decreet of improbation against the bond and inhibition, and then no decreet should be given against them.

The said defenders having pursued an improbation, and certification therein granted, and before extracting, both parties being heard; It was ALLEGED, That a decreet of improbation could not secure either Dumfries or Queensberry, because Andrew Smith, the creditor, might have either assigned the bond to another, or it might have been comprised, and legal intimations and executions used against Dumfries, at the pier and shore of Leith, when he was out of the country for many years together; so that nothing could secure but a discharge from Smith's heirs.

The Lords did, notwithstanding, assoilyie the heirs and executors of Burnet from payment; and ordained the decreet of improbation to be extracted; but withal ordained the defenders to find sufficient caution to warrant both Dumfries and Queensberry during the whole years of the prescription; especially upon this consideration,—that, by the space of thirty years, there was never any pursuit used by any assignee, compriser, or arrester.

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1671. *February* 1. MARK CASS of COCKPEN *against* DOUGLAS and OTHERS.

IN an action, pursued at Cockpen's instance, against some of the Laird of Bonjedburgh's tutors, upon a missive letter subscribed by them in name of the whole tutors, bearing,—that their pupil being debtor to Henry Douglas, who was debtor to the pursuer; that the pursuer should fit an account with the said Henry, and write to the defenders what sum was due to him, and appoint one to receive the same, or bond therefor; which they were willing to grant, or make payment in a very short time: whereupon he did subsume, that he having gotten a bond, from the said Henry Douglas, for 524 merks, the defenders ought to be decerned to make payment.

It was ALLEGED for the defenders, That the missive letter was not now obligatory; because,—it being subscribed *in anno* 1658, when the defenders were tutors to Bonjedburgh, and bearing only an offer to become debtors within a short time, upon closing of accounts and reckoning with Henry Douglass; the pursuer never having declared his acceptation thereof until the defenders were all out of office, and did never intimate the same, but by intenting this action, by the space of 11 years after the date of the letter, before which time payment was made to Henry Douglas,—the missive letter could not be sustained as obligatory; it being of the nature of a bill of exchange, which should have been intimated, and returned within year and day.

It was REPLIED, That the letter was opponed, bearing no special time. But that whensoever count and reckoning should be made with Henry Douglass, the defender should be liable; after which, they should have retained as much in their own hands, of their intromission with the pupil's means, as should have relieved them.

The Lords did sustain the defence; and found, That the letter was not obligatory after the expiring of the tutory; unless the pursuer will prove, by the tu-

tor's oath, (who did subscribe,) or *scripto*, that they had still in their own hands as much of the pupil's means as would satisfy; and that the said Henry Douglass was never paid by them, nor since by their pupil, during minority, with their consent.

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1671. *February* 7. MR PATRICK HOME *against* MR JOHN PRESTOUN.

IN a removing, pursued at the instance of Mr Patrick Home, as being infeft in the lands of Broomestonbank, upon a disposition made to him by William Brown, heritor thereof;—compearance was made for Mr John Prestoun, who had adjudged the right of the said lands from the heirs of William Downie, who had acquired a right of wadset from the said William Brown, granted *in anno* 1637, for the principal sum of 3500 merks, bearing a backtack for payment of the annualrent; whereupon the wadsetter did enter to the possession of the lands, and continued until the year 1655; which wadset was granted to one Thomas Brown, author to the said William; who, likewise, in the year 1642, by two several bonds,—one for the sum of 800 merks, another for £220,—had got an eik to the reversion of the former wadset from the said William Brown; which bonds and eik were likewise settled in the person of the said William Downie, but whereupon no diligence had been done: And, besides, the said Mr John, by adjudication, had right to a comprising, against the said William Brown, for the sum of 500 merks, at the instance of Magdalen Wardlaw.

Whereupon it was ALLEGED, That the tenants could not be removed at the pursuer's instance; because, long before his right, William Downie, from whom the said Mr John had adjudged, had not only the right of wadset and eik to the reversion foresaid, but likewise a right of comprising of the reversion and backtack, which was expired.

It was REPLIED for the pursuer, That as to the comprising, it was satisfied by intromission within the legal, so was extinct: And for the wadset and eiks to the reversion, they could not defend; because the wadset was affected with a backtack, bearing a clause irritant, which was never declared: and for the eik, it was only a personal right, and none of them could defend in the removing.

It was DUPLIED, That any possession William Downie or his authors had, could not be ascribed to the comprising, but only to the wadset, and eik to the reversion; which were long prior, and by virtue whereof they did enter to the possession; so that, unless they were satisfied by intromission, the possession could not be ascribed to the comprising, but only to the wadset and the eik to the reversion.

It was TRIPLIED for the pursuer, That the comprising being the more sovereign right, after the deducing thereof, the possession could only be ascribed thereto; and not to the wadset, which was affected with a backtack: neither to the eiks of the reversion, which were only personal rights against the granters of the wadset, but were no valid titles to give the wadsetter the natural possession, or to uplift the maills and duties from the tenants.

The Lords did sustain the defence, so far as it did extend to satisfaction of all