him, of which she got payment; as also, that there was a preferable debt due to Mr. John Fraser affecting the lands disponed to the defender by the said Major Maxwell, to which he acquired right: relevant to assoilyie from the pursuers' process, in so far as she received from Earlston.

*Act.* Ferguson. *Alt.* Boswall. Sir James Justice, *Clerk.*

*Vol. II. No.* 16. *Page* 19.

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1716. *July* 17. MAXWELL of Orchardtown and MAXWELL of Cuil, *against* M'LELAND of Barklay.

THERE having been a complaint given in to the Lords by Sir George Maxwell and Cuil his factor, against Barklay, as having unwarrantably ejected them from some lands whereof they were tacksmen; in so far as, notwithstanding of a protestation scored on production of a suspension, a second was put up and extracted, and Cuil ejected; and concluding damages, &c.—the defender urged the constant form, viz. That, when there is a protestation put up in the minute-book, calling for production of a suspension or advocation, and that the same is thereafter produced and scored; the practice is, that the suspender, or his doers, cause the keeper of the minute-book score the said second protestation, because the suspension was formerly produced.

ANSWERED for the plaintiff,—That, if the suspension was in the charger or his doer's hands, (as here it must be presumed it was,) he can have no pretence to justify his putting up and extracting a second protestation, and using execution upon a decreet, whereof the suspension was presumed to be in his own hand undiscussed.

The Lords found the charger liable in damages and expenses.

*Act.* Ja. Ferguson, jun. *Alt.* Erskine, jun. Roberton, *Clerk.*

*Vol. II. No.* 19. *page* 23.

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1716. *July* 26. PITCAIRN of Dreghorn *against* COCHRAN of Ferguslie.

MR. DAVID PITCAIRN of Dreghorn, being appointed to take up a list of the pollable persons in the parish of Collington, he himself was contained in the list, and classed at nine pounds Scots; and the said list having been given in to Ferguslie, the general tacksman of the poll, Dreghorn accordingly made offer of the said sum, which Ferguslie refused, alleging he was not given up in the list. After some reasoning, Dreghorn asserting, and Ferguslie denying, that he was in the list: at last Dreghorn wagered the whole poll in Collington parish that he was contained in it, and Ferguslie did wager the quadruple of the said poll that Dreghorn was not in the list. There having occurred several points to be discussed in the

cause, this single one, viz. whether here there was at all any wager properly so called, was only discussed by the Lords: And Dreghorn contended there was,

Because this was not a simple offer, but a formal agreement and transaction concerning the truth of a matter of fact, and the promise upon either hand was the consequence of that bargain; so that here there intervened all that was necessary to complete a formal wager, which is reprobated by no law.

ANSWERED for Ferguslie,—That though Dreghorn did indeed offer a wager to the value of the whole poll of that parish, yet [he] was no otherwise answered than by another offer to wager the quadruple; so that there was nothing but an offer to wager *hinc inde*, but no actual wager closed with, nor accepted: since Ferguslie did not accept of the terms offered by Dreghorn, neither did Dreghorn accept of his terms, which were quite different. And a *sponsio* or wager, where writ is not adhibited, seems to require a stipulation and restipulation, for making it evident that parties are agreed upon the terms, without which the intention of binding themselves can never be inferred; so that this wager being incomplete, resolves upon both sides in a naked offer, without any determinate resolution anent the terms.

The Lords found that here there was no wager, and therefore superseded to determine whether a wager is binding or not. [*See below.*]

*Act.* Ramsay. *Alt.* Muir. Gibson, *Clerk.* *Vol. II. No.* 26. *page* 34.

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1716. *July* 26. KATHARINE MAXWELL and her Husband *against* GORDON of Carleton.

TWO points in this debate, having been determined the 12th instant, the pursuer Katharine Maxwell, now contends, 1*mo.* That the defender Carleton, can only seek relief of so much as he really paid to Mr. John Fraser. 2*do.* That the defender should be obliged to assign to her the heritable bond, with all other diligences wherein Kilwhannady was principal, and her father only cautioner, with the infeftment thereon in favours of Fraser; to the effect that she might have her relief, which was competent to her father against Kilwhannady's estate and representatives.

ANSWERED for the defender,—1*mo.* That as he does not controvert, that if the Major, or any that owned their representing him, were in the field, they would have the benefit of the ease; so the pursuer can have no claim to it, because her interest as creditor to her father was extinguished by her father's payment, and she had no other right. 2*do.* That the defender cannot be obliged to assign, till the pursuer make up a right to the claim her father might have against the defender, which is competent to the father's heirs or executors only: to which the pursuer has made up no title, and therefore can crave no assignation; because *nihil illi deest* as creditor, she being paid by uplifting Earlston's money.

The Lords found the pursuer could not be liable to allow further than the sums for which Fraser's debt was transacted; and that the defender ought to assign her against the principal for her relief. *Vide supra,* 12th July, 1716.

*Act.* Ferguson. *Alt.* Boswall. Sir James Justice, *Clerk.*

*Vol. II. No.* 28. *page* 36.