

No 630.

1687. *November.* ——— *against JOHNSTON'S ASSIGNEE.*

A DEBT pursued for being referred to the defender's oath, he swore with this quality, that as the pursuer's cedent gave him goods, so he thereafter gave the cedent goods.

THE LORDS did not sustain the quality in the oath as a ground of compensation, nor yet as payment, seeing the deponent did not say, that the goods given to the cedent were in satisfaction of the other goods, and now the cedent was bankrupt.

*Harcarse, (OATHS.) No 745. p. 211.*

No 631.

1687. *December 8.* STEVENSON *against* WRIGHT.

THE LORDS were of opinion, that co-partneries and societies in bargains of victual are probable by witnesses.

*Harcarse, (PROBATION.) No 803. p. 226.*

No 632.

1688. *July.* FORBES of Skellitor *against* DUNGAN SHAW.

A FATHER-IN-LAW being pursued for his daughter's tocher of 2000 merks, he proponed compensation on the delivery of certain goods and cattle, estimated to L. 400, which he offered to prove by the pursuer's oath; and the pursuer (having deponed) that these goods were gifted to him by the defender, it was *objected* by the defender, That the quality of gifting was extrinsic and improbable, because *debitur non præsumentur donare*; and the goods were of value above what is usually gifted among such persons.

THE LORDS sustained the quality as intrinsic; but this was afterwards stopped.

*Harcarse, (OATHS.) No 748. p. 211.*

No 633.

In a reduction of a note granted for the price of goods, upon the head of minority, &c. there is no necessity to

1737. *November 27.* SUTHERLAND of Pronsie *against* LADY KINMINITY.

PRONSIE, when a minor, bought a gold watch from Lady Kinminity, for which he granted his note to her for L. 25 Sterling. In a reduction thereof, upon the head of minority and lesion, it was *alleged* he had been greatly imposed upon in the bargain, as the watch was not worth above one third of the price; and although the pursuer would not have been bound to have restored it, in case he had given the same away for nothing, or been liable in the price,

if he had sold it, and squandered the money; yet, as he happened to be still possessed thereof, he offered it back to the defender.

*Answered for Lady Kinminity;* It is not every transaction of a minor's that is liable to reduction, enorm lesion must always be joined; *e. g.* If he buys cloaths from a merchant, suitable to his rank and quality, he cannot reduce the obligation given for the price, on pretence that he could have got cloaths cheaper elsewhere. Now, considering the pursuer's rank and opulency, it was no extraordinary thing for him to wear a gold watch; more especially, as it is admitted, That at the time of the purchase, he had in view to make a present thereof to a young lady whom he was about to marry. And as to the value, it cost the defender the same money she sold it for; which is the more probable, as the common rate of these things are from L. 20 to L. 25 Sterling. Besides, there is no evidence that the watch now offered is the same specific one delivered to the pursuer.

*Replied for Pronsie;* It is contrary to the rules either of law or equity, to load him with a proof that the watch is the same he bought from the defender; because such a proof would be inexplicable, seeing those who allow themselves the liberty of dealing with minors, seldom or never call witnesses to their bargains. Neither does the comparison, from a minor's purchasing cloaths of a merchant, apply to the present question; for, if a merchant should fraudulently induce a minor to pay 30 shillings per yard for cloth not worth 15 shillings, there can be no doubt that he would be entitled to set aside the bargain on the same grounds that this transaction ought to be reduced.

THE LORDS, in respect the watch was produced, found no necessity that the pursuer prove the identity thereof.

*C. Home, No 77. p. 129.*

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S E C T. X.

Relative to Land.

1623. February 27.

MASTER of JEDBURGH against ELLIOT.

In an action pursued by the Master of Jedburgh against one Elliot, for the violent profits of certain rooms, which were not *per expressum* contained in the decret of removing, but libelled in this action of violence to be parts and pertinents thereof; the defender compeared, and alleged them to be pertinents of his proper lands, heritably pertaining to him; and both the parties alleging pos-

No 633.

prove the identity, when the goods are offered back.

No 634.

In what manner competent to prove part and pertinent.