

Johnston has the other half of the booth ; and who consented that he should not flit, providing that he paid his maill, and did not seek another shop.

REPLIED,—Murdoch was only in use to set, and Inglis had taken allennarly from him ; and so, unless he had promised, Johnston's promise was not relevant.

The Lords found Inglis bruiked *pro indiviso* ; and so, Johnston having consented to his sitting, he could not be removed for this year. See Craig, *Lib. 2, Dieg. 9, de Migrando.* Vol. I. Page 51.

1679. July 23. SETON against DUNBAR of BLAIRIE.

SETON pursues Dunbar of Blairie for payment of a debt. ALLEGED,—He had accepted a precept for the debt upon Blairie's chamberlain. REPLIED,—*Non relevat* ; unless he say that either I got payment by it, or that I accepted it in satisfaction ; otherwise law presumes it, like an assignation, to have been only in corroboration. See November 1673, *Lauder.*

My Lord Newton inclined to find, that a creditor's accepting a precept from a debtor, upon the debtor's chamberlain or mother, exonerated the drawer of the precept, albeit the receiver got not payment, unless he protested it for not acceptance, or, being accepted, if he did not diligence, but suffered the acceptor, on whom it was drawn, to turn bankrupt and insolvent ; and found, that in neither of these two cases could the receiver of the precept recur against the drawer ; but it was presumed to be taken in satisfaction. Yet thir precepts seem not to be like the case of bills of exchange among merchants, nor to be regulated in that manner, as they are. See 17th February 1662, *Wright.*

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1678 and 1679. DAVID JACK against CLAUD MUIRHEAD.

1678. February 14.—DAVID Jack pursues reduction of a comprising led against him, as lawfully charged to enter heir to his father, and of the grounds of it, against Clerk and Muirheads. The first reason of reduction was,—One of the bonds was null, because subscribed by two notaries before three witnesses only. The Lords repelled this, because there were four inserted and designed in the body. *2do*, That, in the decret *cognitionis causa*, the procurator's name was blank. This the Lords regarded not. *3tio*, That the charge to enter was wrong signetted. This they also rejected. *4to*, That a sheet in the executions, and another in the comprising, were cutted and falsified. Before answer to this, the Lords ordained John Hamilton, writer of the apprising, to be examined. *Vide 12th December 1678*, thir same parties.

*Advocates' MS. No. 726, folio 320.*

1678. December 12.—DAVID Jack against Claud Muirhead,—*vide 14th Feb. 1678*, [No. 726.] John Hamilton, the writer of the apprising, being examined, and having in some measure confessed the cutting and altering of the two sheets,—the one in the execution and the other in the apprising,—in respect a wrong market-cross was inserted ; the Lords first inclined to restrict the comprising to the precise sum for which it was led, cutting off penalties and sheriff-fees, and to make it redeemable, though the legal was expired. But the parties not agree-

ing on that, the Lords, upon ocular inspection, and John Hamilton's declaration, reduced the said comprising *funditus*.

I hear of a case betwixt *Janet Gall* and the *Earl of Wemyss*, in 1675, wherein the Lords, upon naked inspection of the writ, and upon comparing it with other hand-writs of the party, found it false and null; but declared that her bypast using of it should not import any corporal punishment or infamy against her, as producer and user.

Thereafter Jack gave in a bill, craving that Muirhead might account to him for his intromissions. The Lords, in regard it was represented that they were *fructus bona fide consumpti*, on the 8th of February 1679, adhered to their former sentence; and reserved action to Jack against Muirhead, and the other representatives of Muirhead's father, for the intromission with the maills and duties had by them more than will satisfy the debts for which the comprising was led. *Vide infra*, 19th February 1679; *item*, 31st January 1679, *Irvine*; 1st February 1679, *Seton*. *Vol. I. Page 28.*

1679. February 19.—IN Jack and Muirhead's case, (12th Dec. 1678,) it was debated, if an apparent heir be served, but warn parties to remove before he is infest as heir, but infests himself before the term to which he has warned them, if it be sufficient to validate the warning, and if it will accresce. Some distinguished, if it was on a retour it was sufficient; but not, if it was on a precept of *clare constat*, as in this case of Jack. And thus the Lords positively found, that a seasine on a precept of *clare constat*, after a warning, is not enough; as Haddington observes, 4th March 1623, *Hermisheills*. Others say, there is no difference upon which of the two it proceed; for a seasine, on a precept of *clare constat*, is a good enough title to remove *quoad* the subject matter and lands contained in the precept of *clare constat*, but *non ultra*; it will not serve for an active title *extra subjectum proprium*. See June 1677, No. 579, § 4; and 24th July 1679; and *Stair, tit. Tacks*, § 36. *Vol. I. Page 43.*

July 24.—David Jack pursues a removing against Claud Muirhead, from some tenements in Hamilton, (19th February 1679.)

ALLEGED,—The warning is null, because he was not infest the time of the warning, but after. REPLIED,—The seasine being upon a precept of *clare constat*, and it being before the warning, it accresces and retrotracted; and so was sufficient.

This being reported, the Lords found the warning null, because the very seasine was not only posterior to the date of the warning, but even to the term of Whitsunday, to which the warning was made to remove.

The Lords had decided the same before, as Haddington observes, who makes a difference betwixt a seasine upon a precept of *clare constat* and a retour. See Dury, 20th January 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, 18th July 1625, *Wallace*.

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1677 and 1679. SARAH FRENCH *against* the EARL of WEYMES.

1677. July 25.—Sarah French, as executrix-creditrrix, confirmed to ——— Weimes, her husband, pursues the Earl of Weymes for payment of 100 merks in his hands.