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*, 19*th February* 1679; *item*, 31*st January* 1679, *Irvine*; 1*st 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 infeft as heir, but infefts 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, 4*th 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 infeft 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, 20*th 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, 18*th July* 1625, *Wallace*. *Vol. I. Page* 52.

1677 *and* 1679. Sarah French *against* the Earl of Weymes.

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

ALLEGED,—*Non constat* her husband was dead, and so she has no interest to claim implement of her matrimonial provision till then.

ANSWERED,—It is *jus tertii* to the debtor: he shall be secured at all hands. *2do*, Her husband went to the wars six years ago, and died there; now it is impossible for her to prove he is dead, since she cannot bring witnesses out of France.

This went to the Lords' answer; and they very equitably found, that she, in reason, ought to be burdened with no more but to prove that it was six or seven years since he went out of the country, and that he was *tentus, habitus, et reputatus* dead *in vicinia* where he had lived, and that the bruit and report of the country was of his death; for, in effect, there was no more either possible or prestable to her. Yet the axiom of law runs,—*Quod unusquisque præsumitur vivens nisi probetur mortuus.* See Durie, *25th June* 1622, *Erskin* against *Sterin*; and *Mascardus* and *Vesembec* there cited. See thir parties, 18th January 1679. *Advocates' MS. No.* 617, *folio* 295.

1679. *January* 21.—In the case of Sarah French against the Earl of Wemyss, (25th July 1677,) the Lords, having advised the probation, found the fame of her husband's death sufficiently proven, and therefore decerned the Earl to pay the said sum to her as relict and executrix-creditrix on her contract matrimonial. After which, ALLEGED the debt was not yet proven against him. Wherefore a day is assigned him to depone. *2do*, David Wemyss compears for his interest, and craves to be preferred, as he who was assignee to sundry debts owing by her husband, and had arrested this money, and obtained a decreet against the Earl of Wemyss to make forthcoming. ALLEGED,—Both his assignations and the ground of debt were null, some of them wanting date, others of them wanting writers' names and witnesses. *Vol. I. Page 35.*

July 24.—In the cause pursued by Sarah French against the Earl of Wemeys, (18th Jan. 1679,) Forret having reported to the Lords the competition between her and David Weymes, the Lords preferred her, both in respect of the nullities in his rights, as also because she was a privileged creditor, as relict and executrix, and had a tacit hypothec. *Vide l. un. C. de Rei uxoriæ Actione.*

Vol. I. Page 52.

ANENT IRRITANT CLAUSES, *DE NON ALIENANDO.*

WHERE a charter bears a feu-holding, but with a clause irritant *de non alienando* without the superior's consent, and, in case of alienation, that the feu lands shall return to the superior; this conventional irritancy being committed and incurred by an alienation, it makes the fee open to the superior; and a liferent or other base infeftment granted indeed prior to the said alienation, but not confirmed, will not be able to defend against the superior or his donatar; because, by an alienation, this conventional irritancy makes the fee to return, *tanquam optimum maximum*, as well as the legal irritancy by recognition in ward lands would do. And Newton found this conventional irritancy more pregnant to produce this caducity and casualty to the superior, than the legal one; and this, notwithstanding that it was offered to be proven, that the right was returned again in the person of the apparent heir of the analyier. For, though a disposition made *ab initio*, by a vassal to his apparent heir, does not infer recognition; yet it being once disponed to a stranger, the returning it to the person of the disponer's apparent heir does not purge recognition, nor prejudge the superior.

Vol. I. Page 52.

Anent Recognition.

As the disponing of ward lands, without the superior's consent, infers recognition, and a charter granted *a me* and not confirmed, is null in law; so it may be queried, where the superior subscribes the said charter *a me* with his own vassal, if that will be equivalent to a confirmation, so as to hinder the incurring of the recognition. Some think it will, though, *regulariter*, a seasine taken upon such a charter is null in law; (and the nullity of a seasine does not hinder but, by taking that seasine, recognition is incurred, *quia vassalus contempsit dominum, et fecit quod in se est*; though Craig be of the contrary opinion;) and such a subscription seems not to be *habilis modus* of avoiding recognition, which is only by a resignation in the superior's hands, or by a confirmation: yet any consent of the superior's, adhibited either before or after, stops recognition, if it be before the gift. Of old, the Kings of Scotland used to give their ward vassals a small paper, containing, in few lines, a license to them to dispone upon their lands; which license stopped that odious casualty of recognition.

