2do. is dead since the process; and so your factory falls as extinct: and either of thir being sustained as relevant, the defender, for proving the pursuer's death, adduces sundry missive letters from persons of credit and integrity at London; bearing, that, his affairs running into confusion, he went for Persia or the East Indies, and the report from the Turkey merchants came, that he died on his way thither at Scanderoon in Cilicia, a province of Asia Minor. And also he adduces witnesses, who depone on the common report and fame of his being holden and reputed dead, and that his wife and children were in mourning for him; and also produced an attestation from the secretary of the East India Company anent it, and an extract of the administration of his testament out of the Prerogative Court of Canterbury to one Gabriel Glover.

ANSWERED,—The presumption of law was, that *semel vivus adhuc vivere præsumitur*, especially where he was an old man; and though this may be taken off by a contrary presumption of his death, yet the conjectures here adduced were very slender, and were only *de auditu*, and upon hearsay. And where merchants turn insolvent, it has been given out that they were dead, and their widows put on mourning, and so forced the creditors to compone and give down their debts. And for convelling this probation, and putting the affair out of doubt, they produced a letter from him in November 1697, a year after they give out he was dead.

The Lords having balanced all thir contrary evidences, and considering the allegeance was not to take away the debt, but only to annul the factory and his power of uplifting the money, they found the documents adduced, though not a full probation of his death, yet sufficient to the effect of stopping the factor.

Then the factor offering to confirm the sum before extract, the Lords thought this inconsistent with the title he pursued on in his summons as factor, and therefore refused to receive it *hoc ordine;* therefore, ordained the defender to find sufficient caution to make the sum forthcoming to any who should afterwards make up a sufficient title. Some proposed the consigning of the money; but that was thought prejudicial to the creditor, seeing it would stop the *cursus usurarum* in the mean time; and so caution was appointed, and the factory not sustained; for there was nothing to instruct that the letter in 1697 was Clopton's hand-writ, and there were other suspicions against it.

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1701. *June* 10. BOUTCHART and PATERSON *against* WILLIAM CLERK'S HEIRS and CREDITORS.

IN a process of extinction of a comprising, pursued by one Boutchart and Paterson, his assignee, against the heirs and creditors of Mr William Clerk, advocate, concluding a count and reckoning for his intromissions with the maills and duties of the apprised lands, and offering to pay in the superplus that in the event shall not be found satisfied by his intromission; and it being now contended that the legal was expired during the dependence, it fell to be considered by the Lords, If a declarator of satisfaction and extinction within the le-

gal, containing a conclusion of count and reckoning, pursued by a debtor against his creditor apprising, be equivalent to an order of redemption for keeping the legal open. Some alleged, That a premonition, by way of instrument, with a consignation, and a summons of declarator raised thereon, was the only habile legal way to stop the expiration of a legal of a comprising or adjudication; and such solemnities must be observed *in terminis specificis*, and cannot be done *per equipollens*. Others thought any thing that intimated the debtor's intention to redeem and satisfy his creditor, was sufficient, *in materia odiosa*, to carry away lands by apprisings; and that his pursuing a count and reckoning was a *provocatio in judicium* sufficient to stop the currency of the legal. A third said, if, by the event, his intromission extended to his debt, then there was no doubt but the diligence was extinct; but if there was any part yet remaining unpaid, the apprising now expired stood good for it, and was now irredeemable, unless an order had been used within the legal. Stair, *tit. Wadsets*, inclines to the *second*, that such a summons is equivalent to a formal order, and cites Dury, *2d July* 1625, *Kincaid* against *Haliburton*; but the Lords did not at this time decide the point. *Vol. II. Page* 112.

1701. *June* 19. DEWAR of LASSODY *against* SCOTT of SPENCERFIELD'S FACTOR and CREDITORS.

DEWAR of Lassody, as a real creditor infeft in the estate of Scot of Spencerfield, applies to the Lords by bill, craving that the factor may be decerned to pay him some bygone annualrents during the dependence of the ranking of the creditors, he being preferable, and yet willing to find caution to refund, if in the event other preferable creditors should be found to exhaust the subject. The Lords hitherto had granted their bills on caution: But now, considering that so long as creditors found they got their annualrents, they neglected to bring the ranking to a close, to the general prejudice of creditors, the estates not being now exposed to roup till the ranking was finished and extracted; and to deny their annualrents (which was only hitherto allowed them *ex gratia*,) was the only spur to cause them insist in discussing the ranking; therefore, the Lords resolved to stop the giving any more on bills till their place and preference was known. Some argued, This would be beneficial to none but the factors, who would keep the rents in their hands, and would apply them to their own use, or cause the creditors give them considerable eases and compositions ere they paid them; and that creditors seemed to be much sibber to these annualrents than the factors. It was ANSWERED,—That factors, by Act of Sederunt 1691, were liable for annualrent; and though this was not exacted, yet the reason was, because, by the frequent precepts drawn on them, and their partial payments, it was not known when the rents came into their hands, and how much; and therefore the Lords resolved to stop such summary applications in time coming. Some proposed it might be done by an Act of Sederunt.

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