leith being creditor to Hepburn of Craig, the common debtor, the time of the leading his comprising, in other sums of money besides those contained in his comprising, that he, with consent of the said common debtor, might afterwards, in a stated account betwixt them, apply his intromissions to the payment of these other sums, albeit these other sums were not due to him the time he got the assignation to the maills and duties; and that the comprising is neither null nor extinct thereby, but that the said second apprising does stand; and the order used thereupon is good for purging Pillans's first apprising, in all sums standing in Pillans's person; and therefore ordain Pillans to count and reckon.

This seemed a hard decision; but was to maintain diligence led.

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December 21.—David Plenderleith, writer, against the above mentioned Mr James Pillans, (*vide* 24th January 1682,) and Andrew Burn, tenant in Craig; the Lords, on Saline's report, did repone Mr James, and Burn the tenant, against the decreet which David had taken out against them on circumduction, in regard they on a bill had been reponed against that circumduction, and had offered themselves, by way of instrument, ready to depone. But, as to the steelbow, found it was not so much *pars fundi instructi* as to belong to an appriser; who had indeed right to all the maills and duties, the corns and silver-rent, payable by the tenants, but not to the straw so long as his legal was not expired; but that the same was moveable.

But this point may very well be debated, why the straw should rather follow the ground.

And the Lords found Craig the debtor, during the running of the apprisings against him, might dispose the said straw to David Plenderleith, and that he as assignee had right thereto, and not the apprisers: but, in regard Burn the tenant was out of the ground, and had left the straw to the entrant tenant, they assoilyied him; and found, since it was the straw of the crop 1676, that Mr Pillans, or any other intromitter with that year's rent, ought not to be liable for the said steelbow, in so far at least as the rent was meliorated and improven the following years, by having so much steelbow straw upon the ground; which if the tenant had wanted, he could not have paid so great a rent.

But it being represented, that they who uplifted the rent 1676 got not the straw, but it remained still with the tenant; therefore Saline inclined to decern the assignee David Plenderleith to get the straw of this last crop 1682, as, by progress from year to year, surrogated and come in place of the straw crop 1676 *specifice* disponed to him. *Vol. I. Page* 203.

1682. *December* 22. David Christy *against* James Christy.

The debate between David and James Christies was this day advised; but the Lords being much divided, they superseded to give answer on it, till some farther points were debated.

The case was:—When Mr James Christy died, he left only a daughter, whom he named his executor and universal legatar; and, failing of her, he leaves 3,000 merks to David Christy, his cousin, a part of whose means Mr James's father had got. He did not consider his wife might be with child; but she,

eight months after his death, brings furth a son; and, the daughter being dead, they now refuse to pay David the 3,000 merks, because, *ex agnatione et supervenientia illius postumi, rumpitur, dissolvitur, et evanescit substitutio pupilaris, ex præsumpta defuncti patris voluntate,* that, if he had considered his wife would bring him furth a son, he would never have burdened him with this legacy. And they founded this on Papinian's conjecture, *in Lege* 102 *D. de Condit. Institut. l.* 30 *C. de Fideicom. l.* 6 *C. de Institut. et Subst.*, and the famed *l.* 8 *C. de Revoc. Don.* And though Accursius, &c. restrict that law to the precise case of *patronus et libertus,* yet Cujacius, *lib.* 20, *observat. c.* 5, extends it to all.

David Christy ALLEGED, The father's express will must preponder, and cannot be everted by conjectures, else you may arbitrarily make up defuncts' testaments; and this son had no right to moveables, because he succeeds to an opulent heritable estate, and his sister excluded him *in mobilibus;* and Mr James had good reason to leave David this legacy, because his father had got much of his means by a comprising led against David's father. And they cited for them *Leg. ult. D. de Hæred. Institut.*, and urged that the liberty of revoking a donation, *ob supervenientiam liberorum,* was, *per dict. l.* 8, only competent to the donatar himself, but not to his heir. *Vide* Papon's Arrests, *lib.* 11, *tit.* 1, *num.* 19; and St Augustine's excellent verdict on this case, in the Canon law, *Caus.* 17, *Quæst.* 4, *Canone* 43 *seu ultimo.* *Vol. I. Page* 204.

1680 *and* 1682. ARCHIBALD WILLIAMSON *against* The BAILIES of HAMILTON.

1680. *July* 28.—ARCHIBALD Williamson pursues, by the subsidiary action, the Bailies of Hamilton to pay the sum of , because they suffered Mr John Baillie of Carphin to escape out of their prison.

The Lords repelled the magistrates their whole defence, *viz.* That he was incarcerated by a collusion, and merely upon a design, in so far as Carphin, the rebel, being both sheriff-depute and bailie of the regality there, he had as much power and command over the jailer and prison of Hamilton as the bailies themselves had; and that he staid not half an hour there, but came forth with the messenger again; and they could have apprehended him since, if the same had been intimated to them; and he afterwards died prisoner in the tolbooth of Glasgow; and, if it had been any thing but a mere trepan to ensnare the magistrates, and get them for debtors, they might have taken him to many surer prisons at no great distance. And found it relevant to make the magistrates liable, *in solidum,* for the debt—(but it is thought it will divide in equal halves betwixt the two magistrates,)—that the rebel was incarcerated, or delivered to them to be incarcerated; and repelled the reasons.

This the Lords did, lest they should open too large a door for permitting the escape of prisoners. But it would appear, by the words of this interlocutor, that the Lords have not found that the messenger's execution, bearing, that he delivered such a rebel prisoner to the magistrates, and they accepted of him; or the notary's instrument, bearing, that the prisoner was required, and was not found,—do prove the same.