This being reported, the Lords refused a new measuring, and decerned him only to pay for them as they stood in his tack, it being taxative and not demonstrative, and they being commonly holden and reputed so many. *Vide infra, 9th November* 1682, [Historical Volume,] between thir parties. The Lords had done the same before, 16*th July* 1678, *Robertson:* See Durie, 1*st February* 1634, *Murray*; and Struv. *Syntagm. Jur. tom.* 1, *tit. de Contr. Empt. p.* 821. *Vol. I. Page* 39.

1679. *January* 31. DRUMMOND of RICCARTON *against* ————.

IN Drummond of Riccarton's case, the Lords found, where a bond of provision is given to a daughter, with this express condition, that, if she die unmarried, the sum shall return to the granter and his family; that she could do no gratuitous deed in prejudice of the foresaid quality in the bond, and that she might not evacuate the same by any voluntary assignation thereof: And found, that it was no necessary nor onerous cause that she made a mutual tailyie with another, and assigned it to him. *Vide supra, 25th January, Mr John Daes.* This decision drives them to marry.

In a substitution like this, in a bond of provision given to Mary Scot, Margerton's sister, she having assigned it, and afterwards dying unmarried, Sir John Nisbet and Sir G. Lockhart resolved, that she had no power voluntarily to assign it, in prejudice of the substitutes. See the contrary, in Durie, 8*th March* 1626, *Monro. Vide infra,* 1*st December* 1680, *Anderson.*

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1678 *and* 1679. DAVID FERGUSSON *against* SETON of CARISTON and the EARL of WINTON.

1678. *February* 14.—DAVID Fergusson in Kirkcaldy, a creditor and appriser of Seton of Cariston's estate, pursues a reduction and declarator, against Cariston and the Earl of Winton, of a comprising led by the Earl's grandfather, of the lands of Cariston, upon this ground, That it was a comprising kept up for the debtor's behoof; which was urged from thir conjectures and presumptions, *viz.* Cariston was a cadet of the family, married a cousin; the Earl, who comprised, was his tutor or curator, at least acted as such; and this apprising was in the debtor's own hands retired, without a right to it, and must presume payment and liberation. ANSWERED,—This Earl, at his grandfather's death, was left an infant, in 1650; his papers were squandered, &c.

The Lords, before answer, ordained Cariston and all others, who might give any light in this affair, to be examined how the said apprising came in the debtor's hands. Whereon Cariston, the Viscount of Kingston, who was the Earl's intromitting tutor, &c. were examined, and declared that they were given in to Mr William Syme in 1653, who was the Earl's ordinary advocate; and, he dying, Cariston borrowed them up from one Dalzeell, who had been

Mr William's servant; and, he also dying, Cariston kept them till he produced them in this action.

The Lords falling to advise thir oaths, Fergusson offered farther to prove, by the Earl's oath, that there was some trust, promise, or back-bond, for making that right forthcoming to Cariston's behoof, or his children; and that it was kept up only to hold off other creditors, and that Cariston chose rather to fall in his chief's hands than be in the reverence of strangers; and that he had Cariston's contract of marriage, in which either the Earl's goodsire dispones the lands apprised or his apprising, or consents as curator; in which case it must accresce to Cariston the minor, at least be presumed his, till the Earl, by a count and reckoning, make it appear he is nowise his debtor; at least they alleged he renounced his apprising in so far as extended to the jointure provided to the Lady by the contract-matrimonial. But this last alternative made against them; for that evinced the Earl designed not to quit the apprising any farther.

The Earl compeared, and, on oath, denied any trust; and, to his knowledge, the having of that contract of marriage or that ever he saw it. They interrogated him if he had searched for it? He declined to answer this; and, in truth, it were an intolerable labour for him to seek his vast charter-kist to pleasure them; neither uses he to do it himself, but only to employ others. *Vide supra, No. 615, 24th July* 1677, *Sibbald of Kair.*——*Advocates' MS. No. 725, folio* 320.

