his wife told him she had paid this account in particular, neither had she any discharge of it; so the money destinate to pay George Stirling might have been applied another way. Yet the Lords considering it was not pursued within the three years, (as the Act of Parliament 1579 bears,) and that he did not confess it was resting owing, therefore they found his oath did not prove the debt; and assoilyied: for they thought gentlemen had little more security of the payment of most of their accounts than that they gave their ladies or servants money to pay them, and had their assurance it was so applied; and if this was insecure for artificers, they had a remedy, either to get their account subscribed within the three years, or else pursue within that time.

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1697. *November* 23. SIR DONALD BAYNE of TULLOCH *against* SIR ROBERT GORDON of GORDONSTOWN.

IN an improbation between Sir Donald Bayne of Tulloch, and Sir Robert Gordon of Gordonstoun, certification is craved against a bond dated in 1640, which had been the ground of an apprising, and whereof an extract was only produced, and, after search, the principal bond could not be found, as appeared from a testificate of the clerks, and which coincided with some of those years whereof the warrants were drowned at sea, coming from England in 1661. On the one hand, a bond may be forged, and, after registration, taken out again with a little money; and, if the extract be sufficient to satisfy the production in an improbation, there is a foundation laid to encourage all knavery. On the other hand, what can the lieges do more but give in their principal writs to the Register; and, if they be lost, either by casual accidents or the faults of the keeper, shall the party ingiver suffer for that?

The Lords, in this case, abstracted from the general point, which is of great moment; but inclined to refuse certification here, in regard the debt was old and much diligence led upon it, and never quarrelled till of late, which took off the suspicion of its being false. Yet, in regard it was alleged that the debtor had been charged with horning on this bond in his lifetime, which is yet a farther adminicle of its verity, they ordained the horning, before answer, to be produced, which would tend yet more to clear the affair. See certification refused against principal bonds, in a similar case, *20th November*, 1666.

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1697. *November* 24. ANDREW BOWMAN *against* KER of LITTLEDEAN.

ANDREW Bowman pursues Ker of Littledean for a sum contained in his father's bond, granted to one Cranston, to which debt Bowman has now right.

ALLEGED for Littledean,—That Cranston, in farther security and payment of this sum, got an assignation to a tack-duty payable by sundry tenants to Littledean, and offered to prove his intromission by virtue of the tack and assignation

prout de jure. There was no doubt but the delivery of victual was probable by witnesses, but the receipt of money-rent was all the scruple.

Bowman CONTENDED,—That though the delivery of money falls under the sense of witnesses, as well as that of any other species and fungible, yet *quo animo*, and for what intent it is given, may be altogether unknown to them; and therefore it is an uncontroverted rule in our law, that the receipt of money can only be proven *scripto vel juramento;* especially where it is to take away and extinguish writ; as here it is to prove payment of a bond by witnesses, which was never allowed in Scotland. See Dury, *25th November* 1624, *Bisset* against *Bisset*, and the citations there referred to, especially that of Job.

ANSWERED for Littledean,—Though, *regulariter*, writ can only be taken away by writ, or the party's oath, yet, in sundry circumstantiate cases, the Lords have allowed intromission with money-rent to be proven by witnesses, though it was to extinguish an infeftment of annualrent constituted by writ; as was found, *4th February* 1671, *Wisheart* against *Arthur*, and *2d December* 1665, *Thomson* against *Moubray;* likeas, the extinction and satisfaction of comprisings has been sustained by witnesses.

The Lords shunned the general case here; but finding that sundry receipts of Cranston's were produced, which presumed, that what he received he had given discharges for, therefore they refused to sustain his intromission with money to be proven by witnesses after so long a time, who might now forget or mistake the quantity or cause, especially against a singular successor for onerous causes.

Then Littledean's procurators ALLEGED,—That Cranston, having entered to possess by virtue of that assignation, should have continued to intromit and uplift the whole, unless he subsume he was debarred *via facti et juris*, and show, at least condescend, who got the rents.

ANSWERED,—He was not tied to diligence, being a voluntary assignee, whatever may be the case of apprisers once entering into possession.

The Lords did not decide this point, how far he was liable in diligence, at this time. *Vol. I. Page* 796.

1697. *November* 25. WILLIAM SOMMERVELL *against* ROBERTSON.

THE Lords advised the cause between William Sommervell, merchant in Edinburgh, and Robertson in Glasgow. Sommervell being debtor to Robertson in a sum, he gave him, for security, a bond granted to himself and the said Robertson, by one Skails, a merchant, for the equivalent sum, together with a declaration,—that if Robertson did not recover payment from Skails, after due and legal diligence, then Sommervell should pay him the debt, Robertson always restoring the bond and putting him in his own place. Robertson takes out caption against Skails; but, he breaking and flying to the Abbey, Robertson delivers back Skails's bond, with the horning and caption, to Sommervell, and now contends he must be liable to him for the debt. The question was,—On whose peril Skails broke?

Robertson ALLEGED,—He had done sufficient diligence, and that Sommervell