1671. *December* 5.—The said interlocutor being reported, the Lords found, though the violence was only used to the father, and not to the sons, and though the sons granted the bond, and not the father, yet because of the *pietas paterna*, and propinquity of blood, that the bond was null; the reducer always proving the force adhibited to the father, and that there was a standing suspension of the caption by which they took him. *Vide infra*, No. 532, *January* 10, 1677. [*Duke of Hamilton* against *Stewart.*]

*Advocates' MS. No.* 279, *folio* 117.

1672. *June* 13.—The probation coming to be advised, used in that action marked *supra*, betwixt Macintosh and Spalding, at Numbers 278 and 279; the Lords reduced the bond, because they found the force adhibited to the father equivalent as if it had been done to the sons, and that he was taken with caption, the ground thereof being suspended and the same intimated. *Vide infra*, No. 363, [*July*, 1672, *Essentuly.*]

Then it was ALLEGED,—That the Lords reponing him against that bond as elicited by force, then they must also be reponed against a discharge given by them of all they could ask or crave of him, which they did in contemplation of this bond now reduced, which they accepted in satisfaction of all; and, therefore, they seek regress to what they could have charged him with, before they got that bond. The Lords found the reposition ought to be mutual and reciprocal, and therefore ordained him to deliver up that discharge, and declared that both parties should be in *eodem statu* they were in before that time, as if the said bond and discharge had never been granted.

Then they craved to be reponed to the condition they were then in, *cum omni causa*; and seeing he was now much deteriorated, and diligence done against him since that time, that *cautio judicatum solvi* might be found to them, in case they might prevail in those claims they had against him.

The Lords refused to repone them otherwise than *in statu quo*, seeing it was their own fault and illegal procedure *(ex quo nemo debet lucrari,)* that has drawn them in this *premunire* and prejudice, *et sic tibi imputes.*

*Advocates' MS. No.* 337, *folio* 134.

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1672. *June* 15. ——— *against* STUART of BRUGH and his SPOUSE.

ONE Mrs. Stewart being married upon one Buxton, he, being taken at Worcester, made his escape and went over to the parts of France, where he staid by the space of eight or ten years. His wife, having waited about seven years without hearing from him, supposing him to be dead, married one Mr. Seaton. After they are married some two or three years, home comes Buxton, her first husband, and confesses ingenuously he had wronged her, and occasioned that snare she had fallen in, in never giving her the least notice of his being on life; and, therefore, to make her amends, takes her home and treats her very kindly as his wife. He at last dies, and she marries again to one Stewart of Brugh, in Orkney; and having given a bond in her reputed viduity, betwixt the going away of her husband and her marrying Mr. Seaton, for 700 merks; and she and her present husband being

charged thereon, suspension thereof is raised on this reason, that she was *vestita viro* at the time of the granting, and he does not consent, and so the same is null of the law.

To which it was ANSWERED,—That she was *tenta habita et reputata vidua*, which put the lieges sufficiently *in bona fide* to bargain with her; that she really believed she was such a one, in regard she married again; that a minor affirming himself to be major, though falsely, yet will never be restored against that bond, and so with her.

REPLIED,—*Præsumptio et fictio cedit rei veritati:* now *ex eventu*, it appeared she was then clad with a husband, though in regard of his absence the common presumption ran to the contrary; and, therefore, the bond must be void and null. *Item*, there was no dole in her, as in the minor's case.

I think the reason of suspension not relevant.

*Advocates' MS. No.* 338, *folio* 134.

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1672. *June* 15. MR. PATRICK HOME Advocate, *against* MR. JOHN PRESTON Advocate.

IN the action between Mr. Patrick Home and Mr. John Preston, advocates; Mr. Patrick having right to the lands of Broomsbank, by virtue of a disposition from William Brown the heritor; and Mr. John Preston having adjudged from the heirs of William Dounie a wadset of these same lands, and a comprising led thereof, he compeared in a pursuit at Mr. Patrick's instance for mails and duties, and craved to be preferred.

Against which compearance of his, it was ALLEGED that his rights and sums therein contained were satisfied by intromission of him and his authors. And so the action resolving in a count and reckoning, it fell to be debated to which right possession ought to be ascribed.

Mr. Patrick ALLEGED it ought to be ascribed to the extinguishing of the comprising, as being *durior sors*, the most sovereign and preferable right.

Mr. John ALLEGED it ought to be ascribed to that whereby he truly apprehended possession, viz. the wadset, and so for payment *primo loco* of the back tack duties; and that William Dounie was long in possession before he led apprising, *ergo*, the possession cannot be ascribed to it.

The Lords, not so much by way of decision, as of consent of parties, would not suffer Mr. John to take the advantage of an expired apprising, and, therefore, ascribed his possession of all years after the deducing of the apprising, &c. *primo loco* to his apprising, that it may become extinct: but ordained Mr. Patrick to pay the just sums yet owing of the comprising, the back-tack duties, the principal sums in the wadset and personal bonds, and their annualrents, as shall be instructed to be owing by Mr. John Preston, and appoint Mr. John to assign his rights to Mr. Patrick. *Vide supra*, No. 334, [*January* 1672, *Aytoun* against *Lauder.*]

*Advocates' MS. No.* 340, *folio* 135.