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 obligement 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* bygones: 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 BARNS *against* FINDLAY and CARMICHAEL.

IN the case betwixt Seton of Barns, and Findlay and Carmichael, both brewers in Edinburgh; the Lords having heard the debate reported by Castlehill, they found that the obligement 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 girnels, 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