of Shaw of Sauchie's estate standing in Clackmannan's person, upon the head of the interdiction.

ALLEGED, 1*mo.*---I cannot take a day to produce, because my authors bound in warrandice are not called, *viz.* Kennoway and sundry others. *2do.* I am not obliged to produce any real rights to you, because your libelled summons is only founded on an adjudication.

ANSWERED to the *first*,---You condescending on the authors, I will cite them to the same term *cum processu.* To the *second*,---My charter and seasine is given out, though not libelled on; which is sufficient to compel you to produce your infeftments also.

REPLIED,---Though citing *cum processu* be allowed in other cases, yet it ought not here, because you narrate the progress; and so, knowing them, you should have cited them. To the *second*,---The charter and seasine is posterior in date to the raising and executing the summons, and so is *filius ante patrem.*

DUPLIED,---*Esto* I know the authors, yet, being dead, I can give my oath of calumny I know neither their representatives nor where they live. To the *second*,---The real right must be drawn back to support the summons, even as one is permitted to confirm before extract.

The Lords repelled the two dilator defences, and ordained them either to take a term, or then certification to pass. *Vol. II. Page* 30.

1699. *January 5.* BRISBANE of BISHOPTON *against* ANDREW SCOT.

SHAW of Bargarran, and Brisbane of Bishopton, being debtors by bond in 1000 merks to John Scot, merchant in Glasgow, and, failing of him by decease, to Andrew Scot, his brother; and the said John being three years absent out of the kingdom, a report came to Glasgow that he was dead; whereon Andrew adduced some witnesses, before the bailies there, of his being habit and repute dead, and thereon registrates the bond as substitute; and, taking out a caption against Bishopton, apprehends him: where he is kept a week or two in the jailer of the tolbooth's house, capitulating, during which time John Scot returns; whereupon he is liberated, and afterwards transacts the debt with the said John, and pursues Andrew for wrongous imprisonment, and obtains a decreet against him for £246 for his damage and expense, and £100 Scots of fine to the fiscal.

This decreet was suspended on thir reasons:---1*mo.* He was *in bona fide* to believe the debt was his own, having received letters of his brother's death; and so his caption was warrantable, seeing Bargarran was *lapsus*, and Bishopton, a life-renter, *vergens ad inopiam.* *2do.* Bishopton's legal method was to have suspended on this reason,---that the creditor in the bond was yet presumed to be alive *nisi probetur mortuus.* *3tio.* The bailie was precipitant and unjust in taking Bishopton's oath on so absurd and exorbitant accounts for detention for a week or two; and there was neither *dolus* nor *lata culpa* on Andrew's part, but a pure mistake.

ANSWERED for Bishopton,---He was not obliged to suspend a charge so covetous and unjust, where one would anticipate his succession before it fell due; and he offered to pay, Andrew giving him warrandice at his brother's hands if

alive; which he refused, as an instrument against him proves: and, *esto* his brother had been dead, yet he could not summarily charge without a service or confirmation to complete his right.

REPLIED,---Where a substitution runs in thir terms,---that the sum is made payable to one and his heirs; which failyieing, to such another *nominatim*, that person cannot have access till first there be a cognition that the heirs of the institute's body have failed; but if it run to Titius, and failyieing of him by decease to Sempronius, in that case our law neither requires service nor confirmation; but the substitute may call for the money without any other solemnity, save to prove that the first person is dead, if it be denied. See Stair, 14*th January* 1663, *Beg* against *Nicolson;* and 3*d July* 1666, *Fleming*.

The Lords were clear there was no need of serving or confirming in this case; but some inclined to see what documents he had to lead him to the belief that his brother was dead; others thought he was *in culpa*, seeing the money was offered him on his warranding against his brother, which he refused; therefore, without any farther trial, they found his detaining Bishopton unwarrantable, but reduced the bailie's modification of the expense as too high, from £246 to 100 merks, and assoilyied from the rest; as also suspended as to the fine adjudged to the procurator-fiscal, as exorbitant and oppressive. *Vol. II. Page 32.*

1699. *January* 6. ADAM CARLYLE of BRIDEKIRK *against* CARLYLE of LIMEKILNS.

HALCRAIG reported Adam Carlyle of Bridekirk against Carlyle of Limekilns, being a reduction of a decreet-arbitral pronounced in 1682, by which he was most enormly lesed; the controversy being anent some bygone feu and non-entry duties, which Limekilns owed to Bridekirk, his superior, for which they decerned him not only to give up some debts and bonds Bridekirk's father owed him, but also to thirle his lands to his mill.

ANSWERED,---There was no iniquity, 1*mo*. Because he not only got a discharge of the bygone casualties of the superiority, but was also to get his entry and charter; and as to these debts, Bridekirk not representing the granter of the bonds, he could never be made liable. 2*do*. They can never quarrel this decreet-arbitral, because homologated by charging me with horning to implement; and so he cannot both *approbare et reprobare*.

REPLIED,---You having declined to implement your part of the said decreet, I must be free, and may now reduce it. 2*do*. Performance upon your part is become both imprestable and impossible, because of incumbrances upon your estate by adjudication and otherwise. 3*tio*. It would be now liable for these debts discharged, on the 24th Act of Parliament 1695, for obviating the fraud of apparent heirs.

The Lords thought he having made use of the decreet by charging on it, he can neither repudiate nor reduce it; but, if the other had also reclaimed, then, *mutuo consensu*, they might recede from it, seeing *unumquodque eodem modo tollitur quo colligatur*; but that it was now turned *factum impræstabile* was not a reason of reducing it on iniquity, but a ground to annul it, unless the creditors-adjudgers from him would concur and offer to implement their debtor's part, by receiving him vassal, and giving him a charter; which probably they