ANSWERED,—1*mo*, Your right is gratuitous; mine is onerous. 2*do*, Was not obliged to infeft you; because you wanted a necessary mid couple, viz. a procuratory to serve your author. 3*tio*, If one bailie refused you, you might have applied to another; and though, in Exchequer, the presenting the first signature prefers to a posterior one first past, yet that is not the case here; for the bailie could not cognosce a man without a warrant from him.

REPLIED,—My disposition bore a sufficient warrant to serve him, by that general clause—"to do all that was necessary in the premises for perfecting my right." Likeas, I had the writs and evidents of the lands to instruct the progress, and showed them to the bailie.

The Lords neither went on the latency of Thomson's disposition being kept up for many years, nor on its being gratuitous: for, if he had got the first infeftment, he would have been clearly preferable. But the Lords fixed on this point, That his disposition was defective, wanting a procuratory to serve, which Cardrona's had; and therefore preferred him: otherwise, the requiring the bailie would have been equivalent to any infeftment, had it not been for want of that step in the progress. *Vol. II. Page* 454.

1708. *July* 20. JANET BUCHANAN, Lady Leny, *against* The DUKE of MONTROSE.

JANET Buchanan, Lady Leny, as apparent heir to the Laird of Buchanan, and also a creditor in £1000 sterling, pursued a reduction and improbation of all rights the Duke of Montrose has upon that estate, and craving certification against the grounds and warrants of his apprisings and adjudications.

It was ALLEGED for the Duke,—These being led more than twenty years ago, he was not obliged to produce the letters and executions of apprising *post tanti temporis intervallum;* but the decreet of apprising itself was now sufficient to satisfy the production by the constant form and practice of the house, which did not oblige the lieges to keep such small papers after so long a time, and presumed all to have been *solemniter acta.*

ANSWERED,—It is true this presumption doth liberate the defender from producing them, when they are not extant; but I offer to prove, by the Duke's oath, that he has them; and, in this case, *præsumptio cedit veritati:* and this was so found, within these few years, betwixt *Beatson of Kilry* and *Polguild*, that, after twenty years, they were bound to depone whether they had them in their hands or not.

REPLIED,—It is now become a fixed custom, that the grounds and warrants, except it be the instructions of the debt, are not to be produced after twenty years; as was decided, 11*th February* 1681, *Kenway* against *Crawfurd*; after which time *omnia præsumuntur solemniter gesta.* And it were against common sense, that he who keeps his writs carefully should be in a worse condition than such who lose them: the careless keeper is free, and he who preserves them must exhibit upon oath, and run the risk of all the nullities, informalities, and defects they contain; which opens a door to many pleas, and overturns many peaceable possessions and securities upon niceties of executions, escaping very prudent men's observations.

The Lords observed, that both apprisings and adjudications were here called for, and yet there was a great difference betwixt them: for the grounds and warrants of adjudications, as to the judicial procedure, (abstracting from the titles of the pursuit,) were not taken up, but left in the clerk's hands, and might be sought for there. But, as to apprisings, the letters and executions were given back to the party, yet so as they were *verbatim* engrossed in the decreet of apprising, and so their nullities might be fished out there. But, that the Lords might be uniform, they ordered that practick of Polguild and Kilry to be produced, that they might see what course the Lords steered there.

In the same process, the Lady craving certification against a disposition made to the Duke, by Major Grant, of these lands, and by the Laird of Buchanan to the said Major; ALLEGED,—You can never quarrel that disposition; because your own bond for £1000 sterling from Major Grant, narrates, that he had granted a disposition to the Duke for the burden of her debt, and which bond she having accepted, made use of, and now founding on it, you can never quarrel what it homologates *per expressum;* and so Spottiswood, *voce* Improbation, observes, in *Keith of Benholm's case, 24th March* 1635. And, to seek to improve and reduce this disposition, is so inconsistent that it destroys your own right, flowing from your immediate author, Major Grant, and narrated in your own bond; for this was both to approbate and reprobate the same writ.

ANSWERED,—I may quarrel any deed, whether granted by myself or to myself, if it be my interest to remove it out of the way; which is the present case.

Some of the Lords thought the regular action for getting thir writs was an exhibition, rather than a reduction and improbation. Others said, This allegeance could not hinder the taking a day to produce whatever might operate in discussing the reasons of reduction; but the point was not determined at this time. *Vol. II. Page* 455.

1708. *July* 27. LORD ELIBANK *against* ALEXANDER MACKENZIE of FRASERDALE.

LORD Elibank, as heir to his mother, eldest daughter to Doctor Burnet, late Archbishop of St Andrew's, pursues Alexander Mackenzie of Fraserdale, son to Lord Prestonhall, in a count and reckoning, for half of the bishop's executry intromitted with by Prestonhall.

ALLEGED,—By the bishop's testament and codicil, Anne Burnet, Lady Prestonhall, his second daughter, is nominated executrix and universal legatrix, and so has the total right and property of the goods established in her person; and the Lady Elibank, her sister, had only the half of what she could recover; and he is content to account for the half of all he intromitted with, seeing it is not to be presumed he would let it perish, the half of it being his own; but he cannot be obliged to count exactly and precisely for diligence like other executors, because the bishop, by his testament, has allowed the legatars to affect the goods disponed, in case his executor be negligent or delay their payment; which imports, that he did not tie his executor to diligence.

ANSWERED for Lord Elibank,—That all he craved from Lord Prestonhall was to count to him for the inventory of the testament confirmed; and, where he