defunct in his charter-chest, and blank in the name and date, and that the defender intromitted with the same unwarrantably, and filled up his name ; No 95. *aut minoris ætatis.*

THE LORDS ordained certain persons, who were going to France, to be examined before debate, reserving to themselves to consider what their depositions should work.

Though it may appear hard, that a writ should be taken away by witnesses, yet the reason being relevant, and in fact, and resolving in dole and fraud, it may be proved by witnesses.

1677. *January* 17.—THIS day again, in the case above mentioned, Caribber *contra* Fordel, the LORDS did find, upon a bill given in by Caribber, that albeit writ cannot be taken away but by writ directly, and that a disposition could not be taken away but by a renunciation or some other writ, where there is no question as to the validity and formality of the same, yet it may be taken away by a reduction *ex capite metus et doli*, and *minoris ætatis* and lesion; and that in such pursuits, the reasons being in fact, and libelled either upon force or circumvention and fraud, are probable by witnesses; and that the reduction at Fordel's instance upon that reason, viz. that the disposition in question was found among the defunct's papers the time of his decease, and was intromitted with and filled up by Caribber, is *ex eodem capite doli.*

Clerk, *Hay.*

Fol. Dic. v. 2. *p.* 217. *Dirleton, No* 427. *p.* 211. *& No* 432. *p.* 213.

*** A similar decision was pronounced, 16th January 1677, Stewart against Riddoch, No 74. p. 11406, *voce* PRESUMPTION.

1678. *November* 30. M'KENZIE of Suddy *against* GRAHAME of Drynie.

No 96.

THE LORDS refused to sustain this reason of reduction of a decreet, That the clerk had drawn the interlocutor contrary to the testimonies of the witnesses; for this would bring all decreets overhead, by fixing a pretended guilt on the clerks. Thereafter the Lords renewed their act for sealing the deposition; but, before extracting the decreet, the LORDS will not refuse to review, as in Tweedale and Drummelzier's case.

Fol. Dic. v. 2. *p.* 223. *Fountainhall, MS.*

1679. *February* 13. CATHCART *against* LAIRD of CORSCLAYS.

No 97. Although delivery of a writ, is presumed by

UMQUHILE Mr Hugh Cathcart having disponed all his estate, both heritable and moveable to Hugh Cathcart of Carletoun, his brother's son, and apparent heir to John Cathcart now of Carletoun, as heir to his father, pursues Corsclays

No 97.
being in the hand of the party, in whose favour it was granted, yet it was allowed to be proved by witnesses, that a deed was found among the papers of the granter at his death.

for payment of a bond of 1200 merks due by Corsclays to Mr Hugh, secluding executors. The defender *alleged*, That he had equal interest, as nearest of kin to Mr Hugh, with the pursuer's father, the one being the brother, and the other the sister's son, and offered to prove that this disposition remained by the defunct, Mr Hugh, till his sickness, and was seized upon, amongst his writs, by Carletoun, in whose house he lived and died. It was *answered*, That this was only probable *scripto vel juramento*; for this writ being in the pursuer and his father's hand, the law presumes the delivery, and all the interest the defender could have, is but a share of the annualrents resting at the defunct's death; but if witnesses were admitted to take away writ, by proving it was by the defunct, it would endanger the most of all securities. It was *replied* for the defender, That though writ cannot be taken away by witnesses, in cases where writ is adhibited, as in proving the payment thereof, or the like, yet they are competent in all other cases, as in force, fraud, and in any sensible fact, necessarily inferring an exclusion of the writ, as the being thereof in the coffers or cabinets of dying persons, without which, there were no way to secure their interest, but any person that could be master of their writs, might re-deliver retired bonds, and fill up a blank bond, and deliver dispositions, and other writs, which, though the defunct had once intended, yet did not make the same effectual by delivery, nor did he insert a clause dispensing with the not delivery thereof.

The Lords found the defence relevant, and probable by witnesses, that Mr Hugh's disposition was in his own possession the time of his death, without a clause dispensing with the not delivery.

Fol. Dic. v. 2. p. 217. Stair, v. 2. p. 694.

*** Fountainhall reports this case:

1679. *February* 13.—A disposition is quarrelled as an undelivered evident in the granter's lifetime. The Lords found this relevant to annul it, that it was offered to be proven, that it was seen after his decease, among his papers; but if the disposition had been *in lecto*, the objection of not delivery would have been repelled, because then it would have been of the nature of a testament, or universal legacy, which the Lords declared was valid and obligatory, though lying beside the defunct the time of his decease, and not delivered in his lifetime.

Fountainhall, MS.

1683. *February.* Earl Southesk *against* Simpson and Reddie.

No 98.

In a pursuit for the price of a quantity of victual, conform to a contract of vendition thereof,

Alleged for the buyer, That a part of the victual was not delivered.