

The Lords, before answer, allowed a conjunct probation, *comparatione litterarum*, or otherwise, that it was all written and subscribed by the said old James. And sundry writs being adduced *hinc inde*, to evince the resemblance, or dissimilitude, of the writ; the Lords, after inspection of the fact, and shape of the letters, and air of the writ, generally thought they did not prove holograph.

Then it was **CONTENDED**, that, *esto* it were not holograph, yet, if it was subscribed by him, it was sufficient to sustain the commission: as was found 12th July 1632, and 14th February 1627, *Pyrnon* against *Ramsay*; and 8th February 1671, *Earl of Northesk*; especially where the messenger had the principal writs in his hand, which easily infer a tacit mandate to uplift the money.

The Lords thought, creditors would trust messengers with their captions and other registrate writs, who would never allow them to uplift the money, and who would have more difficulty to draw it out of his hand than the debtor's; but, where they were trusted with principal papers, (as here he gave up both Gray's commission and Stewart's principal assignation to Beaufort, the debtor,) law presumes he had power to uplift and discharge: for, though a null paper cannot be supported nor adminiculated, seeing *non entis nullæ sunt qualitates*, yet it may presume his commission, where he has the principal writs: for captions and registrate bonds might be easily extracted, and the having them can never authorise a messenger to uplift. Though in pointing, if the debtor compare, and offer payment of the debt, the messenger may take it, and dare not proceed any farther in his pointing.

The Lords found, the messenger's having received from Gray the assignation and other principal writs; and having given a discharge, bearing his factory and commission from Gray, with his delivering up the hail writs to Fraser, the debtor; it proved against Gray, and was a contravention of the warrandice.

But it was then farther **ALLEGED** for Gray, that he could never be liable, because all the warrandice his father had given was only from his own and his heir's facts and deeds. But so it was, the commission was no deed of his father's, who granted the assignation to Cromarty, but was his grandfather old James Gray's deed.

ANSWERED,—You have conveyed to me the translation made by James to his son; which will virtually carry the grandfather's warrandice.

The Lords found, The commission not being granted by young James Gray, who is Tarbet's immediate author, but only by his father; and that he gives no warrandice in his assignation, but only from his own and his heir's facts and deeds: that therefore he had not contravened nor incurred the warrandice; and, for that cause, assoilyied him from this process of recourse. *Perezius, ad tit. C. de Procurat.* has a case parallel to this; that a procurator having his client's writs and evidents in his hands, presumes a sufficient mandate for that affair to which they relate, without producing a special mandate or factory for carying on that business.

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1710. December 15. JOHN DUFF against WILLIAM JOHNSTON of SHEINS.

MR William Johnston of Sheins being one of the principal tacksmen of the inland excise, he made Mr Robert Martin of Bruntbrae his sub-collector, in

the shire of Aberdeen ; who falling considerably in arrears, he takes out caption against him, and sends it to John Duff, messenger in Aberdeen, with a letter, desiring him with all speed to put it in execution, cost what it would, and he should be thankfully paid. Duff, after long search and travel, at last finds him, and puts him in Montrose prison ; which occasioned Patrick Macdougall, his son-in-law, to capitulate with Sheins, and take off the debt ; and obliged himself to relieve Sheins, at Duff the messenger's hands, and obtain his discharge. This made Shein slack and remiss in paying Duff when craved, remitting him always to Mr Macdougall, who offered him only £5 sterling for all his pains and expense ; which necessitated Duff to raise a process against Sheins for payment of £341 Scots it stood him and his party ; debtors being there near to the mountains and forests where they skulk, and cannot be hunted out without great travel and expense, and ofttimes deforce the messengers to the effusion of their blood, and wounding them and their party. And he, being allowed to prove his libel, adduced two witnesses, Walker and Moir, who both deponed, That Duff, and five or six more associates, spent four or five days in quest of the rebel, travelling a hundred miles back and forward, and at last apprehended him at Kincairn-o-neal. Walker declares, he took no wages for his attendance, because Duff assisted him at other times. Moir pointed all the particular places through which they went, from the *terminus a quo* to the *terminus ad quem* ; and that Duff maintained his assistants all the time, and paid them also for their pains ; and that he used to get more from other gentlemen who employed him than what he demanded here.

