's, over the whole three roums; but in regard of the reservation in the former decreet, bearing that he should only have recourse to the Hillside, if he fell short of his annualrents out of the other two, they restricted him; he always getting his full annualrent out of these two roums, free of all burdens whatsomever; and this notwithstanding of the declaring of the back-tack; but prejudice to him to reduce that reservation in the foresaid decreet. *Vol. I. Page* 600.

---

1694. *February* 2. CAPTAIN DONALDSON *against* JAMES CUNNINGHAM.

ARNISTON reported Captain Donaldson against James Cunningham. The question was, Whether the defender was bound to produce the disposition of