No 228. suer; but it being only of the creditors underwritten, if these were not underwritten till after the inhibition, they have no place; and as for any verbal communing or agreement, it cannot be effectual, until it be redacted into writ, which was not till after the inhibition.

The Lords found, that the blank being filled up with another hand, and so substantial a clause, and the writer not being expressed at the foot, that it was to be presumed to be posterior to the inhibition, unless the creditors prove by the witnesses inserted, or others above exception, that it was truly inserted before the inhibition and apprising, wherein they would not admit the oaths of the persons entrusted; and they had no respect to the allegeance, that it was communed and agreed upon before the subscription.

Fol. Dic. v. 2. p. 154. Stair, v. 1. p. 660.

*** Gosford reports this case:

In a reduction, raised at Lady Lucy Hamilton's instance, of a disposition of lands made by Dunlop and Pitcon unto other creditors, *ex capite inhibitionis*, in so far as the blank for inserting of creditors' names in the disposition was filled up after the pursuer's inhibition; it was *answered*, That the disposition being now filled up, and infeftment taken thereupon, and being of a date prior to the inhibition, could not be reduced, albeit the creditors' names were inserted thereafter, that being only a perfecting of a prior right; 2*do*, The date of the filling up of the blank was not probable but by the defender's oaths, and the oaths of Dunlop and Pitcon; 3*tio*, They offered to prove, by Dunlop and Pitcon's oaths, that it was communed before the inhibition, that these names should be filled up.—The Lords did sustain the reason of reduction, notwithstanding of these answers; and found, that a disposition, made to creditors blank, could not be filled up to the prejudice of any other creditor doing diligence; as likewise, that the defenders behoved to prove the date of the filling up by others than Dunlop and Pitcon, who were most suspected to have been accessory to the contrivance; seeing the creditor's name inserted in the blank was by another hand-writing than was in the body of the disposition; and, therefore, that the date of the filling up should be proved, *per testes omni exceptione majores*. Likeas, they found that communing before the inhibition was not relevant to sustain the filling up thereof in prejudice of the inhibition intervening: Which the Lords did, to take away the benefit of such contrivances, which were so frequent.

Gosford, MS. No 227. p. 91.

1678. *July* 9. Henderson *against* Monteith.

No 229. In a reduction of a disposition, at

Monteith of Randifoord having disponed his estate to Robert Monteith, younger of Carruber, Sir John Henderson of Fordel being Randifoord's sister-

No 229.
the instance of an apparent heir, it was proved that it was blank in the disponee's name when signed; therefore, it was argued, it might possibly have been filled up on deathbed. The Lords would not put the defender to prove the date of filling up; but appointed him to undergo a judicial examination.

son, and heir of line, pursues reduction and improbation of the disposition on these reasons; 1*mo*, That it contained only two witnesses, Alexander Cumming, servitor to Randifoord, and Wiseman, servitor to Carruber; and that Cumming, upon oath, had denied the subscription, and Wiseman had, by bill to the Lords, offered to retract his deposition, in this point, that, whereas he did depone, that this disposition was filled up with Carruber's name, at the subscribing thereof, he had recollected himself, that it was so filled up when his master gave it him to keep, which was a fourth night after its date; so that the writ is proved as false, at least is null and improbative; for, though by the law and custom of this kingdom, any writ having subscriptions is presumed to be true, and needs not be proved; yet all writs, when questioned, may be improved; and if the witnesses inserted deny they were witnesses, or saw the granter subscribe, if two affirming witnesses prove not the subscription, the writ becomes null, as improbative, and oftenest is improved as false. It is true, if no question be made till one or two of the witnesses be dead, their subscriptions are presumed to be true, and they are proving witnesses; yet their subscriptions may be redargued, upon the indirect manner, by comparing their hand-writing and subscriptions: But here both witnesses are alive, and examined, and the one denies, and the other affirms, but offers to retract his testimony as to another point, and so acknowledge himself a false witness, especially seeing he retracted not *in continenti*, while he was present with the examinators, but some hours thereafter, when he might be, and likely was prompted by Carruber; seeing his testimony contradicted Carruber's declaration, bearing, that this disposition was not filled up when it was subscribed; and it cannot be pretended, that ever Carruber shewed this disposition to his greatest confidants, or lawyers, or any person, but to Wiseman, till Randifoord's death.—The defender *answered*, That, albeit witnesses inserted, denying they were witnesses, do ordinarily annul or improve the writ, unless other two witnesses remain, either dead or affirming; but that rule is capable of many exceptions; for, if the simple negation of a witness should annul a writ without all remeid, a fair way were laid open for corruption, and for annulling the securities of the whole nation; for, by our common custom, there is no notice taken of the quality of subscribing witnesses; yea, making use of them excludes all objections as to their inability, and nothing is more ordinary than to call school-boys to be witnesses; and, therefore, in case of their denial, which may be through want of memory, or alteration of their hand-writing, or through corruption or partiality, the writ may be sustained by adminiculation, by comparing their subscriptions, as they wrote about the time of the writ in question, and by other writs relative to the writ in question; much more in this case, where one of the two witnesses subscribing is *positive* affirming, and where the other in his deposition denying his deposition, is redargued as false in the very motive of his denial; for he depones in these words, That he denies his subscription, never being accustomed to subscribe A. Cumming, as in this deposition; and yet many writs are subscribed by

