No 95. p. 11424.; and Dirleton observes the parallel case, 17th February 1676, Abercromby against Atchison, Div. 5. § 7, *h. t.* And to prove super-intromission now against him by witnesses, were to take away his written discharge by the testimonies of witnesses, which would overturn the clearest principles in our law. *Duplied*, These decisions finding servants not liable for their intromissions, because it is presumed they delivered it to their master, holds only in menial domestic servants, which Mr Chaplain was not, but lived with his wife and family by himself apart; and though erroneous payment sometimes excuses tenants *ob rusticitatem*, and their simplicity, yet that cannot be applied to Mr Chaplain, who was nowise ignorant, but managed Balnamoon's law affairs, and his discharge can go no farther than the discharger had right, or the particular articles of the count related to, bore; so that the general clause can carry no more than what is actually contained in these accounts. THE LORDS thought this might expose servants (who, by their masters' verbal order, uplift their rents, and deliver it in without any thing farther) to an evident danger; and therefore found his super-intromission could not be now proven against him by witnesses, though *regulariter* lifting of victual-rent may be so proved, yet they would not allow it here, in respect of the general discharge.

Fountainhall, v. 2. p. 312.

No 109.

1706. *June* 22.

JOHN WATSON, Governor of Herriot's Hospital, *against* The REPRESENTATIVES of the Deceased WILLIAM FORRESTER, Writer to the Signet.

No 110.
A cancelled back-bond, with notes on the back and margin thereof, bearing that the granter was to renew the same on certain terms, being recovered at the instance of the creditor, in an exhibition against the granter's representatives, the Lords allowed witnesses to be examined for proving the notes to be the granter's hand-writing.

JOHN WATSON, as debtor to the deceased William Forrester, having assigned him to several debts for his further security, got a back-bond from him to hold count; and he, William Forrester, having given allowance to one of these debtors, of L. 19 Sterling that John Watson was resting him, borrowed up his back-bond, in order to grant a new one, with the deduction of the said L. 19, but died before he renewed the back-bond, which obliged John Watson to raise an exhibition against William Forrester's children and their tutors, wherein they deponed and exhibited the retired back-bond cancelled, with notes written on the back and margin thereof, bearing, that William was to grant a new back-bond in such terms. John Watson then craved a diligence to cite witnesses, for proving that the notes on the back-bond are William Forrester's hand-writ.

Alleged for the defenders, That it seemed an unprecedented piece of form, of dangerous consequence, to make up a writ in such a manner, since an uncancelled chirographum penes debitorem repertum præsumitur solutum; and far less could a cancelled bond, with notes thereon, found in Mr Forrester's custody the time of his decease, though never so well attested, to be his hand-writ, import an obligement upon him to grant a back-bond in these terms, or fix a trust upon his heirs: et frustra probatur quod non relevat.

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No 110.

Answered for the pursuer, Extraordinary cases must have extraordinary remedies; and yet the remedy proposed is most natural and rational here, where no writ is sought to be made up but what Mr Forrester's notes afford ground for, and nothing to be proved but that he writ these notes; 2*do*, Though the retiring of a bond by the granter presumes liberation, that *præsumptio juris* is elided and taken off by the notes upon the retired paper, if proved to have been written by Mr Forrester himself.

The Lords granted diligence to cite witnesses for proving the notes to be Mr Forrester's hand-writ.

Forbes, p. 110.

1710. *December* 7. Daes *against* Fullerton.

No 111.

In a reduction, upon the act 1621, of an assignation, which bore not only for love and favour, but for other causes and considerations, the assignee offered to prove the onerous causes; yet the Lords sustained the reduction, because they would not allow the assignee to prove contrary to the terms of his own writ.

Fol. Dic. v. 2. *p.* 223. *Fountainhall.*

*** This case is No 50. p. 921, *voce* Bankrupt.

1711. *June* 21. Sir Alexander Brand *against* The Tenants of Riccartoun.

No 112.
That a bill was blank in the receiver's name at the time of accepting, found relevant to be proved only by his oath or writ.

In the suspension raised by the Tenants of Riccartoun of a charge upon their accepted bill of exchange, at the instance of Sir Alexander Brand, the Lords having, No 21. p. 1679, found it relevant to annul the bill, that it was blank the time of accepting, and after it was out of the accepter's hand; they now found, that the bills being so blank, behoved to be proved *scripto vel juramento* of Sir Alexander Brand; in respect no person's written evident can be taken away otherwise than by his own oath or writ; and it were easy to pretend on all occasions that the writ quarrelled was originally blank. So this rule, that writ should not be taken away by witnesses, is most necessary to be observed in bills, where no instrumentary witnesses use to be adhibited, and, consequently, extraneous witnesses behoved to be relied on. Albeit, it was *alleged* for the suspenders, That if it were not allowed to prove the bill's being blank by witnesses, the design of the act of Parliament would be frustrated, since it is not to be imagined that the receiver of a blank writ will declare under his hand that it was blank; and it is the act of Parliament in this case that annuls the writ; for the testimony of witnesses does but prove the nullity, which is fact.

Fol. Dic. v. 2. *p.* 218. *Forbes, p.* 509.