St Andrew's, against *Beton of Blebo*, about changing his ward-holding to tax; where the Lords allowed the Bishop to quarrel it, though he had taken the tax-duty.

REPLIED,—There was a disparity; for Archbishop Sharp, who taxed it, was only an administrator, and so could not prejudge the benefice. *2do*, He was a singular successor, and so could not know what his predecessor had done.

The Lords, on Carse's report, in regard of the seeming contrariety of the practics, ordained them to be heard in presence.

The President thought, that, if Lochiel had insisted in his reduction of the Duke's quinquennial retour as to superiorities, he would prevail; for the inquest could never retour him to be in the natural possession of lands, when he got only the feu-duty, which is but *possessio civilis*. See, of this retour, Stair, *23d et ult. July* 1666, *Earl of Southesk*. But, to show the Duke what he was to expect, the Lords decided this point that same day in a parallel case, to make it a preparative. *Vol. I. Page* 490.

1688. *January* 14. PENMAN *against* YOUNG.

THE probation led between Penman the gold-smith, and Young his prentice, is advised. The Lords found the boy had childishly run away from his master, and therefore divided the remanent 300 merks of the prentice-fee yet resting; 200 of it to the master, and the other 100 to remain with the prentice. *Vol. I. Page* 492.

1685 *and* 1688. The EARL of TWEEDDALE and LADY YESTER *against* The EARL of LAUDERDALE.

1685. *March* 4.—THE Earl of Tweeddale's action against the Earl of Lauderdale was heard *in præsentia;* wherein he convened him on the passive titles, and as lawfully charged to enter heir, to pay him £10,000 sterling, contained in a bond of provision granted by the Duke of Lauderdale to his daughter, now Lady Yester, and got up from the heirs of James Chalmers, advocate, (to whom it is supposed to have been sent, only to make up a claim in the English time, when his estate was under sequestration, and himself in the Tower;) though he gave her afterwards £12,000 sterling, in his contract-matrimonial with Yester, whereof £5000 sterling is paid. But they had omitted to insert a clause, declaring their acceptation of it in satisfaction of all former provisions; for which they give this reason, that, his estate being disponed to her conditionally, and under redemption, it could not be inserted.

Lauderdale, as charged, offered a renunciation: but seeing he could not propone any defence as apparent heir, and that he was not resolved to suffer this debt to be constituted against the estate; therefore he, as a creditor, (and sundry others of his brother's creditors did concur with him,) offered to debate against it. Tweeddale ALLEGED and contended, that, *in hoc judicio*, where he

was only seeking a decreet *cognitionis causa*, to constitute and establish the debt, no creditor could hinder him; and they had no interest till he came to affect the defunct's estate therewith; and cited a clear decision in Stair, *24th July* 1662, *Alexander Shed* against *Gordon*, where this was so found. ANSWERED,—That case was only where the creditor, by his defence, sought to delay him; so that either himself, or a third party, might, *medio tempore*, come in and do some preferable diligence; but, here, he offered to prove his defence *instanter*, and there was none preventing Tweeddale in diligence.

The Lords found Lauderdale might debate against the debt as a creditor, he proving his allegeance presently, so as not to delay Tweeddale, and producing his interest *qua* creditor; which was as cautioner for his brother.

Then Lauderdale proponed a defence of payment against that £10,000 sterling bond, in so far as the Duke of Lauderdale, her father, having afterwards entered into a contract of marriage between her and the Lord Yester, he thereby, *nomine dotis*, engages for £12,000 sterling, which is more, and so, *præsumptione juris*, is in satisfaction of the other, as the meaning of parties; and cited for this a decision, *13th November* 1624, *Wallace*; and another, *3d March* 1629, *Carmichael*, observed in Dury; and the cases of *Paip* and *Young*, recorded *supra*, *17th January* 1679, and *26th November* 1681; and *22d June* 1680, *Seton* against *Barns*. And with all which Hope goes along, *tit. De Solutionibus*.

Tweeddale opponed other decisions in Dury, *viz. 24th July* 1623, *Stewart and Fleming*; and *20th February* 1639, *Cardross and Mar*; and *l. ult. Cod. de Dot. Promissione*; (yet that law speaks only *de bonis maternis*;) and *Novell. Leonis*, 21, (though that is no canonic text,) where the brocard *debitor non præsumitur donare* ceases *inter parentes et liberos*, and they are all presumed to be *distinctæ liberalitates*; else what needed that clause in our style, to cause children renounce all former provisions.