No 229. him, as witness to Randifoord's subscription, in all which he subscribes A. Cumming; and though he deny his subscription in these writs also, except one, yet the other witnesses and parties in these writs being all examined upon oath, do astruct the verity of the writs; and two of them depone, that they knew this Cumming to be witness in several of them, having seen them at the time of their deposition, though others did depone, that they did not particularly know, or notice him; so that it is not in extrinsic circumstances, or matters of memory, but in the very motives of his denial, in which he depones falsely; and there is not one writ produced, wherein ever he did subscribe Alexr. Cumming. This deposition is also redargued, because it is proved that he was an ultroneous witness, coming from the north to depone, without citation, and upon the instigation of a servant of Fordel's brother-in-law. It is also proved, that he was corrupted, and that he had the offer of 250 merks to go to Edinburgh to depone, and expected more, with some fee resting him by his master. Likeas, the verity of this writ is adminiculated, *first*, By the testimony of Wiseman, the other witness; 2*do*, By the testimony of the Writer to the Signet and his man, who dited and wrote this disposition, which at first was blank, and thereafter filled up in all points by the writer's man, and by Mr David Dewar, who advised the same at Randifoord's desire, being his ordinary, and corrected it as it now stands, containing a power to Randifoord to alienate, or affect at his pleasure. There are also produced several missive-letters, long after this disposition, by Randifoord from France to Carruber, bearing, he had preferred him to all others, and that he had tailzied his estate to him; and Dewar depones, that the disposition was blank when it was advised with him, but that Randifoord then told him, that his heir-male, to whom the greatest part of his estate fell, was a person of no worth, and a small estate with great burden, and that Carruber would furnish him when he was abroad, and being rich, would increase his family. The pursuer *replied*, That one of the two witnesses denying this writ did unavoidably annul it, and did not only deny his subscription, but positively denied he saw Randifoord subscribe, which would annul the writ, though he had acknowledged his subscription, and made himself a forger: And, by our law, a writ wanting two witnesses inserted is so far null, that a thousand witnesses deponing they saw the party subscribe can have no effect, seeing matters of that importance cannot be proved by witnesses; much less can these adminiculations here produced, which only depone of the design of such, but that it was not really done; and for the letters, they are but *verba jactantia* to induce Carruber to furnish money, and have not the effect of other solemn writs in serious affairs; and the most special of them bears to have been subscribed in a tavern, at three o'clock in the morning, and promised to Carruber to be made a Lord of the Session; neither is there any thing of corruption proved to have been done by Fordel; but, on the contrary, it is proved, that Carruber sent one Aves north with the double of a criminal bill for perjury, to induce Cumming to retract his first deposition: And as two witnesses inserted affirming

are *probatio probata*, for astructing a writ, that it cannot be improved, so *a pari* the witnesses inserted denying can admit of no probation to astruct the same. It was *duplied*, That the attempt of corruption, though without effect, rejects that witness's testimony *in odium corrumpentis*; yet where corruption hath taken effect, and is proved, whoever was the corrupter, the testimony was from corruption, and is void. And as a dead witness proves, so must a living witness denying, if his denial be redargued, and made not probative: Yea, there may be cases in which affirming witnesses do not exclude all contrary probation, as if it were proved that the witnesses were not then born, could not then write, were not in the kingdom, or could never write such a hand. No 229.

