1672. *February* 24. ELIZABETH LUNDIE *against* MARGARET LUNDIE and her HUSBAND.

IN a declarator, pursued at Elizabeth's instance, as assignee by her father, James Lundie of Stratherly, who was party-contractor for his sister Janet, to Robert Lundie of Spittall, founded upon a clause of the contract of marriage, bearing, that in case Janet Lundie, the said James's sister, should happen to die without children lawfully procreated of her own body, to succeed her, then, and in that case, the said Robert should pay the sum of 2000 merks, at the first term after the said Janet's decease, as being her tocher received from the said James, or else the just and equal half of the moveables that should happen to be possessed by her and her husband the time of her decease: whereupon they concluded against the heir of Robert, that Janet being now past the age of having children, decreet might be given for payment of the said sum, at the first term after Janet's decease.

It was ALLEGED for the defender, That the meaning of that clause was only in case Robert's wife should die before him, without children; seeing she was provided to the liferent of almost his whole estate, and that she enjoying the same, as she hath done these thirty-five years bygone, that besides that, her brother should get payment of 2000 merks of tocher could not be intended, especially seeing it appeared by the contract, that he did not pay the tocher out of his own means, but in contentation of all portion natural or legacy left to the sister by her goodsire; which did exceed the sum of 2000 merks. Likeas the said clause, bearing an alternative, either to pay 2000 merks, or to deliver the half of the moveables possessed betwixt them when the said Janet should happen to die, as that last part did necessarily imply that her brother could only have right to the half of the moveables, in case she died before the husband, so it ought to be interpreted, in the first place, of the alternative for payment of the 2000 merks.

It was REPLIED, That the obligement of the contract was opponed, bearing, that whensoever the said Janet should die, her husband and his heirs should be liable; and there being no mention of these words,—in case she should happen to die before him,—it cannot now be supplied upon presumptions and conjectures.

The Lords, having considered the conception of the alternative obligement, and that the brother had paid no part of the tocher, did find, that the meaning of the parties was, that the obligement should be effectual only in case the said Janet should die before her husband; and that, it being only an omission of a notary, it ought to be so interpreted and supplied: yet, before extracting, they remitted to one of their number, who had an interest in both parties, to settle therein. But, upon report that the parties could not agree, thereafter the Lords, upon the 25th of June 1672, by their interlocutor, did of new find, as said is, that the clause of the contract, whereupon this action was founded, could only be interpreted in case the wife should die before the husband, not only for the reason above expressed, but likewise upon this ground,—that the provision bearing an alternative, that either the tocher should return to James, or that he should have right to the half of the moveables pertaining to the husband and wife the time of her decease; as that last part did necessarily imply, that the wife should die before the husband, which gave right to the half of the moveables;

the first part thereof bearing the return of the tocher, behoved to be interpreted with that same quality and condition, and could not divide and be of another nature, they being the parts of one individual provision and condition.

Page 253.

1672. *February 27.* ——— *against* ———.

THERE being a reduction pursued of a disposition, made after interdiction lawfully published,—it was ALLEGED for the defender, That the reason was not relevant, unless it were likewise libelled that the party interdicted was hurt and leised.

It was REPLIED, That there was no necessity so to libel, seeing dispositions made by parties interdicted, without consent of these to whom they are interdicted, are *ipso jure* null; as in the case of a minor having curators, who grants a bond or disposition.

It was DUPLIED, That it was offered to be proven that the sums of money, for which the disposition was made, were profitably employed to the behoof of the disponer.

The Lords did sustain the duply, and admitted the same to probation; which is the first decision of that kind; the case of persons interdicted, and minors, being always before thought alike.

Page 254.

1672. *February 27.* JACOB JAMART, Merchant, Bourdeaux, *against* HENRIE JOSSIE.

IN a reduction and suspension of a decreet, obtained at Jamart's instance against Jossie, for the sum of 9000 livres, upon this reason,—That the decreet was for null defence; and if he had compeared, he had a relevant defence to elide the libel; *viz.* That the ground of the debt being contracted at Bourdeaux, by the custom of which place, where a debtor to several persons makes a disposition of his whole estate,—the major part of the creditors accepting thereof,—it is sufficient to exoner him, not only at their hands who accept, but likewise at the hands of them who refuse; and accordingly Jossie had subscribed a concordate with the most part of his creditors, and had consigned his whole estate for their use: whereupon the Parliament of Bourdeaux, by a decreet, had interponed their authority for the suspender's liberation; and so it was *res judicata* in France, according to their law and custom; which, *ratione loci contractus*, ought to regulate this case.

It was ANSWERED for Jamart the charger, That this allegeance, not being verified *instanter*, could not be received to stop justice and a legal procedure here; the suspender having had more than sufficient time to procure an extract of the sentence, if any such was, during the dependence of the first process, wherein decreet was given by the bailies of Edinburgh: And albeit it were produced, yet it could not have furnished any such defence against Jamart; because such