THE LORDS having considered the bond in question, albeit they found the tenor thereof not to be contrary to the act of Parliament, yet found the same was unwarrantably taken, if the same was extorted, as aforesaid; and found the decreet of the Lords not to militate against the suspenders, or to warrant that incarceration *brevi manu*; and found the act of council proved not against the suspenders; and yet ordained them to renew a bond, by the Lords' authority, of the like tenor. No 412.

Fol. Dic. v. 2. *p.* 247. *Stair, v.* 1. *p.* 178.

1665. *January* 31. KIRKTONS *against* Laird of HUNTHILL. No 413.

A tutory found not to be instructed by a confirmation bearing that the tutor accepted and made faith.

Two sisters called Kirktons, having obtained decreet against the Laird of Hunthill for their mother's executry, who left Hunthill, her brother, and two other tutors to her children, in so far as concerned the means left them by their mother; Hunthill suspends, and raises reduction on this reason, 1*st*, That the only ground of the decreet being a confirmed testament, bearing, That Hunthill compeared and made faith and accepted the office of tutory, this cannot be sufficient of itself to instruct he was tutor, seeing acts of inferior courts prove not in any thing but in points of form of process, which are ordinary, but *in aliis* prove not without a warrant; and therefore, unless the warrant of this acceptance were produced, it cannot prove more than an act of tutory or curatory, or cautionry, will prove without its warrant; and therefore now they crave certification against the same; 2*dly*, Neither their subscription to the act nor the principal testament itself can be found, though the registers of that commissariot be searched, and others about that time found; neither can it be astructed with the least act of meddling any way; 3*dly*, A mother cannot name tutors, but the father only, it being *patriæ potestatis*. It was *answered*, That albeit *in recenti* the warrants of such acts ought to be produced, or they are not effectual without the same; yet it being thirty-seven years since this confirmation, after so many troubles, the chargers are not obliged to produce the warrants, being such inconsiderable little papers as they are, but they must be presumed that they were so done, as is expressed in the public record; seeing this process has lasted these twelve years, and before nor since, till within a year, no mention thereof. It was *answered*, That there was no prescription run during which, if at first the chargers were obliged to produce, they are still so, unless they could fortify and astruct the truth *aliunde*, and their silence said nothing, because it was the charger's fault that pursued not till within these twelve years; whereas, if they had pursued timeously, the suspender would then have pursued a reduction. It was *answered*, They were minors in the suspender's own house the former time, who would not have kept and entertained them at all, if he had not known of the tutory, and that they had means.

No 413. The Lords found that this naked testament was not sufficient to astruct the acceptance without further adminicles.

Fol. Dic. v. 2. p. 248. Stair, v. 1. p. 261.

1665. *July* 19. Ryce Gum *against* M'Ewan.

No 414.
A decree bore only that the defender compeared and confessed. The decree found null.

Ryce Gum having obtained decreet before the Bailies of the Canongate against M'Ewan, to repone him to an assignation, he suspends on this reason, That the decreet was null, wanting probation, proceeding only upon the alleged judicial confession of the suspender without proponing any defence, acknowledging the libel, and succumbing in the defence, but simply confessing the libel, which cannot prove against him, being under the hand of a clerk of an inferior court only, without the suspender's subscription or oath.

Which the Lords found relevant.

Fol. Dic. v. 2. p. 247. Stair, v. 1. p. 300.

1671. *February* 8. Laurie *against* Gibson.

No 415.

A decree of session, bearing to proceed upon consent of parties judicially interposed, was found null, in regard it did not bear that the parties had subscribed their consent.

Fol. Dic. v. 2. p. 248. Gosford.

*** This case is No 5. p. 5622. *voce* Homologation.

1672. *November* 21. Carin *against* Wilson.

No 416.
A decree of an inferior court suspended, as it did not bear that the defender's oath was subscribed by himself.

There being a decreet of the Bailies of Edinburgh betwixt James Carin and James Wilson, wherein the defender was decerned upon his oath; which decreet being now suspended, and craved to be reduced upon this reason, That the oath was not subscribed by the suspender, nor did not bear that he did declare that he could not write, and the truth is, that he having deponed, the clerk wrote his oath disconform to his meaning, whereupon he refused to subscribe it; it was *answered*, That the oath was subscribed by the Bailie, and the sum was small.

The Lords found, That the oath should have borne that the party declared that he could not write, or else should have been subscribed by him, or otherwise should have been holden as confessed, if he refused to depone or subscribe