

have affistit him thairintill; becaus the husband is principall and heid over his wife: The same thairfoir is understand to be done be him principallie and allanerlie; and thairfoir his airis and executouris sould be callit thairfoir.

*Fol. Dic. v. 1. p. 106. Balfour, (HUSBAND and WIFE.) p. 94.*

No 19.  
cease, she  
could not be  
pursued for  
it.

1565. November 17. BRYSON against SOMERVILL.

ANENT the action pursued by Janet Bryson against Janet Somervill, and William Sharer, her son, for a spulzie committed by umquhil David Sharer, her husband, and herself, and their son being in company with them; it was *alleged* for the said William, That in time of the said spulzie committed by his father and mother, he was within the age of twelve years, and but alleged to be in company with his said father; and so not being *doli capax, et in patria potestate, non potuit contrahere obligationem.*—It was *alleged* by the said pursuer, that the said William was past ten years, and therefore might be called for the said spulzie, because he was *doli capax, quia in proxima erat pubertati et malitia potuit supplere aetatem*; neither the woman nor he could be excused, by the man being father to the boy, and husband, *quia omnes in pari delicto parem poenam sustineant, et cum hisce actio ex maleficio orietur, omnes tenebat.*—It was *alleged* by the said William, because the said pursuer alleged him to be of ten years and not fourteen, therefore he should be affoizied: Whilk allegeance of the said pursuer was repelled; and the allegeance of the said defender admitted; and the said defender affoizied frae the spulzie, for the causes foresaid.—It was *alleged* by the said Janet Somervill, That she should be affoizied frae the said spulzie, because it was alleged in the pursuer's libel, that umquhil David Sharer her husband, and she in company with him, committed the said spulzie; so on noways should she be called after his decease, she neither being called after as heir, or executrix to him, but allenarly upon her own deed, done in company with her own husband in his time, he being her principal head; Which allegeance of the said Janet, defender, was admitted, and she affoizied frae the said spulzie. The like was practiced before, in my Lady Crawford's case, who being pursued for the spulzie of \_\_\_\_\_, was absolved, because her husband was there; and my Lady Ratie, pursued by ane Bruce, was absolved for the samen reason. See HUSBAND and WIFE.

*Fol. Dic. v. 1. p. 106. Maitland MS. p. 69.*

No 20.  
Found in conformity with  
the above.

1679. November 6. JOHN WILLIAMSON against MARION CLERK and Sir PATRICK THREAPLAND.

IN an action pursued by John Williamson, Sheriff-clerk of Perth, against Marion Clerk, and Sir Patrick Threapland, for his dismissing her out of prison when he was Provost; and therefor concluding payment of the debt against him: The

No 21.  
In a subsidiary  
action for  
payment of a  
debt, the

## No 21.

Lords affoiz-  
ed the jailor's  
relict, because  
her husband  
behoved  
to obey the  
magistrates.

defenders having produced several partial discharges of the debt given by him, (for if they be discharges granted by one's cedent, they will not so much reflect upon him,) 'THE LORDS not only suspended the letters *simpliciter*, in respect of 'his discharges produced; but also fined him in 100 merks of expences for his 'calumny.' It were to be wished, that the Lords did more frequently modify larger expences than they do, *in penam temere litigantium* \*. (Referred to *voce* REPARATION.)

*Fol. Dic. v. I. p. 106. Fountainhall, v. I. p. 61.*

1767. January 22.

MACPHERSON against ARROT.

## No 22.

A factor for  
the rebels, in  
1745, indor-  
fed precept  
on tenants  
for their farm  
victual, by  
order of the  
pretender's  
secretary.  
He was found  
not liable in  
recourse.  
The indorfee  
was in the  
knowledge of  
his situation,  
and he was at  
the time un-  
der absolute  
controul.

JOHN ARROT, by order of John Murray of Broughton, secretary to the Pretender, drew precepts on the tenants of the estate of Winton for their farm victual. These precepts were accepted by the tenants, and indorfed by Arrot; against whom action was brought, after the precepts had been protested against the tenants, for not delivery, and against the drawer for recourse

The pursuer *contended*, That these precepts must be considered in the same light as bills of exchange, so as to subject the drawer and indorfer in recourse.

The defender, on the other hand, *pleaded*, That the precepts were null, as wanting the solemnities of probative writings. And, supposing them actionable, that the indorfations could be made in no other light than that of an assignation, which implies warrandice from fact and deed only; and which warrandice is not incurred in the present case, since the refusal of the tenants to deliver the victual was not occasioned by the fault of the defender, but was a necessary consequence of the suppression of the rebellion; so that the principles will apply, which were established in the action brought by the Town of Paisley, against Mr Murray, for restitution of the money levied by the rebels. *See* REPARATION.

'THE LORDS, in respect the precepts were drawn by the defender, as factor appointed by the rebels upon the estate of Winton, and purchased by the pursuer's author, when in the knowledge of the character in which he acted, and that the value paid was applied for behoof of the rebel army, which was then in possession of that part of the country, found that the defender is not liable in recourse.'

*Act. Jo. Williamson.*

*Alt. Montgomery.*

*Fergusson.*

*Fac. Col. No 52. p. 281.*

\* What is in the text is all that had been printed of this case. What is on the margin is taken from the MS.