1679. *February* 1.—In the reduction pursued by David Fergusson against Seton of Carriston and the Earl of Winton, (14th Feb. 1678;) it was urged, in the Inner-House, that the comprising was retired, being produced by Carriston himself, and that *instrumentum apud debitorem repertum præsumit liberationem debiti, et pro cancellato habetur.* Sir G. Lockhart showed, how that brocard in law made but a presumptive probation at best, and that it held mainly in personal bonds, and other such writs whereon nothing had followed, but had little or no strength in comprisings, or other real rights, especially if infeftment had followed upon them, as in this case; because the giving up of the comprising, and its grounds and warrants, was not the *habilis modus* to denude the creditor, or to secure the debtor whose lands were apprised, since the seasine still remained in the register, and the apprising itself stood recorded, and the executions in the messenger's book, and the letters at the signet, and so might easily be made up. But, in either case, and even in personal rights themselves, the strength of the presumption arising from the foresaid maxim was totally elided by proving a positive way and manner *quomodo creditor desiit possidere*, and how the right came into the debtor's hands; it neither being by solution, nor other transaction, importing the consent of the creditor thereto. See Perez. *ad tit. C. de Solut.* § 16; Gayl. *lib. 2, Observ. 37.*

The Lords, when they came to peruse the depositions, were exceedingly stumbled, and ready to decide against the Earl; for there was only one witness, *viz.* the Viscount of Kingston, who deponed that the comprising in question was in the Earl's charter-chest in his minority; and Carriston deponed, most supinely, that he neither remembered what tocher he got, nor how, nor by whom it was paid. So some suspected a conveyance. Some of the Lords inclined to let it subsist as a debt, but not to take away the estate, as an elapsed apprising. Sir G. Lockhart was of opinion, that the comprising should subsist against the debtor Carriston; because he, by his oath, had declared he had got

it without payment, but not against Carriston's creditors, who ought all to be preferred to it, since their debtor's oath ought not to prejudge them.

The Lords referred to the Lords Forret and Pitmedden to settle and agree the parties: who did so: and Winton purchased in Fergusson's apprising, and got an abatement of seven years' annualrent, and gave him bond for the remainder. See 21*st June* 1677, *f.* 286, *in fine*:—*Item Massuer. prac. forens. tit.* 19, *de Præsumpt. p.* 176. *Vol. I. Page* 39.

Anent Moveables.

There is an heritable bond due to a minor; his tutor uses requisition; the minor dies; a competition falls in betwixt the minor's heir, and his executors, who allege the sum belongs to them, because it was made moveable by requisition. The heir says, the tutor's deed cannot wrong him; for, 1*mo*, He could not uplift an heritable sum (especially if infeftment followed on it, for that makes it like to lands,) *sine decreto judicis interposito*. 2*do*, If he had lifted it, he was obliged to have reëmployed it on heritable security again, in which case it would have belonged to the heir.

It would be considered whether it was a redeemable or irredeemable right of lands. 2*do*, If there was necessity to call for it, either because the minor stood in need of it, or that the party debtor was turning insufficient, or that a better occasion offered. The best lawyers were divided upon this question. If he was a pupil within 12 or 14, who can give no consent, some think the tutor alone cannot alter it; but, if he be under curatory, it is somewhat more questionable. See the case, *Park* against *the Earl of Wigton, &c.* (which agrees with this case,) where a moveable bond, surrogated by a tutor in place of an heritable, *sapit naturam prioris*, and which the Lords found on the 21*st June* 1677, in that case. *Vol. I. Page* 40.

1679. *February* 1. Anent the Town of Edinburgh's Imposition on Ale.

I heard that the Lords had found the Town of Edinburgh's imposition of two pennies on the pint of ale extended only to what was brewed, vended, and consumed within the Town of Edinburgh's liberties, taking these words, *brewing* and *vending*, *conjunctive* and not *disjunctive*. What was brewed therein, but was consumed in the shire, without their liberties, they found the imposition did not reach to that, though the words of their gift from the King be copulative. *Vol. I. Page* 40.

1679. *February* 4. The Pewterers of Edinburgh *against* The Plumbers.

The Pewterers of Edinburgh raise a declarator against the Plumbers, that they have as good right to work in lead, as making pipes, thatching platforms, &c. as the Plumbers. Alleged, 1*mo*,—The Lords have found the Plumbers a distinct trade. (See Feb. 1676, No. 469.) 2*do*, It is for the good of the king-