

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.*

---

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.*

---

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

receipt of bolls of good and sufficient victual; which they found obliged the said Thomas. Barns had receipts for all except 18 bolls: which they denying, it was sustained relevant to be proven by his servants who brought it in to them.

*Vol. I. Page 79.*

1680. *January 31.*

DAULING *against* MATHIE.

IN an action, Dauling against Mathie, a bond was ALLEGED to be wrong registrate in the bailie court-books of Edinburgh; whereas the parties dwell in the Pleasants, at the Cowgate-port, which lies within the regality of Broughton, and answers with the shire; and should either have been registrate in the sheriff-court books, or in the books of the Canongate.

*Vol. I. Page 79.*

1680 and 1681. PHILIP VAN PORTEN *against* ANDREW DICK and OTHERS.

1680. *January 31.*—IN the case betwixt Philip Van Porten, and Andrew Dick and Others, anent the ship taken by Captain Martine from the merchants of Hamburgh, the intromitters with the goods being pursued, the Lords found, *1mo*, That it ought to be proven the goods were piratically taken; and found the Admiral's decret not sufficient to prove it, but required the oaths of the seamen and other habile witnesses who were robbed. Now, they dwelt in Hamburgh, and might be dead. *2do*, That the cautioners for the privateer who took the said ship behoved to be discussed before the intromitters with the goods. *3tio*, Ordained the stranger to prove and adduce the laws and customs of the other nations in Europe, that the Lords may see what is the *jus gentium* in making intromitters *bona fide* with goods robbed at sea liable for restitution, and if it be *vitium reale*. For, in goods stolen by land, it is certainly an inherent vice, and they are recoverable, *rei vindicatione*, wheresoever they are found. *4to*, They reserved to themselves to consider if it should assoilye the intromitters, that the owners had once Captain Martine, the pirate, prisoner in Edinburgh, where he escaped in woman's apparel; and again prisoner at London, where they consented to his liberation. This was thought an odd and wimpled interlocutor. *Vide Zeigler. ad Grotium de Jure Belli, p. 548.*

The late author of *Jus Maritimum*, c. 4, Of Piracy, shows that the buyers of caped goods in England are not liable in restitution; but our countryman, Wellwod, in his *Sea-Laws*, c. 25, Of things taken on the Sea, shows a decision to the contrary; but it is in 1487, near 200 years old.

*Nota.*—Upon the 19th day of January 1681, the Lords having advised the probation taken at Hamburgh, with a complimenting letter from the magistrates to the Lords, thanking them for their justice; the Lords found the robbery to have been clearly done *in alto mari* by Captain Martine, and therefore decerned Captain Dick the intromitter with the robbed goods to restore *in quantum lucratus*. His oath being taken, he deponed he had paid so much to Martine, the robber. Several of the Lords voted that this ought not to be discounted nor allowed to him, because he was *in pessima fide* to buy such goods before