Vol. I. Page 52.

Anent Cautioners.

There is a bond granted by one as principal, and others as cautioners, for payment of a principal sum; and when it comes to the obligement for payment of the annualrent, it only binds the principal debtor; which is the style of many bonds, as they use to be drawn and conceived in the West-country. A cautioner being charged upon a bond thus conceived, both for principal and annualrent, he suspends on this reason, that the obligement for annualrent only ties the principal.

Answered,—This conception is but a mere mistake, and it is contrary to the general custom and universal practice received in this kingdom.

Replied,—They offered to prove it was the custom in the west, and it was the general meaning of parties there only to bind the principal for the annualrents, and not the cautioners; because, if the principal do not pay the annualrents duly, then you may call for your principal sum: and this is against no public law, and so is a lawful paction: and consuetudes are local, and derogate from the municipal customs; *et, in dubio, mos illius regionis ubi res agitur*, is attended. *L.* 34 *D. de R. J.*

This was debated, but not decided. Some of the Lords inclined to sustain the custom, if it were proven. *Vol. I. Page 52.*

Anent Bonds of Corroboration.

Where a bond of corroboration is charged on, and the principal bond which is corroborated is not yet extant, or not produced, *quær.* if the bond of corroboration be valid by itself alone, without the principal. *Videtur quod non;* for *non creditur referenti nisi constet de relato; et, sublato principali, tollitur accessorium.* Yet I would think the corroboration binds him to pay the debt, though the first bond, in corroboration whereof it was granted, were perished; and it burdens the debtor to prove that the first bond is extinct, cancelled, and retired, by payment. *Vol. I. Page 53.*

ANENT TESTAMENTS.

It was queried if a testament, whereof the dead's part in the inventary exceeds £100 Scots, (for, if it be within that, there is little doubt,) be only subscribed by one notary, if it be null by Act 1579, requiring two notaries and four witnesses to all writs of importance, which is interpreted to be writs above £100 Scots. Some thought it valid, because *ultimæ voluntatis liber debet esse stylus, et liberum quod non iterum redit arbitrium. L.* 1 *C. de S. Sanct. Eccles.* 2*do*, By Act 1584, one minister is declared enough; *ergo* also one notary. Others thought it null; and that the argument from a minister to a notary was not good, the law reposing more confidence in a minister's faithfulness than in a notary's.

The Lords indeed have found contracts of marriage, subscribed only by one votary, valid, if marriage hath followed thereupon; Durie, *ult. February* 1637, *Lockhart*; *ult. January* 1639, *Dundas.*

The Lords found a testament privileged; and that it needed not two notaries and four witnesses; Hadd. 18*th January* 1623, *Boog* against *Hepburn.* See Stair, *tit.* 30, and *infra*, 23*d June* 1680, *Ogilvie.* *Vol. I. Page 53.*

1679. *July* 28.

A WRIT, consisting of more sheets than one, was quarrelled as null, because not side-subscribed. The party user offered to get it side-subscribed; upon which the Lords allowed him to do it. *Vol. I. Page 54.*

1679. *July* 29. JAMES MILLAR *against* CRAMOND.

IN James Millar's suspension of a decreet, obtained against him, by one Cramond, a surgeon in Kelso, for curing him of a *hernia:*

The Lords, having considered the probation of the employment, and furnishing the drugs, and finding that it was very slender, and did not condescend upon particulars and the quantity furnished, and that some of the witnesses were women; yet, in respect there was somewhat proven, they took the pursuer's oath in supplement of the probation. *Vide* 31 *D. de Jurejurando.*

Vol. I. Page 54.

1679. *July* 30. JOHN EWART of MULLOCK *against* SIMEON COOPER, Minister of Kirkcudbright.

IN a bill of suspension, presented by John Ewart of Mullock, against Mr Simeon Cooper, minister of Kirkcudbright, for his stipend, upon this reason,