the Lady or to him: and then his girnel-keeper broke up the Lady's girnel, and carried away 33 bolls meal to his own girnel. 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 girnels, 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;

then raises an advocation. But, being remitted, after a long dependance, he at last obtains a decreet against Ardincaple: who, all this while, never denies his own letter or mandate; but now raises a reduction and improbation of it, alleging, he never subscribed it, but his hand was forged, and put to the same. Wherein Allan being forced to take terms for producing the letter, he obtains a diligence against John Chapman, clerk to the commissariot of Glasgow, for recovery of the said letter, it being given in to him as the active title of his process against Ardincaple, for instructing him debtor *ex mandato;* and where it is still lying, or at least ought to be, as the warrant of the commissaries' decreet pronounced against Ardincaple, which expressly bears the production of it, and so binds it on the clerk; who having come in to Edinburgh, in obedience to the diligence, and offering to depone with some quality, that it was gotten up from him, and now is lost:—This looking very like collusion betwixt Ardincaple and him, who never questioned the verity of that letter for several years that the process depended; therefore, Mr Allan declined to let him swear himself free, but contended his subscribing the decreet, bearing the production of it *speciatim*, did bind it on him, and subjected him to one of thir three; either to produce it; or *2dly*, to show somebody's receipt for it; or *3dly*, to make up the damage and interest, as succeeding *loco facti imprestabilis.*

Answered,—This was running too fast; for he was only by an incident to exhibit it, if he had it; which could never found a libel against him for the value. When that was raised, he would have the *inducie moratoriæ* to answer; but to bring him in short hand, no form would allow. All that could be done in this state of the process, was, either to take his oath or pass from it.

Replied,—Could there be a clearer probation of his having it, than his own confession, under his hand, subscribing the decreet, bearing expressly the production of it? And it were a very rare case, if he, by his oath, should deny what is proven against him *scripto.* And, if this were allowed, it would make the clerks masters of all our properties, and put us in their mercy and reverence, to dispose of our writs at their pleasure; for they ought to give up no principal papers without a receipt. And this augments the suspicion, that, during sundry years' dependance, this letter was never quarrelled as false, till now it is amissing.

The Lords saw inconveniencies on both sides. Papers may, and do miscarry in processes, where the clerks are very innocent. Many times processes are carried to judges' chambers; what, if, betwixt hands, small papers be lost, where shall this be fixed? Yea, the damage may exceed the clerk's whole fortune. On the other hand, what security have the people, who must of necessity trust their writs with clerks, if they be allowed to exoner themselves upon oath? Therefore the Lords took a middle course, that the Ordinary might hear what Chapman the clerk said, why the mentioning it in the decreet was not a plenary but only a presumptive probation of his having it; which he might elide, by condescending either *quomodo desiit possidere*, or how it comes to be amissing; and in the [mean] time, stop Ardincaple's certification for not producing the said letter. See a case somewhat parallel, *supra, 9th December* 1709, *Johnston* against *Pedder*, where a clerk was overtaken for giving out a precept where there was no decreet. *Vol. II. Page* 686.