This being taken to interlocutor, the Lords found the letters orderly proceeded, without respect to the suspension, unless the party would yet find sufficient caution, if he succumb in the suspension. It was a little rub on the Lord, but much more on the clerk to the Bills. It were much to be wished that a subsidiary action were tried against the clerks of that chamber, for receiving so many irresponsal cautioners as they do, especially where the insufficiency is intimated to them. Yet I confess, if that were brought in practice it might make that place very dangerous, yea a snare, and might draw more burden on Sir William Bruce than he is worth, since it is impossible for him to know the condition and solvency of all the lieges in Scotland; and it is enough they have a designation by land, and, in vulgar estimate, are reputed worth the sum charged for at that time when they are received. *Vide* more of this *alibi; item,* No. 489, [Historical Volume,] *July* 1676, *Earl of Argyle and Maccleans.*

Advocates' MS. No. 311, *folio* 127.

1672. *February* 1. SIR JAMES RAMSAY of Whythill *against* MAXWELL of Garnsalloch.

IN the action [mentioned in page 612,] between Sir James Ramsay and Maxwell of Garnsalloch, at number 302; the Lords found an act of curatory null, because three was declared to be a quorum, and three never accepted, and so their not acceptation (though the rest acted as curators) made the whole curatory to fall. But I suppose it will not be so in a tutory, where some, yea the major part, renouncing, the office accresces unto the rest, though the fewer: at least there will be more doubt in it. See Hadington, *December* 12, 1609, *Fairsyde* and *Adamsone.*

Advocates' MS. No. 313, *folio* 127.

1672. *January* 10, and *February* 1. LADY MACCARSTON and CAPTAIN GUTHRY, her Husband, *against* The LAIRD of MACCARSTON, her Son.

January 10.—A MOTHER having alimented her children, which she was not otherwise bound to do; *quæritur,* if she will get repetition thereof? It seems she will not, if she be yet a widow, *quia præsumitur inter ascendentes et descendentes præstitum ex pietate,* and so *cessat repetitio;* but the presumption fails *si præstita sint postquam super induxit vitricum vel si protestata fuerat. Vide omnino Nesennius,* 34 *D. de negotiis gestis.*

Advocates' MS. No. 296, *folio* 123.

February 1, 1672. In the action noted *supra* at number 296, betwixt Captain Guthry, who had married the Lady Maccarston, and the Laird of Maccarston, her son; the Lords found that a woman, having alimented her children come to

years, (though she was at the time clad with a husband,) and made no conditions with them, could have no repetition, because there the presumption of donation takes place; but if they were infants who were not capable of pactioning and entering into terms, then the mother's alimenting them, and not declaring *quo animo* she did it, prejudges her not, but she may thereafter crave the same. I think it ought also to be considered, if the children had *aliunde* sufficient means whereon they might have been alimented according to their rank and quality; in which case, I think the presumption *quod mater vellet donare* is weak; but if she liferent the whole, or the greatest part, then the presumption is pregnant against repetition.

See this and other two points in the informations beside me. *Vide infra February* 1676, No. 471, § 3, [*Viscountess of Oxenfuird* against *her Son.*] See *February* 18, 1679, *Sibbald of Kair.*

Advocates' MS. No. 314, *folio* 127.

1672. *February* 1. DAME ANNA FOULLS *against* The CHILDREN of PRESIDENT GILMOUR.

IN the action pursued by Dame Anna Foulls against the children of President Gilmour, the Lords inclined to find there ought to be a representation in moveables, on the same very reasons that it has been hitherto received in heritage; so that if one die leaving two brothers or two sisters behind him on life, and one of them die before confirmation, his or her children *jure representationis et stirpis* will come in and carry away the equal half of the executory from the brother or sister still on life: but if, at the time of his decease, he leave only one brother on life, and nephews by another who predeceased, the question will be greater, whether then the brother's children will come in *pari passu* with their uncle, to the executory. But for the first case, they say it was already determined in 1663 or 1664, between Bells and . Sure I am, before that time it was a novelty and heresy in our law, and contrary to its most uncontroverted principles.

Advocates' MS. No. 315, *folio* 127.

1672. *February* 2. Anent PROTECTIONS.

IT was questioned this day amongst the advocates, if a protection could defend one from a caption taken out against him upon a decreet for exhibition of writs. It seemed to be out of question that it would not, seeing a protection defended his person against civil debts, but not from such deeds as these.

It was also doubted whether a man at the horn, who has not *personam standi in judicio*, obtaining a protection, so redintegrates his state that he may pursue or defend. And it was thought it did not, because protections being odious should