refused the second time, he gave in a protest for remeid of law to the Queen and House of Peers in England. *Vol. II. Page* 549.

1709. *December* 30. SIR DAVID DALRYMPLE of HAILLS *against* ROBERT HEPBURN of BEARFORD.

I REPORTED Sir David Dalrymple of Haills against Robert Hepburn of Bearford. The deceased Viscount of Kingston, as heritor of Haills, intents a reduction and improbation against the vassals thereof in 1666; and, amongst others, calls Bearford's father, who, to stop certification, produces a disposition to the lands; and then, on the foot of Kingston's act, there is a receipt in 1667, bearing, that John Cochran, servant to Mr Alexander Seton, advocate, for my Lord Kingston, the pursuer, had borrowed up the disposition produced for Bearford, and obliged himself to reproduce it. This process lies over all Kingston's time, and Sir James Stanefield's, who purchased these lands; and at last Sir David having bought them at a roup, he raises a transferring and wakening of Kingston's old reduction, and, amongst the other vassals, he insists against Robert Hepburn, now of Bearford, and craves certification for not production of the rights called for; who ALLEGED, You can have no certification against me, because my father produced already, and your author's advocate's principal servant took up my production, and never returned it; as appears by his receipt on the foot of your own act, standing entire to this hour unscored; and therefore, till you reproduce my papers, you are *in mala fide* to crave certification.

ANSWERED,—It is true, advocates and their servants have power, by custom and the daily practice of the house, to borrow up papers produced by the contrary party, to see what their client or employers have to say or object against the same, or if they can discover nullities therein. But that power has its limitations and restrictions; for an advocate may not defer back an oath referred to his client's oath, unless he have a special mandate for that effect, showing the client declines to swear upon that point himself; neither can he cede or renounce his employer's rights, without a warrant in writ; and though the borrowing up papers requires no special mandate, but stands upon his privilege *ratione officii et muneris publici*, yet that can never empower him to keep them for months, sessions, and years; which were of the most dangerous consequence and importance to the lieges, as here it is forty years since the disposition was borrowed up. And it is impossible Bearford would let his papers lie so long, but certainly has got it back, only the receipt has been forgot to be scored, as frequently falls out where the subscriber is dead. And if Bearford neglected to seek it, *sibi imputet*, seeing *factum cuique suum, et mora sibi nocere debet, non alteri;* and, *esto* the disposition were still in the field, what would it signify against an infeftment under the Great Seal, which can never miss to be preferred to a personal right?

REPLIED,—Cochran's receipt is as good as if it had been my Lord Kingston's; in which case *qua fronte* could he crave certification against a writ in his own hand? And as to the negligence, Bearford alleges his father died shortly after that production was made, and he was left a minor. And if it was *lata culpa*

in him not to inquire after his papers, there was as great negligence on Kingston's part, who did not insist on his process, and make avisandum with the production, and crave preference: And though it was only a personal right, yet, if you reproduce it, I can make it real by the connexion of a seasine: And the receipt is now more than twice prescribed; for being holograph, twenty years does take it off *quoad agendum*, but not as to the founding an exception thereon; for *quæ sunt temporalia quoad agendum*, the law makes them perpetual *quoad excipiendum*; and therefore, though the subscriber, not being pursued within the forty years, is free, yet there arises a perpetual exception from it to Bearford, aye till his writs borrowed up be reproduced.

DUPLIED,—Law has introduced remedies for parties recovering of their papers: By a summary complaint they can get a caption against the havers, and, if parties be so simply negligent as not to use this benefit, they have none to blame but themselves.

The Lords saw hardships and inconveniencies pressing on both sides: that writs borrowed up ought to be reproduced; on which head Sir David Cunningham, Mr Thomas Rigg, and sundry others have been overtaken; and yet it is as unaccountable, that parties should let their writs lie for a great number of years without taking them up, or using legal compulsitors for recovery of them; therefore, previous to deciding the general point, they ordained trial to be taken, before answer, how this paper has miscarried, and if it can be yet found; and for that effect to examine my Lord Pitmedden, (his servant Cochran being long ago dead,) and to take Bearford's oath of calumny, whether he has reason to allege it never came back to him, and all other manner of expiscation, to find it again if possible; it being very hard to grant a certification against a writ that the pursuer's own doers borrowed up, and no evidence produced of their having restored it, save only the presumption of the length of time and Bearford's silence. *Vol. II. Page* 549.

1710. *January* 5. PATRICK MORTIMER *against* JAMES ARCHIBALD.

AGNES Wilkie, a widow in Kennoway, being obliged, in her sickness, to some of her neighbours, and particularly to James Archibald's family, who waited day and night upon her, three or four weeks; before her death, gifted and delivered to him about £11 or £12 sterling, taking his promise to bury her honestly, and to take the rest to himself for his pains. Her friends being ignorant of this, and never acquainted till she was dead, Patrick Mortimer in Coupar, one of her nearest relations, confirms himself executor, and pursues James Archibald for restitution of the defunct's goods and money he had intromitted with, and refers the same to his oath; who depones in manner foresaid, that the same was gifted, and delivered to him out of her own hand, some weeks before her death, in the terms abovementioned. And this oath coming to be advised, it was ALLEGED,—The qualities adjected were extrinsic, and must be otherwise proven by witnesses present, who saw her deliver the money, and heard the terms on which she gifted it; and if they did it clandestinely, without adhibiting witnesses to be present, *sibi imputent*; for, though possession of moveables