servance of any contract made by him without consent of his said curators, but restores him against the same; because the said deeds being *ipso jure* null, there is no act whereto the oath can be accessory; *quod non est nequit confirmari; non entis nulla dantur accidentia, nullæ qualitates.* *Sic* Hadington, 15*th December* 1609, *Constable of Dundy.* *Sic* Perezius, *in Paratitlis ad supra-d. Tit. C. Si adversus venditionem,* who shows that the canons order all oaths given by minors, without distinction, to be sacred and inviolable, *cap.* 28 *ext. de jure jurando,* but that the French law rejects all such oaths *ob lubricitatem ætatis, in qua æque facile est iis jurare ac contrahere,* and restores minors against them whether they be adjected *contractui valido vel invalido; nam quæ contra legem fiunt, nulla stipulatione, nullo mandato, imo nullo sacramento firmitatem capere debent; L.* 5. *in fine C. de legibus.* *Vide L. septimam, p.* 16. *D. de Pactis, ibique* Gothofredum. Gudelinus, *De jure novissimo, libro* 3*tio, cap.* 14, shows this also to be the law of both *Gallia Celtica et Belgica.* *Vide infra,* Provost Currie's case, 10*th January* 1680.

Advocates' MS. No. 328, *folio* 131.

1672. *February.* Anent PROBATION by WITNESSES.

ABOUT this time one being pursued to pay the sum of L.40, conform to his bond; he offered to prove payment by witnesses, which he alleged to be lawful for him to do, the sum being within L.100. To this it was ANSWERED, That the payment of L.100 might be proven *per testes,* where the debt was not constituted by writ; but wherever any sum, though never so small, was due by writ, the same can never be taken away except by writ or oath of party. The Lords refused to admit witnesses against writ, though it was *in re tam modica.* And truly this is agreeable to former practiques. See Dury, 15*th July* 1624, *Nisbet* and *Short,* with the quotation on the margin, out of Antonius Faber. See Hadington, 15*th November* 1622, *Macgill* and *Forrest; infra November* 1673, [*Syme* against *Inglis,*] *numero* 429. See Dury 4*th July* 1632, *Dalrymple* against *Closeburne.*

The Lords also refused to admit the probation of a promise of L.20 only to witnesses, but ordained it though never so mean to be proven *scripto vel juramento.* Yet see the contrary in Dury, 25*th February* 1636, *Laird of Ernock.*

Advocates' MS. No. 329, *folio* 131.

1672. *January* 18, and *February.* MR. THOMAS RAMSAY, minister at Mordington, *against* JO. RENTON of Lammerton.

Jan. 18.—MR. THOMAS RAMSAY, minister at Mordington, having recovered decreet in 1656, before the sheriff of Berwick, against Jo. Renton of Lammerton, for pay-

ment making to him of L.360, as Lamerton's proportion of the manse of Mordington, according as the same was appreciated by craftsmen at the command of the Presbytery: whereupon, after the sheriff's precept was disobeyed, having charged him, then minor, with horning, and denounced, and registrate; he now, upon the act of Parliament 1621, ordaining annual-rent to be due after the denunciation, craves by a summons annual since that time, and in time coming, ay till the sum be paid.

It was ALLEGED,—There could be no annual-rent due, because the horning was null, and unorderly executed, in so far as they did not bear that the defender's tutors and curators were charged at Dunse, as the market-cross of the head burgh of the shire where the minor dwelt, which, in form, they ought to have borne, and so there can be no ground for annual-rent.

ANSWERED,—That the minor was personally apprehended; that his mother, who was his tutrix *sine qua non*, and managed all his affairs, was present when it was given, consulted it with her advocates; that the other heritors of the parish, viz. old Mordington, and Pat. Scot of Langshaw, then heritor of Edrington, who were *majores scientes et prudentes*, and as much concerned as this defender, after all imaginary courses taken by them to elude the payment of their proportions, yet were forced to pay the same. That the charge given to him personally, being past tutory, put him sufficiently *in mora non solvendi*, which is the reason whereon the act of Parliament is founded. That the citations given to minors are, indeed, null, if the tutors and curators be not also cited at the market-cross; but that must not be drawn here: because the annulling the citation is only *peremtoria istius instantiæ*, which may be made up by giving a new citation; but here *majus versatur prejudicium;* if the horning be annulled he loses the haill interest of his money, and that most innocently on his part, for the informality or knavery of a messenger. That hornings which are made the ground of declarators of escheat must be strict and formal, but they need no such exactness to the effect of annualrent.

