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-

No 21. tending so; and if all these debts, which are but articles of discharge, should stand out against the minor, and yet prescription take place, that act would be a great prejudice and a snare to minors, and would leave them open to articles of discharge as debt, and yet disable them to lay a charge against their tutors.

It was *duplied;* If such exceptions were sustained, the act would in a great measure be eluded; for in this case, and many others, the curator was creditor before he was curator; so that there is no presumption that the debt was originally purchased by the means of the minor; And the law presumes, that all the curator's intromissions were applied for the behoof of the minor after the decennial prescription; so that the creditor who was curator has the same right and title to claim his money, as if no curatory had intervened; and it were very hard, if, notwithstanding of the act of Parliament, he must enter into count and reckoning before he can demand his clear liquid debt; for the act of prescription excludes all question on that subject, either by action or exception, which is the same thing; for *reus excipiendo fit actor*; and the said act bears, that the tutors and curators shall be as fully exonered, as if the pupils or minors had after majority granted ample discharges.

It was *triplied;* That the whole tenor of the act of Parliament relates only to actions at the pupil's instance against the tutors and curators, or the contrary actions at their instance against him, but not to exceptions; for it is to this effect, that all actions of count and reckoning shall prescribe in ten years, &c and the said tutors and curators shall be as fully exonered, as if the said pupils and minors had discharged the same; which words, 'the same,' are to be understood, the same actions; but that can never intitle a tutor or curator to pursue the minor for such debts as law presumed to be satisfied and paid before the prescription run; for that presumption of *intus habet* continues still unprescribed; and generally exceptions are perpetual: Neither is there any difference whether the debt was due to the curator before his office, or a right to a debt acquired by a curator during his office; because the presumption *quod intus habet*, militates equally in both cases; for the curator's first intromission is imputable in payment of anterior debts; and so the presumption taking once place, continues still. It is true, the curator may reply and say, that he will count for eliding that presumption, and make appear, that the pupil's whole effects are otherwise applied for his behoof; in which case, if the curators should so far succumb, that a balance ten times greater than the sum acclaimed were found in his hand, the prescription takes place to exoner him amply for the whole balance, except in as far as it compenses the debt acclaimed.

"The Lords found, That the act of Parliament did not take place to exclude the exception, upon the presumption that the curator *intus habuit.*'

Fol. Dic. v. 2. p. 50. Dalrymple, No 124. p. 173.

*** Bruce reports the same case:

No 21.

THE deceased Sir William Bailly of Lamington being debtor to Mr William Bailly, Advocate, the now Lamington made some partial payments to Mr William; and Mr James Bailly, as having right from his father to these debts, insists now against him on the passive titles.

Answered for the defender; That Mr William, the pursuer's father, having been curator to him, no action could be sustained at the pursuer's instance, for any debt of Lamington's predecessors, *ante redditas rationes*, since the pursuer could be in no better case than his father and author.

Replied for the pursuer; That the curators accounts were prescribed in the terms of the act 1696; and, therefore, the exception no more to be regarded, than if the pursuer's father had been actually discharged of his accounts, conform to the said act.

Duplied for the defender; 1*mo*, That, though the action for count and reckoning be prescribed, yet the exception was still entire, by the rule in law, *temporalia ad agendum, sunt perpetua ad excipiendum*; 2*do*, It was presumed, that the creditor having been curator, *intus habuit*, whereby the debt became extinct, *per compensationem*; which takes place *ipso jure*, and is equivalent to payment. And as to the prescription being equivalent to a discharge, even an ample discharge of the *actio tutelæ directa*, in favour of Mr William Bailly, could never have screened him from the extinction of this debt; for law would never presume that the discharge was granted gratuitously, but from a consciousness, that the curator had applied his intromissions in the way he ought to do: And in the present case, law obliged him not only to intromit, but to apply his intromissions to the extinction of his own debt; and since he was obliged to apply his intromissions in that manner, law will likewise presume he made the application duly.

Triplied for the pursuer, That if this were sustained, a curator would be in a worse case after the prescription is run than before: For the contrary action being also by that act prescribed, the curator can never bring the minor to account, and thereby the prescription shall cut off the curator from all debts due by the minor's predecessors; 2*do*, There is no obligation on a curator to pay himself, only he has a faculty to do it if he pleases, as is plain from *L.* 9. § 5. *D. De Administratione Tutorum.*

"THE LORDS sustained the defence on the presumption that the pursuer *intus habet*, his father having been curator to the defender; and found the act of Parliament takes not place."

Act. *M'Doual.* Alt. *Nasmyth.* Clerk, *Gibson.*

Bruce, vol. I. *No.* 16. *p.* 21.

No 21. *** A similar decision was pronounced, 17th June 1737, Scot of Ancrum against Douglas of Glenbervie.—See APPENDIX.——In this case it was yielded, that the defence could not stand upon the footing of compensation, because the defender's claim upon his curator's intromission was sopite by the decennial prescription.

1734. *December* 5. BRYMER *against* GRAHAM.

No 22.

A REAL creditor upon a bankrupt estate, who was also cautioner for the factor, having conveyed his debt to a creditor of his own for his security and payment; the question arose, If the assignee could draw this debt out of the bankrupt estate or price thereof, without being chargeable for the balance due by the factor, who was now become bankrupt, as well as his cautioner the cedent. In this case there could be no place for compensation; for, *esto* the balance due by the factor had been liquid, the cautioner was creditor upon the estate, but had no claim against the co-creditors, neither was he debtor to them for the factor's intromissions, but to the Court of Session; neither could payment or extinction be pleaded, because a factor has no power to apply his intromissions towards payment of his own debt, and far less has his cautioner power to apply the factor's intromissions; the LORDS therefore found, That the onerous assignee was not liable to account for the factor's intromissions, and repelled the objection pleaded against him upon that head.——In a former case, the LORDS had sustained the objection against the onerous assignee, 3d January 1730, Oliphant against Morisons.—*See* APPENDIX.

Fol. Dic. v. 2. *p.* 51.

1736. *January* 31. LEGATEES of JOHN CALDWALL *against* THOMAS CALDWALL.

No 23.

THOUGH an executor may exhaust the testament by debts due to himself, without necessity of doing diligence, a legacy left to him is upon a different footing, which he is not allowed to take credit for, in exclusion of the other legatees; for seeing the legacies are all expressed in the testament, they must come in *pari passu*, and he is not allowed to pay *primo venienti*, as in the case of debts. Yet where a legacy of L. 20 was left to an executor to buy a suit of mournings, he was allowed to take credit for what part of the sum he had *de facto* employed that way, as being a sum to be laid out *ante omnia* by the express orders of the defunct.

Fol. Dic. v. 2. *p.* 50. *C. Home.*

*** This case is No 23. p. 8066. *voce* LEGACY.