

in him not to inquire after his papers, there was as great negligence on Kingston's part, who did not insist on his process, and make avisandum with the production, and crave preference : And though it was only a personal right, yet, if you reproduce it, I can make it real by the connexion of a seasine : And the receipt is now more than twice prescribed ; for being holograph, twenty years does take it off *quoad agendum*, but not as to the founding an exception thereon ; for *quæ sunt temporalia quoad agendum*, the law makes them perpetual *quoad excipiendum* ; and therefore, though the subscriber, not being pursued within the forty years, is free, yet there arises a perpetual exception from it to Bearford, aye till his writs borrowed up be reproduced.

DUPLIED,—Law has introduced remedies for parties recovering of their papers : By a summary complaint they can get a caption against the havers, and, if parties be so simply negligent as not to use this benefit, they have none to blame but themselves.

The Lords saw hardships and inconveniencies pressing on both sides : that writs borrowed up ought to be reproduced ; on which head Sir David Cunningham, Mr Thomas Rigg, and sundry others have been overtaken ; and yet it is as unaccountable, that parties should let their writs lie for a great number of years without taking them up, or using legal compulsitors for recovery of them ; therefore, previous to deciding the general point, they ordained trial to be taken, before answer, how this paper has miscarried, and if it can be yet found ; and for that effect to examine my Lord Pitmedden, (his servant Cochran being long ago dead,) and to take Bearford's oath of calumny, whether he has reason to allege it never came back to him, and all other manner of expiscation, to find it again if possible ; it being very hard to grant a certification against a writ that the pursuer's own doers borrowed up, and no evidence produced of their having restored it, save only the presumption of the length of time and Bearford's silence.

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1710. *January 5.* PATRICK MORTIMER *against* JAMES ARCHIBALD.

AGNES Wilkie, a widow in Kennoway, being obliged, in her sickness, to some of her neighbours, and particularly to James Archibald's family, who waited day and night upon her, three or four weeks ; before her death, gifted and delivered to him about £11 or £12 sterling, taking his promise to bury her honestly, and to take the rest to himself for his pains. Her friends being ignorant of this, and never acquainted till she was dead, Patrick Mortimer in Coupar, one of her nearest relations, confirms himself executor, and pursues James Archibald for restitution of the defunct's goods and money he had intromitted with, and refers the same to his oath ; who depones in manner foresaid, that the same was gifted, and delivered to him out of her own hand, some weeks before her death, in the terms abovementioned. And this oath coming to be advised, it was ALLEGED,—The qualities adjected were extrinsic, and must be otherwise proven by witnesses present, who saw her deliver the money, and heard the terms on which she gifted it ; and if they did it clandestinely, without adhibiting witnesses to be present, *sibi imputent* ; for, though possession of moveables

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infers a presumptive title, yet it admits of pregnant presumptions to elide it,—as that they were in the woman's possession about the time of her death; and as donation is never presumed, and at most is but *donatio mortis causa*, which cannot subsist above £100 Scots; and this gifting, being *factum alienum*, must be proven by witnesses: else we open a door to wives and servants about defuncts, when they are expiring, to put to their hands to moveables; and when they are pursued, to defend and discharge themselves, by saying they were gifted; which encourages both theft and perjury to cover it: And as *nemo præsumitur donare*, and that *semel dominus* is presumed to continue so, till it be proven *quo modo desiit possidere*; and that he who depones *super facto alieno*, must prove it, by Dirleton's Observe, 16th November 1672, *Fife* against *Daw*; so here their oath can never exoner them.

ANSWERED,—Possession in moveables must presume property, else all commerce would be at a stand; and if you refer it to the party's oath, and he depone anent the cause and title of his possession, that it was by gift, sale, excambion, or the like, the same is probative and intrinsic, and cannot be divided; as the Lords found, 3d February 1672, *Scot* against *Elliot*.

The Lords found the qualities adjected to the oath intrinsic, and required no other probation; but, in regard it was insinuated that the woman was imposed upon, and her sickness concealed from her nearest relations, who lived within four or five miles of the place, they allowed them to condescend on any relevant qualifications of fraud or circumvention, seeing it is fit dying persons should be free of all importunity, solicitations, and impressions.

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1710. January 7. The REVEREND MR WEBSTER and OTHERS against MICHAEL ALLAN.

MICHAEL Allan, late Bailie of Edinburgh, being proprietor of a house in Miln's Court, at the head of the West-bow, and having a vault or cellar under the passage and entry leading into the said court, and the head of it coming to fail, by the loads and heavy carriages brought over it for the use of the back tenements of that land, he applies to Dean of Guild Neilson, and craves a visitation; who calls some wrights and masons, who declare that the roof of his cellar was damaged by the carriages brought into that court; and, upon citation of the adjacent heritors, he decerns them to bear a proportional part of the expense in repairing it, extending to £100 Scots, or thereby. Mr Webster the minister, and others, raise a suspension of this sentence as iniquous, on thir reasons,—That they had bought their houses from Mr Miln the builder, with a clause in their dispositions, of free ish and entry, and so can no more be liable for repairing his cellar than any other of the lieges whose business leads them to resort to that court; and it is as ridiculous to burden them as to require the neighbouring heritors in the Parliament Close, or at the heads of wynds and streets, to uphold and repair the cellars and *fossata* digged under the ground of these passages, over which all the lieges walk; and this being a *via publica*, it was free to them as well as any other of the lieges, to pass and repass, and to bring their loads and burdens that way.