Vide Dury, 28 *July*, 1625, *Rankeillor* against *the L. of Aytoun.*

Yet my Lord Gosfurd found the horning null, even *quoad* the effect of annualrent, and all others, unless we would say Lamerton was then major.

Then we converted our process unto damage and interest, which Mr. Thomas had sustained through the want of that money these sixteen years; which *damnum et interesse* must succeed *in vicem usurarum*, and are due *nomine pœnæ et ob moram non solventis;* though I call to mind that *ex mora non debentur usuræ nisi in bonæ fidei judiciis.* This my Lord Gosfoord allowed us to do, providing we gave in our condescendence to the adverse party to see. *Vide L. 32, p. 2, L. 35, L. 38, p. 7. D. de usuris, ibique Doctores. Vide supra, num.* 251. [11*th Nov.* 1671, Mathy.] *Vide supra*, No. 198, [5*th July*, 1671, Pitreichy against Geicht.]

In this cause we having only produced the letters of horning and their executions, for instructing the summons; my Lord Gosford refused process till the decreet were also produced, and alleged it should have been given out to see *ab initio.*

Advocates' MS. No. 304, *folio* 125.

February, 1672.—IN the action marked at No. 304, between Mr. Thomas Ramsay, and the Laird of Lamberton, the horning being cast, and no annual-rent found due, we converted it to damage and interest; and having qualified the same

pregnantly enough, yet the Lords refused altogether to grant any, but assoilyied Lammerton therefrom; nowithstanding that in our law the English double bonds are restricted to the single with interest, which is in place of *damnum*. But I think his profession, *(cui de jure canonico interdicitur mercantia illa usurarum,)* made this his claim unfavourable.

Advocates' MS. No. 330, *folio* 131.

1672. *February.* MR. ROBERT MERCHINSTON, Minister, *against* THOMAS ROBERTSONE.

ABOUT the same time Mr. Robert Merchinston, minister, pursuing Thomas Robertsone, town-treasurer of Edinburgh, to make payment to him of the price of fifty-five bolls of bear, sold to him in 1656, by Mr. James Winrahame; which Mr. James being his debtor in a greater sum, he had arrested in the said Thomas his hands, the price of the foresaid bolls, and now craved to have the same made forthcoming; and produced, for instructing the debt, a precept drawn by Mr. James Winrahame on Mr. Cornelius Inglis of Eastbarns, bearing, that he had sold Thomas Robertsone fifty-five bolls of bear, and therefore desired him to deliver the same to the said Thomas, out of the increase of the lands of the Barnes, Newtonlies, and the acres about Dumbar; and at the foot of it Thomas Robertsone acknowledges the receipt of the said bolls contained in the precept.

ALLEGED,—He cannot make forthcoming, because the receipt produced, unless it had borne an obligement to pay the price, (which it does not,) can never bind a debt upon Mr. Robertsone.

ANSWERED,—A naked receipt of victual is a sufficient constitution of a debt against the receiver, and he must instruct either by writ or oath of party how he paid for it; yea, which is more, though there had been no receipt, if the pursuer should prove that the bolls were truly delivered, it would have undoubtedly bound him to pay the price, unless he could instruct where it was discharged.

The Lords found a naked or simple receipt of victual, imported an obligation to pay the price thereof.

Then ALLEGED,—That this was not a naked receipt, but depended upon a prior onerous cause, and related thereto; viz. to a precept, which in law presupposed payment of the price before Mr. Winrahame, a lawyer, and one exact in these things, would give the precept out of his hands; that the precept must be reputed of the same nature with a bill of exchange, which if protested, then the receiver has his regress to the drawer; even so here. I put the case, Mr. Cornelius Inglis had refused the precept, and to deliver the bolls, are there any doubt but Mr. Robertsone, *actione mandati contraria, ut eum præstet indemnem,* might recur against Mr. Winrahame to the value of the precept? and all that would be allowed him is to prove by Mr. Robertsone's oath, or otherways, that albeit he had given him such a precept, yet he was still unsatisfied therefore, and so *removendus erat exceptione doli mali.* Which point was farther pressed very elegantly by Sir Jo. Cunyghame in his information.