meet and stent themselves in their proportions, and bring them in to the steward. *2do*, If there were any extortion, let them complain to the judge competent, and they'll be punished according to law.

The Lords, in respect of the possession, (which was not denied,) refused the bill, reserving to them to get the way of uplifting it better regulated. If the possession had been controverted, the Lords would certainly have passed the bill, to the effect it might be proven; but there was no use for it here, the possession not being denied. *Vol. II. Page* 688.

1711. *December* 20. SIR DAVID DALRYMPLE *against* The EARL of CARNWATH.

The Viscount of Kingston, as proprietor of the barony of Hailles, pursues a reduction and improbation against the vassals of that lordship; and, particularly, calls Sir John Dalzell of Glennay, for his lands of Kirkmichael; and, after the terms are run, obtains a certification; for stopping whereof he made a partial production. The process having slept for many years, it is at last wakened by Sir David Dalrymple, last purchaser of these lands; and craving out his certification against the Earl of Carnwath, as representing his grandfather, in respect the writs then produced were taken up again; it was ALLEGED,—No certification; for your title is prescribed, in so far as you had taken no document on it for forty years preceding Kingston's citation; and so, by the Act of King James III. it was lost *non utendo*, by the negative prescription. ANSWERED,—Not competent *hoc loco;* but it should have been proponed *in initio litis*: all objections against the title must be before the taking of terms. Neither is *res integra*, the production being taken up; and, till these be again in the field, I will not debate my title. You must first put me *in statu quo*.

2do, ALLEGED,—Your summons is expired; not being renewed every seven years, according to the Acts of Parliament 1669 and 1685. ANSWERED,—These citations for interruption are only required where a process is raised and not insisted in; but here it was brought the length of a certification; after which it lasts forty years, without necessity of a septennial renovation.

The *3d* defence was,—That your author, Stewart, Earl of Bothwell, had no more by his gift of the Hepburns' forfeiture but the lands holding feu, and redeemable; of which kind Carnwath's lands were not. ANSWERED,—This restriction is taken off by a posterior charter in ample and comprehensive form.

4to, ALLEGED,—Your seasine is null *quoad* my lands in Dumfries-shire; because neither registrate in the general register nor in the particular one where the lands lie, as the Act of Parliament 1617, anent registration of seasines, requires. ANSWERED,—The haill lands being united in the barony of Hailles, and a seasine taken at the castle and messuage thereof, lying in East Lothian, being declared to serve for the whole, it was sufficient to register in the books of that shire.

REPLIED,—We must distinguish betwixt the taking of the seasine and the registrating of it; for, though the seasine, by the union, comprehends all, yet there is no such indulgence for the registration: such fictions of law are not to be extended. And by what rule can a purchaser of lands in Dumfries be ob-

liged to search the registers of East Lothian more than those of Orkney or Shetland, there being no law pointing me more to the one than to the other?

DUPLIED,—What are you that object the nullity of my seasine, who produce none in your own person? And Sir George Mackenzie, in his Observes on that Act 1617, tells this nullity of not due registration, is only competent to him who produces a right to the same lands; and, though he starts the question, where the seasine of united lands should be registrate, yet he insinuates there is no decision in it; and it is *jus tertii* to you, who produce nothing.

The Lords were clear, that the three last defences were not competent to stop production; but divided on the first, of prescription,—some thinking it might be proponed in any step of the process: But the plurality found it not receivable, after extracted acts and certification granted, till he put the pursuer in the same state he was in, by reproducing the papers taken up; and then he might be heard to propone prescription or any other defences *in causa*, at the discussing of the reasons of reduction, especially seeing the act has never hitherto been quarrelled in a reduction. *Vol. II. Page* 689.

1711. *December* 22. CARNEGY *alias* BLAIR of KINFAUNS *against* JAMES CARNEGY of PHINEVEN.

THE deceased James Carnegy of Phineven being tutor to Carnegy *alias* Blair of Kinfauns, his nephew, and likewise having married him to his daughter, and so being debtor to him both in his tutor-accounts and his tocher; there is a process of count and reckoning intented, at his instance, against James Carnegy, now of Phineven; who propones Absolvitor, upon a discharge granted by you to my father, not only of the tutor-account, but likewise of the tocher; except £1000 Scots of it, acknowledged to be yet owing; which made Kinfauns repeat a reduction and improbation he had raised of that discharge as false, and craved Phineven to abide at the verity thereof; who offered to abide *qualificate* by it in thir terms, That he found it, after his father's death, amongst his papers.

But the Lords rejecting the quality, he abode at it simply; but protested he might be no farther liable than as he who found it in manner foresaid.

Then Kinfauns, insisting in his articles, offered to prove, 1*mo*, That his uncle, Phineven, on his death-bed, in March 1707, was oft heard to regret that he had not cleared his counts with Kinfauns, his nephew. *Nota*, The date of the discharge is just three days before his death; in which space it was impossible such a long account could be ended with a dying man. 2*do*, After his death his writs were visited and inventoried, by order of the magistrates of Edinburgh, and no such paper found, though it was pretended it was in his breeches. 3*tio*, It bears to be subscribed before two witnesses, George Wilson, shoemaker in Edinburgh, and John Morrice, merchant there; whereas no such men can be found; or, if there were such men, they were dead long before March 1707, the date of the discharge.

ALLEGED for Phineven,—Clear and full discharges are not to be taken away by such lean and slender presumptions. There is nothing more frequent than on prospect of death to clear accounts; and it is no wonder the discharge was not found at the first; for his servants had rifled his pockets, and, after great