Yet many things in our style are only *ad bene esse ex superabundanti, et ad majorem cautelam*, and not absolutely necessary. See Scotanus very clear on this, *Examen Juridicum, tit. de Dotis Promissione*. Bonds of provision are granted to children in order to their better settlement and maintenance in marriage; *ergo*, when they are married, it unanswerably follows that these bonds are fulfilled.

Notwithstanding of this debate, the Earl of Tweeddale gave in a bill, showing, that, under the pretence of his being a creditor, Lauderdale could not stop the course of his diligence to constitute his debt of the £10,000 sterling bond, but ought to renounce, that he might adjudge; (now this would force all the other creditors to proceed in like manner, which would heap a fifth part more debt on the estate, and sink it;) and that, by Sir William Sharp's tack of the estate of Lauderdale, he and the other creditors and cautioners were paid, or might have been paid.

And the Lords retracted their former interlocutor, of the 4th of March, and found Lauderdale might probably be paid, and so had no interest to stop Tweeddale here; but reserved his defences, not against the adjudication, but the action of maills and duties.

It was thought a great inconstancy in the Lords to alter thus; especially seeing Tweeddale had, the former day, so far acquiesced as to enter *in causa* and to debate. This was on the 17th March; and Lauderdale gave in a bill against it, anent which *vide* 4th December 1685. *Vol. I. Page 347.*

1688. *January* 19.—Yester's case against Lauderdale, about the L.10,000 sterling bond, mentioned 4th March 1685, is again debated. It was ALLEGED for Yester, that *L. ult. C. de Dot. Prom.* was most just; and that Minzinger tells it was so decided in the Imperial Chamber of Spira; and that her renunciation of her bairns' part of gear and others extended not to this bond; for Gifanius, *de Renunciat.* tells they are *strictissimi juris*, and gives 25 cases where they are to be interpreted and restricted, even against the propriety of words.

The Lords being to advise this cause upon the 26th of January, Yester craved a farther hearing to delay it, apprehending the event; and ALLEGED,—That this L.10,000 bond had an onerous cause to make it subsist, over and above what he got with her in tocher, *viz.* her mother's contract of marriage; and L.8000 sterling which Lauderdale got *stante matrimonio* by way of composition with her, as one of the heirs of line of the Earl of Home.

The Lords, before answer, granted Yester a diligence, to the 19th of February, to recover these papers. And having resumed the case, upon the 21st of February, and advised the whole debate, the Lords repelled the first defence against this bond, upon the not delivery: but sustained the second and third upon the contract of marriage and renunciation: and found, that the L.12,000 sterling of tocher, in the contract matrimonial, fulfilled and took away the said prior bond, notwithstanding of all the adminicles Yester produced to instruct the onerous cause of the bond; such as the adventitious fortune which the Duke of Lauderdale got with her mother, as one of the two heirs of line of Home, &c.; reserving to Yester to insist for these debts as accords.

On the 28th of February, Yester gave in a bill, offering to prove the renunciation was extorted from him and his Lady, by the Duke of Lauderdale's power and concussion. But the Lords refused his bill. *Vol. I. Page* 492.

See the other parts of the Report of this case, pointed out in the Index to the Decisions, under *Yester* against *Lauderdale*, and *Tweeddale* against *Lauderdale*.

1688. *January* 20. SIR JAMES COCKBURN *against* ALEXANDER MILN, LORD ROSS, &c., Creditors of Hamilton of Grange.

See the prior part of the Report of this case, Dictionary, page 1046. See Harcarse's Report, Dictionary, page 1051.

IN the competition between the Creditors of Hamilton of Grange, debated this day *in præsentia;* it was contended for Sir James Cokburn against Lord Ross, Bonhard, Alexander Miln, and others, that, *quoad* a 4000 merks' bond, he ought to be preferred; because it was granted by John Hamilton of Grange as principal and the Lord Forrester as cautioner; and Sir James, father to the said John, had disponed the estate to the Lord Forrester, under a back-bond that it should subsist for relief of his cautionries. ANSWERED,—The back-bond says only for relief of what he should be engaged in for Sir James.

REPLIED,—It bears, in the narrative, "for the well of the family;" *ergo*, It must extend to his cautionries for John the son, this being profitable *et in rem*