

liged to search the registers of East Lothian more than those of Orkney or Shetland, there being no law pointing me more to the one than to the other ?

DUPLIED,—What are you that object the nullity of my seasine, who produce none in your own person ? And Sir George Mackenzie, in his Observes on that Act 1617, tells this nullity of not due registration, is only competent to him who produces a right to the same lands ; and, though he starts the question, where the seasine of united lands should be registrate, yet he insinuates there is no decision in it ; and it is *jus tertii* to you, who produce nothing.

The Lords were clear, that the three last defences were not competent to stop production ; but divided on the first, of prescription,—some thinking it might be proponed in any step of the process : But the plurality found it not receivable, after extracted acts and certification granted, till he put the pursuer in the same state he was in, by reproducing the papers taken up ; and then he might be heard to propone prescription or any other defences *in causa*, at the discussing of the reasons of reduction, especially seeing the act has never hitherto been quarrelled in a reduction.

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1711. *December 22.* CARNEGY *alias* BLAIR of KINFAUNS *against* JAMES CARNEGY of PHINEVEN.

THE deceased James Carnegy of Phineven being tutor to Carnegy *alias* Blair of Kinfauns, his nephew, and likewise having married him to his daughter, and so being debtor to him both in his tutor-accounts and his tocher ; there is a process of count and reckoning intented, at his instance, against James Carnegy, now of Phineven ; who propones Absolvitor, upon a discharge granted by you to my father, not only of the tutor-account, but likewise of the tocher ; except £1000 Scots of it, acknowledged to be yet owing ; which made Kinfauns repeat a reduction and improbation he had raised of that discharge as false, and craved Phineven to abide at the verity thereof ; who offered to abide *qualificate* by it in thir terms, That he found it, after his father's death, amongst his papers.

But the Lords rejecting the quality, he abode at it simply ; but protested he might be no farther liable than as he who found it in manner foresaid.

Then Kinfauns, insisting in his articles, offered to prove, *1mo*, That his uncle, Phineven, on his death-bed, in March 1707, was oft heard to regret that he had not cleared his counts with Kinfauns, his nephew. *Nota*, The date of the discharge is just three days before his death ; in which space it was impossible such a long account could be ended with a dying man. *2do*, After his death his writs were visited and inventoried, by order of the magistrates of Edinburgh, and no such paper found, though it was pretended it was in his breeches. *3tio*, It bears to be subscribed before two witnesses, George Wilson, shoemaker in Edinburgh, and John Morrice, merchant there ; whereas no such men can be found ; or, if there were such men, they were dead long before March 1707, the date of the discharge.

ALLEGED for Phineven,—Clear and full discharges are not to be taken away by such lean and slender presumptions. There is nothing more frequent than on prospect of death to clear accounts ; and it is no wonder the discharge was not found at the first ; for his servants had rifled his pockets, and, after great

pains, the writs were recovered. And, as to the 3d, There is no use to inquire and search after witnesses, when the writ is holograph, all wrote with Kinfauns' own hand; and so is good and probative without witnesses; for *superflua non nocent, utile per inutile non vitiatur, et non solent quæ abundant vitiare scripturas*, l. 94 *D. de Reg. Juris*. Likeas, Spottiswood, *voce Improbation*, cites a case exactly parallel in 1583, where one Maxwell offered to improve the Laird of Stankie's testament *per testes insertos*: and the witnesses deponing they knew nothing of it; yet, because the testament was holograph, the Lords sustained it, and assoilyied from the improbation; for *quorsum* shall we examine witnesses, when I pass from them and can clip away their names and subscriptions, and yet the writ, after all, shall be good?

ANSWERED,—Whatever was the validity of this discharge, without witnesses, because it bears holograph, (and which is even denied,) yet you having, *ad majorem cautelam*, adhibited them, if their subscriptions be false, the discharge can never subsist on the bottom of its being holograph; because you have not rested on it yourself; and, by adding false witnesses, you have vitiated the whole writ. For falsehood may be perpetrated four ways. 1mo, SCRIPTO, in a false forged writ. 2do, DICTO, *in falso teste*. 3tio, USU, in producing and founding on a false writ. And 4to, FACTO, *in falsa moneta vel mensura*. And the first three are all to be found here. And the *Lex Cornelia, de Falso*, reckons the species of this crime to be not only *delere, mutare, subscribere*, but likewise *addere vel subijcere*, as is here. And Menochius, *de Presumpt.* says, a falsehood, defect, or nullity in any substantial part influences the whole writ. And the Lords, in that famous case, *Fleming and Nimmo, 20th February 1673*, found, though a writ was holograph, yet, having witnesses, it might be improven; and, on advising the testimonies, they found it null and improbative, though not amounting to falsehood. See also *22d February 1676, Innes against Gordon*. And as to that old practick cited by Spottiswood, the witnesses, at most, was but a *non memini*; and so the Lords justly sustained the testament, it being holograph not being denied. But where a man tampers, by adding false witnesses, though the deed were never so true, it is just he lose the benefit of it.

The Lords, before answer, ordained the witnesses, if on life, to be examined on the verity of their subscriptions, and all other trial and expiscation to be taken for redarguing the truth of the discharge: But, likewise, allow Phineven to prove it holograph, *comparatione literarum*, and adduce what probation he can, for adminiculating and fortifying the discharge. For the Lords thought it their duty to inquire into such suspected deeds, though parties should lie by and collude among themselves.

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1711. December 26. HAMILTON of MONKLAND *against* HAMILTONS of ORBISTON and WISHAW.

WILLIAM Hamilton of Monkland was forfeited, *anno* 1673, for his accession to the rebellion of Bothwell Bridge; in so far as he sent turkeys, and other victuals, and provisions to their camp; though he alleged he was forced, to save his lands from being plundered; and his forfeiture being gifted to the Earl of Melfort, he caused try at his lady and friends, what they would give for a com-