a seasine upon a precept of *clare constat* and a retour. See Dury, 20*th Jan.* 1625, *Elphinston.*

If the seasine be prior to Whitsunday, though posterior to the warning, and within the forty days, it will be more dubious if such a warning would be null. See Dury, 18*th July* 1625, *Wallace.* *Vol. I. Page* 52.

1680. *June* 22.—In the action David Jack against Claud Muirhead, (12th Dec. 1678,) craving him to count and reckon for his father and mother's intromissions, and thereby offering to prove him paid:

ALLEGED,—Their possession was by virtue of an expired comprising, (though now reduced,) and so they were *bona fide possessores, qui lucrantur omnes fructus perceptos ante litem contestatam.* REPLIED,—The apprising is *funditus* annulled, and so can never be a title.

The Lords repelled the defender's allegeance, founded on his *bona fides*, and find he is liable to count for the bygone maills and duties more than will satisfy the debt for which the comprising was led, though the legal be long ago expired. *Vol. I. Page* 103.

1681. *June* 18.—The case between them was an improbation of a tack of some lands, set by one to his mother-in-law. One of the two witnesses inserted therein being dead, the law held him for a proving witness; the other appearing, deponed he never remembered to have signed such a tack, and his reason for it is, because at other times he subscribed his name Herbertson, and in this it is Herbison.

The Lords having allowed the tackswoman to adminiculate and fortify the tack.—She adduced two extraneous witnesses, who are neither subscribing nor inserted in the tack; but they depone they were present, and heard it read, and saw it subscribed, but that Herbertson was drunk when he subscribed it.

The Lords, notwithstanding of the denial of one of the two instrumentary witnesses, yet sustained the tack, in respect the one who is dead *fictione juris* is reputed to affirm, and the two other (who are famous persons) declared they saw it signed: and for the diversity of his subscription, the Lords regarded it not; seeing it probably appeared he was then in drink.

This was judged arbitrary by some, though others saw not so much iniquity in it. And indeed *interpretatio capienda est ut actus potius valeat quam pereat.* *Vol. I. Page* 143.

1681. *June* 22. JOHN CHEISLEY of DALRY *against* JAMES and ROBERT CHIESLEY.

JOHN Cheisley of Dalry pursuing an exhibition *ad deliberandum* against James and Robert Cheisleys, his brether: ALLEGED,—He had no interest; because, by a ratification granted by him to his father, he had ratified all the rights granted by his father to his said two brothers; and so it is, that their father had disponed all his estate (except what he formerly had given his eldest son, now pursuer,) in their favours. *2do*, He, being heir, could not call for moveable bonds, bills of exchange, and a sight of the count books, and other personal estate, he having no interest in the executry by law.

The Lords, on Pitmedden's report, found that the ratification did cut him off

from craving this exhibition, if the defenders produced a general disposition from the father to all his estate, both personal and real, except the lands of Dalry and Gorgie, formerly disponed to the pursuer. But ordained them to depone anent their having of all personal bonds, discharges, tickets, bills of exchange, count-books, &c. to the effect he may understand to liberate and disburden his estate, that, by abstracting thereof, he nor his estate may not be affected therewith as heir. *Vol. I. Page* 144.

1681. *June* 22. The Town of North-Berwick *against* Sir John Nisbet of Dirleton.

The Town of North-Berwick having charged Sir John Nisbet of Dirleton for his proportion of their cess for his heritage within their burgh; he suspends, 1*mo*, He was a Lord of the Session a part of the time, and so free. Answered, —The Lords had of consent obliged themselves to bear a part, and in so far had dispensed with their privilege.

2*do*, That his houses in their town were only girnels for keeping his victual, and at shipping of it they got the anchorage and shore dues; and he was neither a burgess nor residenter; and he receiving no rent for them, they ought to bear no burden. Answered,—*Ratione rei* he was liable whatever use he made of them.

The Lords found he ought to pay for his girnels.

Then he alleged, the *quota* was exorbitant, and not proven. Pitmedden ordained the stent rolls of the whole burgh to be produced, that, after comparing his share and interest with the other neighbours, it might appear if he was overvalued, yea or not. *Vol. I. Page* 144.

1681. *June* 23. Sir Alexander Forbes of Tolquhon *against* Forbes of Waterton.

The debate between Sir Alexander Forbes of Tolquhon and Forbes of Waterton being reported by Newton; the Lords found the allegeance of the general discharge produced doth not exclude the compensation: and find that Waterton is only obliged to denude *habili modo*, by entering and infefting himself in those rights where his father was infeft, and assigning and disponing where his father was not infeft, with absolute warrandice of the lands, conform to a minute.

But thereafter the Lords having considered Waterton's declarator, they sustained it: and declared the minute void and null for not performance by Tolquhon, upon repayment of the sums paid by Tolquhon in part of the price of the bargain. And find the letters orderly proceeded at Waterton's instance for the maills and duties, unless Tolquhon pay the remainder of the price within a month; Waterton giving Tolquhon a valid disposition of the lands conform to the minute at the sight of the Lord Newton, and to compare the same with the principal. *Vol. I. Page* 144.