

quota. To the *third*, The minor was not concerned to pay the expense of a process between his tutor and grandfather anent the contravention of the articles of agreement ; and, if they insisted against the tutor as liable *nomine proprio*, he opposed the libel, where he was only convened as tutor, and so could not answer *hoc ordine*.

REPLIED to the *first*, Though I ceded his being tutor, yet it was upon conditions advantageous to the pupil : To the *second*, Though I demanded 5000 merks, yet I then declared I would sequester the half of it to be a stock to augment the younger children's portions : To the *third*, The tutor is convened *super propria culpa*, for contravening the articles of agreement ; and so, it being for a fact of his own, he must be liable ; especially seeing, by a writ under his hand, he had renounced all dilators in this cause.

The Lords found the pupil not liable for the expenses contained in the three articles, nor yet the tutor for the first two ; but as to the third, being founded on the contravention of his own agreement, they ordained him to answer summarily *hoc loco*, without putting the Earl to a new process ; and allowed him to be heard on his defences before the Ordinary, reporter of the cause.

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1698. June 15. JOHN MONTGOMERY and ROBERT CUNNINGHAM *against*
THOMAS RIG.

PHILIPHAUGH reported Mr John Montgomery, writer, and Robert Cunningham, under-clerk, against Mr Thomas Rig, advocate, for exhibition of some papers, contained in his father's receipt of the same.

ALLEGED, *1mo.*---Mr Thomas Rig, my father, was pursued in his own lifetime for these papers ; and, the libel being referred to his oath, he deponed *negativè*. *2do.* This receipt, being dated in 1670, it falls under the Act of Parliament 1669, anent the prescription of holograph writs, if not pursued within twenty years after the date ; and this is twenty-eight years ago. *3tio.* The writs in the receipt have been restored, though it has been neglected and forgot to be sought up ; because, a year after the receipt, there is a certification, in the process wherein they were produced, extracted, in which all these writs now craved are mentioned as in the clerk's hand, and inserted in the decret as produced ; which demonstrates they have been restored, though the receipt be unretired ; especially seeing the receipt bears also the process, and yet it is now in the clerk's hands, and acknowledged to have been returned : so all has been restored together.

ANSWERED, to the *first*, The exception, *quod juratum est*, does not meet here ; for he only depones, in the terms of an exhibition, that he had them not since the citation, nor put them away fraudfully before ; and his receipt being found out since, the oath and it noways interfere ; nor can it absolve him, being now pursued *super diverso medio* : To the *second*, The vicennial prescription of holograph writs relates only to bonds, missives, or subscribed count-books, and cannot be extended to receipts of writs no more than it was found to comprehend bills of exchange in a late case of *Lesly of Boquhayne* : To the *third*, Mr

Rig was not only agent in that cause, but had also an interest, and, by the suppressing thir papers, possesses the lands of Balap, whereas they were clearly preferable to him : and the mentioning them in the certification produced does neither presume nor infer their redelivery ; because the extractors, having a full inventory of them and a receipt, they hold them as if they were in their hands, because they can command them back, upon the receipt, when they please ; and that they have copied the writs from the inventory appears by the scroll produced.

The Lords found, The determining the *third* defence would put a final period to the whole ; so waved the *first* and *second* : and as to the *third*, Considered there were inconveniencies on both sides ; for writs are frequently given back by advocates and agents, and their receipts forgot to be retired ; and it were a great hardship, after many years' silence, to make them liable to produce the papers, or make up the value. On the other hand, what security can the lieges have for the documents and evidents of their properties, when they are borrowed up by the contrary party's agent, upon his receipt, if that shall not be found probative, but eluded and taken away by presumptions ; which is of dangerous and threatening consequence to the people. Yet the plurality of the Lords found, The mentioning and inserting the writs in the certification posterior to the receipt, and the evidence that the process itself was given back, presumed the redelivery of the whole after so long a time ; and assoilyied the defender ; especially considering his father had, upon oath, denied the having.

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1698. June 17. PATON of KINALDIE against STRACHAN of GLENKINDY.

PATON of Kinaldie, as assignee, charged Strachan of Glenkindy on his bond. He repeats his reason of suspension and reduction as coincident, that it was extorted from him by concussion, being pursued before the Highland Justiciary for a theft committed by one in his ground, and, though he delivered the man, yet they threatened him till he gave bond ; whereas, *noxæ deditio*, he should have been free.

ANSWERED, 1mo.—This is not good against an assignee for onerous causes ; 2do. *Instrumenta quarentigiata*, such as our registrate bonds, should have summary execution, as appears by the French and German lawyers ; and, even by the common law, restitution craved *ex capite metus* is refused *ubi morandæ tantum solutionis gratia eam peti suspicio est*,—L. 2, C. ad Leg. Cornel. de Falsis. And, if the casting in of a reduction were sufficient to stop execution, then every debtor would raise it ; whereas the reduction should only be reserved, as accords, that the charger may have his *induciæ legales*.

REPLIED, to the *first*,—*Vis et metus* being *actio in rem scripta*, it meets singular successors *licet per mille manus res transiit* : To the *second*, Though a reduction recently intented, after he is charged on the bond, may be suspected as done *animo protelandi*, and so ought not to be summarily received ; yet here it is offered to be proven the reduction was raised before the charge, and delivered to the messenger to be executed ; but he was prevailed on to forbear till