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

not be enlarged; and a horning has all its civil effects, notwithstanding of a protection, save only caption; so that annualrent will be due thereon, his escheat may be gifted, and so of all the rest.

Advocates' MS. No. 316, *folio* 127.

1672. *February* 6. Mr. JOHN BAYNE of Pitcarly *against* Mr. GEORGE SCOT of Pittedy.

THE Lords having advised the debate betwixt Mr. John Bayne of Pitcarly and Mr. George Scot of Pittedy, with the depositary, Mr. Robert Reull, his oath, they found the minute obligatory, and ordained the same to be given up by Reull to Pitcarly; notwithstanding it was alleged that the same was not a delivered evident, but only consigned till next meeting, at which time sundry things controverted betwixt them were to be communed on; so that it being an unconsummated bargain, there was *locus pœnitentiæ*, likeas he did resile *debito tempore;* see Balmanno's practiques *verbo* Penalties, page 224, *et seq.;* as also, he offered to pay the penalty to be freed of the bargain, which penalty was 4000 merks; which the Lords repelled, as being over and above the performance. See it so decided on the 5th of *March*, 1634, *Murray* against *Lord Blantyre; March* 19, 1630, *Crichton.* But in regard, it was controverted betwixt them, whether Pitcarly should take, in part of the price, a bond of 20,000 merks, granted to Mr. George, by William Calderwood, who acquired the lands of Pittedy, seeing the same was clogged and affected with sundry conditions, and expressly that William Calderwood should retain it ay and while the lands of Pittedy were disburdened of the incumbrances condescended on, which are not yet purged; the Lords recommended to two of their number to consider how the said bond might be made effectual to Pitcarly, so that he might accept it in part of the price of his lands. See the information of it beside me.

Advocates' MS. No. 317, *folio* 128.

1672. *February.* SIR GEORGE GORDON of Haddow *against* The LAIRD of COCKBURNE.

ABOUT the beginning of this month was the debate betwixt Sir George Gordon of Haddow and the Laird of Cockburne, wherein the case was as follows; Bailie Mercer being debtor to Haddow in the sum of 3000 merks, and Cockburne being bound for Mercer in sundry considerable cautionaries, he obtains for his relief an assignation to a bond of 4000 merks, amongst many other bonds due by the Laird of Cragievar to Bailie Mercer. Haddow hearing the Bailie was breaking, and had disposed on the most part of his estate, and particularly on that bond, he causes draw an assignation of Bailie Mercer's bond of 3000 merks to him in favours of Cragievar, Mercer's debtor, and delivers the same to Mr.