cause he was neither called nor compearing, and it was *res inter alios acta ;* so the pursuer, having declared that right null, could not make use thereof as a standing valid right, wherein he could pretend no interest.

It was TRIPLIED, That George Stewart, whose right was reduced, having fully denuded Neilson by a comprising long prior to Alexander's right flowing from Neilson, Doctor Hay, notwithstanding he had reduced the same, for not production of the bonds whereupon George Stewart had comprised, yet he might make use thereof against Alexander, who was not pursuer in that reduction.

The Lords did repel the allegeance and duply, in respect of the reply and triply ; and found, That if Neilson was totally denuded by George Stewart, by an expired comprising before the right made to Alexander, that Doctor Hay ought to be preferred, Alexander's right being *a non habente potestatem ;* but if his right was before the expiring of the legal reversion, that he ought to be preferred to the Doctor, as deriving right from Neilson, who had a prior right from the common debtor. Which was most just : but the great point thereby in debate was not decided, but passed over without decision, *viz.* that the Doctor, who had declared George Stewart's right void and null, could never found upon the same, as a standing right, against a third party, who was neither called nor compearing ; which is against common reason and law ; and, as that maxim holds, *quod approbo non reprobo,* so, *a contrario, qui reprobat approbare non potest.* And not being so found was very hard.

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1674. *January* 22. HALBERT LAUDER *against* WILLIAM ALISON.

IN a suspension, raised at William Alison's instance, who was charged at the instance of the said Halbert, for payment of the sum of £1000 of tocher, contained in his contract of marriage with the said William's daughter, upon this reason,—That the letters ought to be suspended as to 500 merks ; because, by the contract, he was only obliged to pay 1000 merks in real money or bonds, and for making up of the £1000 he was obliged to deliver merchant-ware for 500 merks ; which he had really done, by delivering as many merchant goods to the charger, upon inventory, after the marriage :

It was ANSWERED, That the reason was noways relevant ; because the merchant goods were in possession of the daughter long before the marriage, who, for several years, was in use of buying and selling in the shop as her own goods, and never counted for the profit thereof to her father.

It was REPLIED, That the daughter, being *in familia paterna,* and having no means of her own, any goods in her possession must be presumed to be the father's ; and his payment of the maill of the merchant shop to the heritor thereof, and delivering the goods after marriage upon inventory, must be interpreted a fulfilling of the contract of marriage, as to that obligement of delivering of 500 merks of merchant ware.

The Lords did sustain the reason of the suspension, notwithstanding of the answer, unless the charger would offer to prove that the suspender's daughter had means belonging to herself, whereby she might buy merchant-ware, and trade therewith by succession, or legacy, or any other right flowing from any

other person than her father; otherwise they found, that she, being *in familia*, the goods behoved to be reputed the father's goods; and the delivering of the same upon inventary ought to be ascribed to the fulfilling of the contract of marriage *pro tanto*.

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1674. *January* 23. MR WILLIAM NISBET *against* ROBERT MEINE.

IN a poinding of the ground, pursued at the instance of Mr William Nisbet, as having right, by progress, from one Gourlay, who had comprised a tenement of land, lying in the town of Edinburgh, from James Nisbet, with the pertinents, and all right that he had thereto, against Robert Meine, who was infeft in a laigh booth, which was a part of the said tenement:—

It was ALLEGED for the said Robert, That the pursuer had no right, as being infeft upon his comprising; because the said annualrent was not specially denounced to be apprised, nor no special infeftment taken in the said annualrent; without which no comprising or infeftment of the property could carry the same, they being distinct rights of their own nature.

It was REPLIED, That this laigh booth, being but a part of the tenement, which was disponed with a reservation of the said annualrent of £20 yearly, the said annualrent did remain as part and pertinent of the whole tenement whereof the laigh booth was a part before the disposition thereof; likeas the said James Nisbet, heritor of a great part of the tenement, against whom the comprising was led, was specially infeft therein.

The Lords did sustain the poinding of the ground, notwithstanding of the allegeance; which they found not competent to Robert Meine, who could pretend no right himself but only to the laigh booth, out of which the annualrent was reserved: likeas, he had secured himself from all hazard of the said annualrent, having allowed to him 500 merks out of the first end of the price, until the same was purged. But if any other, as having right, by a special apprising or infeftment of the annualrent from James Nisbet, had compeared and proponed this allegeance against the pursuer's comprising, it had been otherwise decided.

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1674. *January* 23. SAMUEL CHEISLY *against* FRANCIS WAUCHOPE.

IN a suspension, raised at Samuel Cheisly's instance, against Francis Wauchope, who had charged him as having right by translation from his wife, who was assignee constituted by his sister, to whom the suspender had granted bond for the sum of ————, upon this reason,—That the charger could have no right by translation from his wife; because her assignation from her sister was to her and her children, secluding her husband; so that it was not in her power to transfer the same in his favours:

It was ANSWERED, That his wife, being fiar, and having only right whereby she might uplift, or her creditors affect the sum contained in the bond; notwith-