The Lords found the writ in question probative, that it was neither false nor null, albeit Cumming, one of the two witnesses subscribing, denied his subscription, seeing his testimony was redargued in the express motives thereof, by many express writs and witnesses upon oath, proving that he subscribed A. Cumming in many other writs, in which he was witness to Randifoord's subscription, and that 'the subscription he acknowledges being A. Cumming, doth astruct this subscription, and likewise the rest, though there be variety in some of the letters, as is ordinary among persons who seldom subscribe. And, in respect of the adminiculation of the writer, diter, and adviser of this disposition, and letters acknowledging a tailzie, the Lords did not regard that this writ had not been shown but to the witnesses, seeing it contained a power to alter, the publishing whereof might have provoked the disponer to alter the same.

The second reason of reduction was, That this disposition was drawn and subscribed blank in the name, and by Carruber's declaration it was acknowledged that it was delivered to him blank, which Wiseman, one of the witnesses, desired also to depone; and, therefore, it must be presumed still to have continued blank till the defunct's death or sickness, at which time it could not be filled up by the defunct himself, and much less by Carruber, who could have but a trust or mandate to fill it up, which ceaseth by the death of the mandatar. The defender *answered*, That he now producing the disposition filled up in his name, was not obliged to prove when, and though he had filled it up in the defunct's sickness, or after his death, he might lawfully do it; for the delivery of a blank writ presumes it to be in the power and discretion of him to whom it was delivered, that he may fill it up as he pleases, which is ordinary in blank bonds and assignations, which is always held to be his in whose possession it is, unless by writ, or the oath of party, it be proved to be deposited or entrusted for another end. It was *replied*, That the case here was singular, it being notour that Carruber was the defunct's factor, and entrusted with all his writs; so that the having of this disposition blank is presumed not to be *in rem suam*, but as factor. It was *duplied*, That Dewar's deposition and the letters did instruct, that this disposition was for Carruber's behoof.

The Lords would not put Carruber to prove when this writ was filled up; but ordained him to be examined *ex officio*, when it was filled up, before whom,

No 229. and what the defunct did express when he delivered the same, whether that it was for Carruber himself, or for any other end, or whether he said nothing, but delivered it?

The third reason of reduction was, That this disposition being, with Randifoord's other writs, in Carruber's hand, who was his factor and trustee, he ought to prove that it was delivered before Randifoord's sickness, otherwise it were a deed done *in lecto;* and though ordinarily men are not put to prove the delivery of writs in their hand, yet a factor and trustee ought to prove it.

The Lords repelled this reason; but sustained it to be proved, that the writ remained undelivered in his charter-chest, or in his power, till he contracted the sickness whereof he died, and that either by writ, oath of party, or witnesses above exception.

Fol. Dic. v. 2. *p.* 155. *Stair, v.* 2. *p.* 628.

1683. *November.* Buchanan *against* Leny.

No 230.
The designation of a disponee having been inserted in a blank, holograph of the disponer, death-bed was not presumed.

John Buchanan in Stirling having, *in anno* 1682, disponed his estate to his friend and kinsman John Buchanan of and died in the latter end of February 1682. The disposition was recovered after his death from his wife, with the blank designation filled up with these words, of Leny. The defunct's heir raised reduction of the disposition *ex capite lecti*, upon this reason, That no disposition, or any substantial clause in a disposition, filled up on deathbed, can prejudge the heir; and *ita est*, that adjection, of Leny, must be presumed to have been filled up on deathbed, being at best but the defunct's holograph since the date of the disposition, which proves not *datum* against a third party, far less against the heir, who is secure by an express act of Parliament; and the allegeance of deathbed is presumed; and to oblige the heir to prove that the blank was filled up *in lecto*, would render the law of deathbed elusory; because the *moribundus* might do it so privately as might be impossible for the heir to prove when it was done, and therefore it should lie upon the receiver of the right to prove that it was seen filled up *in liege poustie*. And the filling up the words John Buchanan at first doth not alter the case; for notwithstanding thereof *defuncti voluntas* was *collata in personam incertam*, there being several John Buchanans kinsmen to the defunct. And as the deed can operate nothing, had not the blank been filled up, it cannot have any effect unless the filling up *in liege poustie* were proved.

Answered for the defender, That he opponed the disposition filled up in his own name; and it is presumable the blank was filled up about the time of subscribing the right privately, that none of the relations called by the name of John Buchanan might be disobliged by his publicly preferring any one of them; nor is it unusual to subscribe tailzies or assignations in favour of a blank person, and then immediately to fill up the person's name privately.