raised; for which end he gives it in to Robert Rutherford, cashier for Provost Home and the other commissaries to the army, and takes a ticket payable to himself; but the commissaries having met some time after, they, by an act of sederunt, subscribed with their hands, declared there was £150 sterling borrowed at Lammas 1699 from Sir Robert Douglas, for which they were to give him bond, with annualrent from the said term of Lammas. In the mean time, Duncan Ronald dies, and his son finding the ticket amongst his father's papers, he claims the sum. Sir Robert Douglas founding on the act of sederunt, Robert Rutherford suspends on double poinding: wherein Mr Ronald craved to be preferred, in respect of the clear liquid obligement given to their father for repayment of the said £150 sterling. Sir Robert Douglas urged that the money contained in that ticket was his; which he endeavoured to evince from thir probabilities and presumptions:—That he offered to prove, by the oath of Duncan Ronald's relict, his servants, and apprentices, that he depositated in his hands £150 sterling; and that, when he lent it to the commissaries of the army, he declared it was Sir Robert's money; and that the deceased Hugh Blair, then cash-keeper to the commissaries, has expressly set it down in his book, that it was Sir Robert's money; which fortifies the declaration contained in their act of sederunt.

Answered,—They opponed the ticket payable to Duncan Ronald and his heirs; and if he was but a trustee for Sir Robert, that now, by the late Act of Parliament 1696, can only be proven *scripto vel juramento* of the party intrusted; who being now dead, there remained no imaginable way to clear it but a declaration under Duncan Ronald's hand; which they did not pretend to have.

Replied,—That Act of Parliament did not concern this case, but was only intended where one did not think fit to insert their own name in a writ, but borrowed the name of another; and what if I trust a servant to pay or uplift a sum, must I have writ from him to instruct it was my money?

The Lords demurred if the Act of Parliament did extend to this case, and thought it not safe, by distinctions, to diminish the security of that new law. Yet, to have the matter fully before them, they allowed Sir Robert, before answer, to prove the facts condescended on by him, and gave him a diligence for recovery of Hugh Blair's books; and this in regard it was very presumable to be the same individual sum Sir Robert left with Mr Ronald. Yet some thought there might be two different sums; for there is here both *diversitas personarum et diversæ obligationum formæ et stipulationes*, though *eadem summa*. See Menochius *de Arbitrariis Judicum Quæst. lib. 2, cent. 3, cass. 213*; and Mascardus *de Probationibus*. *Vol. II. Page* 111.

1701. *June* 6. William Clopton and George Watson *against* Duncan M'Intosh.

William Clopton, merchant in London, and George Watson, his factor, pursue Duncan M'Intosh, merchant in Edinburgh, for £76 sterling, contained in his accepted bill of exchange in 1695.

Alleged,—No process at your instance, as factor; because Clopton, your constituent, is either turned bankrupt, conform to the statute in England, or,

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-