

amined on this, that there was no more intended by that renunciation but only that she should not succeed *ab intestato* as one of his executors. And so Mr M'Kell carried the cause. *Vol. I. Page 76.*

1680. *January 27.* ANENT SUBSTITUTES in TAILLIES.

WHERE one is substitute as an heir of tailyie, and the first is infest, that infestment after his death will not serve the substitute, but he must be served heir, though his name is in the first infestment *per expressum*; nor will that first infestment hinder the casualty of ward, non-entry, &c. to fall to the superior. *Vol. I. Page 77.*

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1680. *January 27.* The RELICT of ROBERT BRUCE *against* The TOWN of INNERKEITHING.

THE cause of the relict of Mr Robert Bruce, Minister at Innerkeithing, against that town, was this day debated. There is a tenement within that burgh-royal, which holds not burgage, but feu of the King: the town stents the inhabitants of it with the rest of the citizens; they suspend that they are not liable, it not being burgage-lands, and the town by their jurisdiction might not take a prisoner out of that house; and they might as well stent my Lord Halton for the house he possesses, which belonged to the Constable of Dundee; and there are Fordel, and other gentlemen, that have houses there in the same case. Craigie gave them the Lords' answer; and, on the 5th February 1680, the Lords found it not liable to be stented by the town, if the heritors of the landward parish and the shire of Fife will compear and allege that it ought to pay with the shire. For hitherto it had, like the concealed lands, paid with neither, but was cast in with other lands and teinds of the Earl of Dumfermline's; who having now sold it, it had never yet received a separate valuation. *Vol. I. Page 77.*

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1680. *January 28.* The LORD REGISTER *against* Sir WILLIAM PRIMROSE.

THERE is a bill given in by the Lord Register against Sir William Primrose, bearing, that he, as clerk to the notaries, did not attend, nor call in for the notaries' protocol-books yearly, or after their decease. ALLEGED,—The 22d Act of Parliament 1617 does indeed ordain the notaries to bring in their books to the clerk of register and his depute, but not the clerk to call for them.

The Lords, on the 6th February 1680, found he was obliged to attend personally, and not by a deputy; seeing he was not *delegatus principis, qui potest subdelegare*, but only the clerk register's depute: he could not substitute, notwithstanding that his gift empowered him, unless they could make it appear that it hath been an immemorial custom to serve by a deputy. As also they ordained Craigie and Newton to examine him if he understood the said employ-

ment. All this was done to oblige him to demit; yet we see, in the Clerks of Session, who are not the King's delegates, but only the clerk of register's, they depute the inferior clerks under them; so that the axiom is not infallible.

Again, on the 19th of February, the Lords found, in respect his father had given him the said clerkship, with power to him to call in for the said protocols, and an obligation on him to relieve his father of the hazard of not doing it, that the same imposed a necessity upon him to do it; though, in sense and common grammar, these words, "with power," import no necessity, mandate, or duty, but an arbitrament and faculty to be done or omitted at pleasure; only the rest of the points of his duty run in the same strain, "with power," &c. And, in respect he had neglected to call in for them these thirteen years, therefore they deprived him. It is true, by not calling for them, the lieges, in many cases, suffer irreparably, as in orders of redemption, in intimations, and instruments *ad remanentiam*, and many other instruments, which cannot be made up like seasines, which can be found at the registers. Yet it was never customary for them to do it; and in such things *error communis jus facere debet quoad by-gones*: and rational and indifferent men thought that a reprimand or admonition (as is to be used in the case of heretics,) for the future, might have been sufficient.

*Vol. I. Page 79.*

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1680. *January 29.* SETON of BARNES *against* FINDLAY and CARMICHAEL.

IN the case betwixt Seton of Barnes, and Findlay and Carmichael, both brewers in Edinburgh; the Lords having heard the debate reported by Castlehill, they found that the obligation in the contract of victual being to deliver marketable stuff, it was sufficient that the victual delivered was marketable, albeit not sufficient to make malt of; unless it be offered to be proven, *scripto vel juramento*, that it was communed that the victual to be sold was for making of malt: which, if it be proven, then they find it relevant to exclude the reason of suspension anent the insufficiency of the victual, for the charger to offer to prove that the victual is the same which the suspender saw on the charger's barn-floor and girnles, and were satisfied therewith after the bargain was made. And find also the reason not relevant, unless the suspenders allege, that, immediately after they found the victual insufficient, they intimated the same to the charger; and also, that the suspenders prove that the victual, so insufficient, was taken out of the foresaid victual seen in the charger's barn and girnles; and that the said insufficient victual was a part of the victual received by them from the charger and his servants.

*Vol. I. Page 79.*

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1680. *January 31.* THOMAS WILSON *against* PATRICK HEPBURN.

THE Lords, about ten or eleven years ago, in a case betwixt Thomas Wilson, merchant in Edinburgh, and Patrick Hepburn, apothecary there, found Thomas could not complain of the insufficiency of the bear bought by him, since the skipper, by his receipt under his hand at Dunbar, had acknowledged the