When this probation came to be advised, it was OBJECTED,—They never refused him a competent gratification for his pains ; but his account was the most exorbitant that ever a messenger presumed to give in : and that the 72d Act, 1587, had restricted messengers' wages to a merk *per diem*, summer and winter overhead ; and yet they were ready to give him more : and the 83d Act of the same Parliament was so very sensible of their extortion and abusing the lieges, that it declares, if they be convicted of oppression, they shall be punished to the death. And, as to the probation, Walker says, He took nothing but his diet and entertainment ; and Moir was a most inhabile witness, being his own servant ; and though he made him enter a messenger since, yet that was only in view to capacitate him. And the Lords need no more to convince them of the extravagancy of this account, but to read where he charges £16 Scots for one night's lodging, and £10 sterling for his own pains. And, once lay down this preparative, messengers may exhaust the sums of the caption with such covetous and unreasonable accounts. And there is a general outcry against this Duff ; *et qui semel malus, talis præsumitur in eodem genere mali*.

ANSWERED,—He opposed Sheins' obligatory letter ; and it was neither just nor generous in him, after his own satisfaction, to turn him over *in duriores adversarium*, into an agent's hands. And though the Act of Parliament speaks of a merk a-day, yet, in 1587, when that law was made, a merk went farther than ten will go now : and that their wages are local, according to the difficulty of the work is evident from the 35th Act, 1686, where justices of peace and their inferior judges are empowered to modify messenger's wages to more or less, as circumstances require ; which prove the same to be local : and there is no place in Scotland where the Queen's letters of caption meet with greater resistance and deforcements than in the north. And, as to the probation, if Walker

served him *gratis* at this time, then he is *debitor beneficii* to him for it, and must give him an equivalent another time : and Moir was not his servant when he deponed.

The Lords, instead of his L.341, gave him L.200 Scots in full of all, which some thought a high modification ; yet Duff complained much, that they had put him to more than L.100 of expenses, in seeking his own by this process, for which he got nothing at all.

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1710. *December 23.* ELISABETH DICKSON and PATRICK HERIOT *against* ISOBEL LOGAN.

THE deceased Mr John Dickson, secretary to the Marquis of Twedale, in his contract of marriage, in 1707, with Isobel Logan, sister to Burncastle, dispones the fee of 7 or 8000 merks he had in Lord Yester's hands and in the African Company, to her, in case of no children, and the liferent only in case there were bairns. He dies in 1710 without children, whereon Elisabeth Dickson, and Patrick Heriot her husband for his interest, confirms herself as nearest of kin to the said Mr John, her brother, and pursues the debtors for payment. Isobel compares, and, producing her contract of marriage, craves to be preferred. Against which the executrix repeats a reduction on this reason, That it was null, because the 179th Act, 1593, declares, That all writs not mentioning the designation of the writer, by his dwelling-place, diocese, or other denomination, shall make no faith in judgment, nor outwith the same : and the 5th Act 1681 declares this defect shall not be suppliable by a condescendence thereafter. But so it is, this contract bears no more but "Written by the said Mr John Dickson ;" and though the word "said" be relative, yet in no part of the contract is he designed any more than simply by his name, which neither satisfies the letter nor meaning of the foresaid Acts.

ANSWERED,—The designation of parties and writers is only required in law *ad evitandam personarum incertitudinem*, and to discriminate two persons of the same name one from the other ; so that, by the Roman law, even *falsa demonstratio* did not vitiate *ubi constat de persona* ; names and designations being invented only to avoid confusion, dubiety, and uncertainty. Now here Mr John is sufficiently designed, by him and her being called future and affidate spouses ; for *correlata se mutuo ponunt et distinguunt* ; and in his assigning her to the bonds he is fully designed in them, which is all one as if it had been repeated in the contract ; for one may be known *per relationem ad aliud* ; and it is mere trifling and quibble, unless they say there was another Mr John Dickson married at the same time to another woman called Isobel Logan ; and, on their oath of calumny, they dare not refuse but he is the very man. Besides, the marriage having followed, and stood for some years, that, beyond all rational contradiction, explains and supplies all difficulties ; many things *favore matrimonii* being allowed, which law requires in other cases ; as minutes of contracts matrimonial are sustained though only signed by one notary, and though it be a minister instead of a notary : though the 133d Act 1584 only permits that in the case of testaments,—*Vid. 12th July 1631.* And all thir privileges are indulged, because marriage actually followed ; which supplied all defects.

REPLIED,—This is still to make up his designation by consequential infer-