

charged thereon, suspension thereof is raised on this reason, that she was *vestita viro* at the time of the granting, and he does not consent, and so the same is null of the law.

To which it was ANSWERED,—That she was *tenta habita et reputata vidua*, which put the lieges sufficiently *in bona fide* to bargain with her; that she really believed she was such a one, in regard she married again; that a minor affirming himself to be major, though falsely, yet will never be restored against that bond, and so with her.

REPLIED,—*Præsumptio et fictio cedit rei veritati*: now *ex eventu*, it appeared she was then clad with a husband, though in regard of his absence the common presumption ran to the contrary; and, therefore, the bond must be void and null. *Item*, there was no dote in her, as in the minor's case.

I think the reason of suspension not relevant.

*Advocates' MS. No. 338, folio 134.*

1672. June 15. MR. PATRICK HOME Advocate, *against* MR. JOHN PRESTON Advocate.

IN the action between Mr. Patrick Home and Mr. John Preston, advocates; Mr. Patrick having right to the lands of Broomsbank, by virtue of a disposition from William Brown the heritor; and Mr. John Preston having adjudged from the heirs of William Dounie a wadset of these same lands, and a comprising led thereof, he compeared in a pursuit at Mr. Patrick's instance for mails and duties, and craved to be preferred.

Against which compearance of his, it was ALLEGED that his rights and sums therein contained were satisfied by intromission of him and his authors. And so the action resolving in a count and reckoning, it fell to be debated to which right possession ought to be ascribed.

Mr. Patrick ALLEGED it ought to be ascribed to the extinguishing of the comprising, as being *durior sors*, the most sovereign and preferable right.

Mr. John ALLEGED it ought to be ascribed to that whereby he truly apprehended possession, viz. the wadset, and so for payment *primo loco* of the back tack duties; and that William Dounie was long in possession before he led apprising, *ergo*, the possession cannot be ascribed to it.

The Lords, not so much by way of decision, as of consent of parties, would not suffer Mr. John to take the advantage of an expired apprising, and, therefore, ascribed his possession of all years after the deducing of the apprising, &c. *primo loco* to his apprising, that it may become extinct: but ordained Mr. Patrick to pay the just sums yet owing of the comprising, the back-tack duties, the principal sums in the wadset and personal bonds, and their annualrents, as shall be instructed to be owing by Mr. John Preston, and appoint Mr. John to assign his rights to Mr. Patrick. *Vide supra*, No. 334, [January 1672, *Aytoun against Lauder.*]

*Advocates' MS. No. 340, folio 135.*