No 591. has there been a child born of it; and no authority has yet given a woman in such a situation, right to the legal provisions of a widow.

Answered, The presumption certainly is, that the marriage subsisted for more than a year and day: the parties, ten months before Crawfurd's death, acknowledged themselves to have been married, of a prior date; and the petition of the Procurator-fiscal, in consequence of which they appeared, sets forth, that this took place some considerable time ago. This was presented in concurrence with Crawfurd; but, at all events, the wife must be entitled to her legal provisions, as the marriage was not dissolved without lawful children. The fiction of law is, that the marriage was contracted when the child legitimated was begotten, Erskine, B. 1. Tit. 6. § 52. This must operate as much in favour of the mother as of the children; indeed the legitimacy of the children depends upon this very presumption, that she was a lawful wife at the time of their birth, which limits the case of legitimation, by a subsequent marriage, to those where the parties might have been married at the time. Were it otherwise, where there is confessedly a widow and children, the goods in communion would suffer a bipartite instead of a tripartite division; Anderson against Wishart, 23d February 1714, No 579. p. 12676. is a narrower case than the present: There were there no children, and the proof of prior marriage was extremely weak, yet she was found entitled to the terce.

Upon the principle, that she was the mother of lawful children at the time of her husband's death, the Lords "adhered."

Lord Ordinary, *Armadale*. For the Trustees, *Fergusson*. Agent, *A. Blane, W. S.*
For the Widow, *H. Erskine. H. D. Inglis*. Agent, *W. Inglis. W. S.* Clerk, *Home*.

F. *Fac. Col. No 17. p. 34.*

*** Promise of marriage how relevant to be proved.—*See* Div. I. Sect. 9. *h. t.*

SECT. VI.

Minority.

No 592. 1626. *March* 3. Wilson *against* Aitken.

In an an action of reduction of a bond betwixt Wilson and Aitken, upon a reason of minority and lesion, the pursuer produced a testimonial, bearing the time of his baptism, subscribed by Mr Patrick Henderson, keeper of the session books of the kirk of Edinburgh, to prove his minority. The Lords found it could not prove, because neither was that register of that authority that the extract thereof alone ought to make faith *per se*, much less could it prove minority, for the time of the baptism ought not to be reputed as if the child had been born at that time, seeing he might have been one or more years of age before he was baptised, and so the minority could not be proved thereby, to count from his baptism; but such testimonials may have greater respect and

faith to prove majority, and that to count from the time of his baptism, for he must be born ere he be baptised. No 592.

Act. *Lermonth.* Alt. *Absent.* Clerk, *Hay.*

Fol. Dic. v. 2. p. 268. Durie, p. 187.

1667. *June* 4. THOMSON *against* STEVENSON.

No 593.

AN extract out of the kirk-session books is not a sufficient probation of age to infer reduction *ex capite minorennitatis*, but the case being *difficilis probationis* after a considerable time, the LORDS found, That *aliqualis probatio* ought to be received with the adminicle aforesaid.

Fol. Dic. v. 2. p. 268. Dirleton.

*** This case is No 104. p. 8982. *voce* MINOR.

SECT. VII.

Payment and Extinction.

1624. *July* 29. NORKAT, Englishman, *against* HUME.

No 594.
A notandum, in the creditor's handwriting, on the back of a bond, tho' delete, joined with other circumstances, found good evidence of partial payments.

IN an action of registration pursued by Norkat an Englishman against Hume, the LORDS found, That the obligation desired to be registrated ought not to have execution for that quantity of the sum therein mentioned, whereof there was a note written upon the back of the obligation, by the creditor himself, now pursuer, bearing so much of the sum to be paid, and that there rests only the particular sum expressed in the note; in respect of the which note written by the pursuer's self, and coming out of his own hands, the LORDS found, That no execution ought to pass, but for that rest which he had written to be owing; and this note so written was found sufficient to liberate the defender for the remnant of the sum, except the rest foresaid: Albeit it was *replied*, That the note ought not to derogate from the bond, nor prejudge the pursuer, seeing it was delete, and was not subscribed by the pursuer, who might have written the same upon hope of payment; which never being made, he might lawfully delete that note, as he hath done, and ought not to be hurt in his lawful debt by the once writing thereof, except that the defender might prove payment of the same. Which reply was once sustained as relevant; but the defender further *duplying*, That since the writing of that note the pursuer had received an obligation from him of far greater sums than were contained in this obligation now controverted; which sums he had paid, and had retired the said posterior bond, which he then produced cancelled, it was a great presumption that the sums