1697. *July* 21. JOHNSTON *against* JOHNSTON.

No 8.
A person having apprised lands on a bond granted by the apparent heir, and the apprising coming afterwards into the next heir's person, who was liable *passive*, this heir assigning the apprising to a third person, and he excluding the creditors by it, the Lords found that the apprising having been once in the apparent heir's person, it was thereby extinguished, so that he could not transmit it to a third party.

IN a cause between Mr William Johnston, son to Westerraw, against Sarah Johnston, the LORDS decided this point, which was new: Jardine of Applegirth apprised the lands of Lockerby, on a bond granted by the apparent heir. This apprising afterwards comes into the next heir's person, and who, by his contract of marriage, so far represents as to undertake his father's debts. This heir assigns the apprising to Mr William Johnston, and he excluding the creditors by it; it was *alleged*, The apprising was extinct by confusion *ipso momento* it came into the person of the heir, so he could make no valid conveyance of it; for he being both debtor and creditor *confusione tollebatur*, that being *inter modos dissolvendi obligationem*. *Answered*, By the act of sederunt 28th February 1662, in Glendinning against Nithsdale, *voce* PASSIVE TITLE; *that* conveyance was found a passive title, but did not declare the debt extinct; and so adjudications on such bonds have been commonly made use of to be a title for apparent heirs to quarrel their predecessors' deeds by reductions. *Replied*, The inferring a passive title is a greater penalty and certification, than to declare the right null, and these conveyances have proven a seminary of fraud, whereby apparent heirs have created vexation to their predecessors creditors. Therefore the LORDS found it an extinction so as he could not transmit it to Mr William Johnston. But in the case of Hugh Neilson, the LORDS found no extinction, though he had acquired a right to a debt of his father's, because his representing his father was no otherways proven against him, but that he being out of the kingdom and pursued in a *cognitionis causa* for a debt of his father's, he gave not in a renunciation and so *præsumptione juris* became personally liable; for the LORDS thought it reasonable to repone him against this passive title, by allowing him yet to give in his renunciation, unless they could instruct that he truly represented some other manner of way: so as it be a real addition or immixion, and not a presumptive one. *See* PASSIVE TITLE.

Fol. Dic. v. 1. *p.* 195. *Fountainhall, v.* 1. *p.* 788.

1726. *January* 4. CUMING of Coulter *against* IRVINE of Crimond, &c.

No 9.
A person tailzied his lands to heirs male. Afterwards he granted a bond of provision to his second son;

IN the year 1683, Alexander Irvine of Drum made a tailzie of his estate in favour of himself, and the heirs male of his body; which failing, to certain other heirs male named. In the year 1687, the said Alexander Irvine executed a bond of provision for the sum of L. 80,000 Scots to his second son Charles, and the heirs male of his body; which failing, to the other heirs male of the persons nominated and designed by him to succeed in his lands and heritages.