

inhibition as accords. But where he REPLIED, The compriser was satisfied, either because he had intromitted, or might and should have intromitted, seeing he debarred others having right; the Lords FOUND this relevant, and ordained them to count and reckon.

*Act. Wallace.*

*Alt. Andersone.*

*Advocates' MS. No. 55, folio 79.*

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1670. *July 2.* GEORGE MONTEITH *against* GEORGE ACHESONE.

THIS was a pursuit, for making payment of some money contained in a precept drawn on the defender, and accepted by him; as also for sundry other particulars which I do not remember.

*Advocates' MS. No. 56, folio 79.*

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1670. *July 2.* PENNICUIK, Chirurgeon, *against* HAY.

THIS was a charge on a bond. The reason of suspension is, The bond is null; it wants witnesses. ANSWERED, he produces also the suspender's letter, acknowledging the debt. REPLIED, the letter *laborat eodem vitio*, and so cannot prove. DUPLIED, he refers the truth of the subscription to the suspender's oath. This was found relevant.

The second reason is, That as a bond granted by a minor having curators without their consent is null, so a bond granted by a minor *in familia paterna* without his father's consent: but such is this bond. ANSWERED, denies he was minor; *2do, esto*, he had been then minor, he can never be free of this bond, because it is offered to be proven it was granted for medicaments furnished by the charger to the suspender in his sickness.

The Lords assign a term to the suspender to prove he was then minor; and though that were proven yet they will sustain the bond *pro tanto* as shall be proven furnished.

*Act. Dinmuire.*

*Alt. Yeoman.*

*Advocates' MS. No. 57, folio 79.*

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1670. *July 2.* Anent a BOND of PRESENTATION.

ONE being charged to pay a penalty contained in his bond, by which he was obliged either to sist a certain person taken with caption, at such a precise day, or else pay such a sum; because he had faillyied in sisting the debtor:—

ALLEGED,—*Imo*, *Absolvitor* from the penalty, because there is no day expressed in the bond at which he was liable to sist him; and therefore he was not obliged to sist him till they required it, which they never yet did.

*Vide infra*, No. 409, [3d July, 1673, *Seaton* against *Forbes* ;] and 639, [1st January, 1678, *Clelland* against *Lockhart*.]

REPLIED,—They offered to prove by the defender's oath he engaged to present him betwixt and such a day, and that it was so agreed upon, though it be omitted in the bond. This was FOUND RELEVANT.

That *2do*, ALLEGED,—He could not be bound to sist him at that day, because he offers him to prove he was then lying bedfast of a very heavy sickness, which behoved to purge his failie. Sir George Lockhart remembered the same was found relevant to himself, in an action some few days before, *viz.* on the 30th of June, 1670, (it is No. 47, *supra*.) seeing the same was *casus fortuitus*: yet he contended that the defender had yet incurred the penalty, in so far as he was obliged (not indeed to sist him when he was lying sick and unable,) but *primo quoque tempore*, so soon as he was able to come abroad and travel; which they did not, and therefore must be liable. REPLIED,—That they needed not offer him till they were required. Which was REPELLED; since here *dies interpellat pro homine*, and therefore they found it was the defender's duty to have offered him as soon as he was in a condition to come abroad.

Then they ALLEGED,—They offered them to prove he has ever since lain sick and unable to come abroad. Which was FOUND RELEVANT.

*Act.* Lockhart.      *Alt.* Cheap.

*Advocates' MS. No. 58, folio 79.*

1670. July 2. SIR ALEXANDER CUNYGHAME of Camskeith *against* The TOWN of HADINTOUN.

THIS was a charge for delivery to him of a cup, or of L.15 Sterling as the price thereof, which the said town was decerned by the commissaries to make payment of to him as he who had won the same at their horse race. The reason of suspension was, that this being about a horse race it was noway a consistorial matter, and so the commissaries were not judges competent to the same; but *esto* they had been judges, they committed manifest iniquity, in so far as they repelled an unanswerable defence in law, *viz.* that Camskeith could never be heard to seek the cup, because they offered them to prove that, being weighed at the louping on and at the leaping off, he was lighter when he leapt off than when he began, and so can never plead the cup; and this, though the same was proven by the judges sworn and appointed for weighing them.

ANSWERED,---This is *jus tertii* to the town, and noways competent to them but only to the second rider, who compears not; *item*, denies there were any such persons sworn to weigh them; as also to prove the custom in that place is that they do not weigh them at their leaping off, which special custom must derogate to