The Lords did, notwithstanding, assoilyie the defender, and found, That in this or the like cases, where bonds are registered against any one party who was living, it ought to exoner the tutor from exhibition; and the liferenter or curators of a minor, succeeding to the tutor, ought to pursue a registration against the heirs of the principal debtor, or any other cautioners who were then living the time of the registration.

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1669. *November* 27. WILLOX *against* COUTS.

CHRISTIAN Howison being married to David Knolles, burgess of Aberdeen; after there was a son begotten of the marriage, she did resign, in favours of the husband, a tenement with barn and barn-yard belonging thereto, and in favours of herself in liferent, and the heirs of the marriage; which failing, to his heirs whatsoever. At which time the husband gave bond, bearing, That for as much as all the means he had was by his wife's virtue, therefore he obliged him and his heirs whatsoever, failing heirs of the marriage, gotten or to be gotten, to pay to his wife, her heirs or assignees, the sum of 500 merks, at the first term after the last of their deceases; whereupon Dr Willox, executor of the said Christian, did pursue Alexander Couts, who was heir by progress to the husband, for payment of the 500 merks.

It was ALLEGED, That the defender was not obliged in payment, because the condition of the bond did never exist; in so far as there was an heir of the marriage who survived the father, and was infeft in the same tenement of land; to whom the defender succeeded, but not to the husband who was obliged by the bond.

It was REPLIED by the pursuers, That the meaning of the bond could not be otherwise interpreted; but whensoever that tenement of land should fall to the husband's heirs, by the death of the heirs of the marriage, the sum of the bond should be due; seeing it expressly bears to be payable at the death of the last heirs.

The Lords were much divided about the interpretation, seeing the heir of the marriage did succeed the father; for, if the defender had been heir to the husband, in that case they found, that undoubtedly the sum would have been due: So it being otherwise, they recommended to the parties to agree.

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1669. *December* 2. ARKINLEYS *against* CAMPBELL of GLENCARRADALE.

IN the above mentioned removing, pursued at Arkinley's instance as being infeft in his father's estate, which was forefaulted, upon the resignation of Duke Hamilton who was donatar to the forefaulture, against Glencarradale, as possessor of the lands of Auchattan Moglen, which was contained in his seasine:

It was ALLEGED for the defender, That he bruiked by tolerance from Camp-

bell of Kilberry, who was apparent heir to his goodsire, who stood infeft in the said lands. It being REPLIED, That the tolerance was only probable *scripto ;*— It was DUPLIED, That the apparent heir compearing, and owning the defender's possession, there was no necessity of a tolerance.

The Lords found, That there was no necessity of a tolerance to be produced in writ; seeing the pursuer did not allege that he or his authors had ever been in possession.

Thereafter it was ALLEGED, That the apparent heir of Kilberry could have no interest to defend, because he could not allege that he or his predecessors had been in possession these forty years bygone; and so the right was prescribed; especially in this removing, which was a possessory judgment: but he ought to have intented a removing at his own instance. It was ANSWERED, That the pursuer not being able to allege possession, in effect the removing was only *adipiscenda possessione ;* wherein Kilberry having as good right as the pursuer,—*viz.* his predecessor's seasine, which was long prior, and whereupon, in a double poinding, at the tenant's instance, he would be preferred,—he had a good interest to compear and debar the pursuer in this removing.

The Lords, before answer, ordained all parties to produce all rights which they or their predecessors or authors had of the same lands; and to condescend and prove, if any of them ever had possession in the manner thereof.

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1669. *December* 3. THOMSON *against* IRVING.

THOMSON, having obtained a decreet before the commissaries of Aberdeen, against Irving, for payment of 100 merks; as likewise ordaining him to stand barefooted at the parish kirk, and in face of the congregation, to crave pardon for calling him a thief and robber:

The decreet was SUSPENDED upon this reason:—That he had pursued Thomson before the sheriff for the same crimes; and, by the depositions of the witnesses produced, it appeared that the facts were proven. It was ANSWERED, That, notwithstanding of these depositions, Thomson was assoilyied. To which it was REPLIED, That the sheriff's decreet was given by collusion; and the suspender offered yet to prove the said crimes.

The Lords found the letters orderly proceeded for the sum of money decerned; but did ordain the acknowledgment of the offence to be before the commissary court; in respect that the sheriff's decreet was not quarrelled either by reduction or a summons of error, and refused to receive any new probation.

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1669. *December* 8. CAMPBELL of ORMSAY *against* The LAIRD of MACNAUGHTAN.

IN a spuilyie, pursued at Ormsay's instance against this Macnaughtan, as heir