

fyng the production,) and this might be delayed to a time that his witnesses for proving deathbed might be dead, and so his mean of probation totally perish; therefore he gives in a bill to the Lords, representing, That, for him to extract his decret of certification would be to little purpose; and that he had ground to believe that they kept up the papers, with that very prospect and view, that, his old witnesses being dead, then they might safely produce them: therefore craved the Lords would examine his witnesses, to lie *in retentis* to meet their process when they insisted in a reduction of his certification, that he might then repeat his probation of the deeds being done on deathbed.

The Lords considered that this pursuer had neglected a very clear remedy law gave him, if he had adjected a conclusion of improbation to his reduction; for then he would have got a certification, against which, the defenders would not have been so easily reponed; and that a pursuer in a simple reduction could regularly get no more but the certification of his summons; which is only to annul and reduce them, aye and while they be produced: Yet, the case being favourable, they ordained the bill to be answered by the defender; who, in excuse for not satisfying the production, did affirm, That, going to Flanders, he left the papers with Mr Carstairs, Principal of the College, who being now at London, he could have no access thereto till his return; and did not contradict much the examining the witnesses *medio tempore*, but opposed a commission, and craved they might come to Edinburgh and depone.

The Lords were straitened in two things:—*1mo*, How witnesses could distinctly depone upon writs not produced, nor their date yet known. *2do*, How far they could grant a commission, seeing Wood's consent to their examination was expressly clogged and qualified with their coming here. As to the *first*,—The Lords thought the difficulty might be removed by adjusting the special interrogatories, when the deeds were done, when he died, and when he contracted the sickness, and how long before; and, if he came abroad, or kept his house, and, if he came forth, whether supported or no. And as to the *second*,—They considered the testificates produced, bearing, they were so old, infirm, and valetudinary, that they declared on soul and conscience they were not able to come to Edinburgh; and so directed a commission to any whom Wood should name, and, failing thereof, to the commissary or magistrates of St Andrew's, where they dwell, to be reported against the tenth of January next.

The admitting a probation *hoc ordine* was thought a great relaxation, and dispensed with our ancient strict forms; but it was supported and maintained by material justice and equity, the great law of the world.

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1711. December 11. The LADY ENTERKIN *against* CUNNINGHAM of ENTERKIN.

THE Lady Enterkin against the Laird. Mistress Catharine Hamilton, Lady Enterkin, being in possession of her jointure-lands; John Cunningham of Enterkin, her son, alleging she had taken herself to a lesser annuity till the debts were paid, holds a Baron-court, and therein decerns the tenants of the life-rent-lands to pay in their rents to him; and then, in the tenants' name, raises a suspension upon multiple distress, as not knowing whether to pay their rents to

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the Lady or to him : and then his girdel-keeper broke up the Lady's girdel, and carried away 33 bolls meal to his own girdel. Upon thir acts of dispossession, she gives in a complaint to the Lords, craving to be repossessed of her lands, and restitution of her meal, and bygone rents, with a sum for her damages.

And this summary complaint being admitted to probation, and falling to be advised this day:—ALLEGED, There could neither be repossession, nor restitution, till the competition of right betwixt his mother and him were discussed ; for, as she craved an additional remunerative jointure, which wanted a warrant, so he instructed, by the tack of farm set to Drumsuy, she had restricted herself to a lesser annuity. And what he did was legal ; the rollment of a Baron-court being a judicial deed by our laws, both ancient and modern ; and being suspended, the only remedy in form was to call for the suspension and discuss the reasons, which he was willing to debate *instanter*. And masters have always been allowed to use their tenants' names in double poindings ; neither can they disclaim it.

ANSWERED,—The sole question now was the possession ; the point of right would come in, in its own proper place ; but it was an undoubted principle, that *spoliatus ante omnia est restituendus* ; and that the dispossession was illegal and unwarrantable is evident from the probation. And her possession was neither *clam, vi, nec precario* ; nor a momentary possession, but of a long continuance for sundry years. And his taking decreets before his own Baron-bailie was but a *color quæsitus*, and a sham-pretence to cover and palliate his oppression. And where forms of law are made use of to colour and varnish plain violence and spuilyie, it is so far from excusing it, that it aggravates the guilt.

The Lords found my Lady ought to be repossessed, but ordained her to find caution to make her intromission forthcoming to any that in the event should be found to have best right ; and remitted to the Ordinary to determine the point of right summarily with his first conveniency. Enterkin alleging the meal was yet extant in girdels, and offering to restore it to the Lady ; it was found she was not bound to accept it, after it was deteriorated by two or three years' keeping. But ordained him to pay her the price at the fiars of that year ; who, for her subsistence in carrying on the plea, stood more in need of money than victual.

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1711. December 12. FRANCIS ALLAN *against* JOHN CHAPMAN.

LORD Pollock reported Allan *contra* Chapman. Macaulay of Ardincaple and one Parlan Macfarlane, wrote a letter with one Dougal Macfarlane, in 1704, to Francis Allan, collector of the customs at Donachadee, in Ireland, obliging themselves to pay what money he should advance him. On the faith of this letter of credit, Mr Allan lends him £36 : 10s. sterling, and takes his bond in the English form. After two years' attendance, and finding no appearance of payment, and Dougal having broke and died, he raises a process, before the commissaries of Glasgow, against Ardincaple, on his letter. Who makes great opposition, first craving his oath of calumny, which put him to depone on a commission ; then objecting against the bond, which forced him to lead the instrumentary witnesses to adminiculate it, being only signed by initial letters ;