which he is still presumed to have in his own hands *ante redditas rationes*; and, as he could have no action against the defender for payment of this debt, neither can Brebner, in whose name he took the assignation, to evite the exception competent against himself, *Nam quod non licet directe, non licet per ambages*; if it were otherwise, the privilege competent to minors for preventing encroachments upon their estates by their tutors and curators, might be easily eluded by their purchasing in the persons of trustees, rights to the minor's debts, and making them subsist as grounds of eviction of the minor's estate, though purged by his own means, and disappointing the minors of the benefit of eases got from the creditors. No 19.

Replied for the pursuer; Had the Doctor paid the debt, and taken a blank assignation, or taken an obligation from Binning to assign in favour of any person he should name, the defender might have had some pretence to say, that she could not be convened *ante redditas rationes*; but there is no place for it here, where the debt was in the pursuer's name, from the beginning delivered to himself, and never in the Doctor's person. Our law, which so far protects an onerous assignee, as not to allow the oath of the cedent to militate against him, can never allow a personal exception against a third party, who was neither author nor cedent to the pursuer, to militate against him; yea, a bond taken by a debtor in his creditor's name, was found not to be affected by arrestment laid on for the procurer's debt, even while it was in his hand not delivered to the person whose name was in the bond, 12th July 1677, Bain *contra* M'Millan, *voce* PRESUMPTION. Nor can the assignation to the pursuer be understood to elude the law; seeing the Doctor might lawfully pay his own debt, either by money in specie, or in case the creditor did not desire that, by procuring an equivalent right to him, and *nemini fraudem facit qui jure suo utitur*.

THE LORDS found there could be no adjudication at the pursuer's instance, as having right from Dr Arnot, the defender's curator, *ante redditas rationes*.

Fol. Dic. v. 2. p. 51. Forbes, MS. p. 92.

1714. *July* 22.

VISCOUNT of GARNOCK and His CURATORS, *against* JAMES WILSON, late Factor to the Deceased Viscount of Garnock.

No 20.
Effect of vouchers in the hands of a factor.

IN the compt and reckoning at the instance of the Viscount of Garnock, against James Wilson, as chamberlain and factor to the late Viscount, the defender craved, *imo*, Allowance in his accompts of several bonds and bills due by the Viscount, and now produced by the defender, without any discharge thereof by the creditors bearing receipt of the money from him.

Answered for the pursuer; The defender's simple having of the bonds and bills is no proof *per se*, unless he instruct that he actually paid the money; be-

No 20. cause a factor's custody of his constituent's bonds is all one as if they had been in the constituent's hands. Nor does the simple having of a writ give any interest therein to any person, unless it be granted to, or some ways conveyed to the haver; for otherwise, the party in whose favour it is conceived, might recover it by action out of the haver's hand. It is true, that such action would not lie against a factor, for recovering out of his hand, a bond granted by his constituent for this only reason, that a factor's custody is understood the constituent's custody; and a writ in the factor's hand is, in the interpretation of law, *instrumentum penes debitorem.* And as law presumes thus against the creditor, so it presumes also against the factor, that the constituent's bonds lying by him, have been paid and retired by the constituent himself, unless the contrary be instructed. Seeing law requires diligence and exactness in factors, any obscurity arising from their fault, should be interpreted against them; and here the factor has it in his power to put this question out of doubt, by taking receipts from the creditors to him in name of his master, which he hath neglected to do.

Replied for the defender; The retired bonds and bills being in the compter's own hands, who was under the character of chamberlain, it is presumed he retired them as chamberlain; because it is usual for such to pay and retire their constituent's obligations without taking formal receipts, especially where these obligations are not recorded, and the haver of the principal writ is presumed the payer. Were it a menial servant, having no other trust, who produces such retired bonds, it might be said, that he was only the hand that transmitted the money from the Viscount; but, where one has a written factory for uplifting the constituent's rents and effects, it is presumed that payment has been made by him as such; and chamberlains use to keep by them the retired instructions of their master's debts, till compting, as sufficient vouchers of their discharge; for a chamberlain may have access to tacks, rentals, and such like documents concerning his trust of uplifting the subject standing out; but he is not presumed to have access to other writs that do not concern his trust. Nor are chamberlains to be considered as tutors and curators, or others having universal mandates from persons absent, whose administration leads them to the charter-chest.

The Lords found that the factor's simple having of bonds and bills does not presume that he paid them.

2*do*, The compter discharged himself with the advances of money to my Lord himself from time to time, for which he hath no formal receipt, but only a book of memory which his Lordship kept, wherein he set down, with his own hand, the several payments, and other loose pieces of paper within the leaves of that book, written with his Lordship's own hand, which the compter contended was a sufficient proof for these articles; because, 1*mo*, They exactly quadrate with the accompt given in; 2*do*, My Lord needing frequent advance, it was impracticable to have formal receipts; 3*tio*, What one sets down in his

day-book or book of memory, proves against himself, though not for him; for it is not to be presumed, that he would set down, with his own hand, what he did not receive, and the loose notes being found in his book, are of the same force. No 20.

Answered for the pursuer; An accompt-book is not *per se* sufficient without being otherwise adminiculated, as was decided 20th Jan. 1631, Ogle's Creditors *contra* Brown, *voce* PROOF; far less can the accompt-book be sustained here, where the defender produceth a great many receipts under my Lord's hand, and craves allowance, both of these receipts and the sums in the accompt-book. For it is probable, the payments stated in the accompt-book were included in the receipts, where these are posterior; besides, the book and schedules could at most be sustained, only in so far as they are proved to be my Lord's holograph, and bear the receipt of money from the defender.

THE LORDS sustained the book, with the scrolls and loose papers within the leaves thereof, mentioning or acknowledging payments or disbursements made by the factor; the factor always giving his oath in supplement thereupon.

Forbes, MS. p. 96.

1714. *December* 9.

MR JAMES BAILLY, Advocate *against* WILLIAM BAILLY of Lamingtoun.

No 21.
The decennial prescription of tutor and curator accompts, does not elide the exception that the tutor or curator *intus habuit*.

MR JAMES BAILLY, as assignee by his father, pursues Lamingtoun as representing Sir William Bailly of Lamington, for certain sums contained in two heritable bonds.

The defender *alleged;* The pursuer's father had been his curator, and *præsumitur intus habere ante redditas rationes.*

It was *answered*; By the 9th act Parl. 1696, all actions for tutors and curators accompts prescribe in ten years, and such as were prior to the act prescribe in ten years after the date thereof.

It was *replied*; The defender pretends not to call the pursuer to an account as representing one of his curators, because of the fact of prescription; but nevertheless does allege, that the presumption that the curator *intus habet* does take place for extinguishing the pursuer's claim against the defender. And it many times happens, that, when an action is temporal, the exception may be perpetual, as by the civil law *actio doli* doth prescribe in two years; but the exception was perpetual, and compensations are often sustained on holograph writs or tickets after twenty years; because the compensation operates an extinction *ipso jure* from the time of the concourse: Just so the pursuer's father, being the defender's curator and his creditor, his intromissions were imputable in payment of the debt due to him; and if it were not so, the act might become a snare; for tutors and curators do frequently take assignations to the pupil's or minor's debts, either as not having of the pupil's money in their hand, or pre-