could infer no passive title against him; which the law never extends but to clear deeds, and not to presumptions, as being most unfavourable: whereas, if the creditors had pursued any possessory judgment, then, undoubtedly, they would have obtained to the possession; and, if the Lady had defended upon his right of apprising, they might have reduced the same.

It was ANSWERED for the creditors, That the Lady, having entered to the possession by that only right she had from the Lord Couper, which was reduced *ex capite lecti*, and likewise at the creditors' instance *ex capite inhibitionis*, her possession ought to be ascribed to the Lord Balmerrinoch his right; which flowing from him, being apparent heir, and that for a most onerous cause, the law does always interpret the possession of any having right from apparent heirs to be theirs, seeing it cannot be ascribed to any other right: and the creditors were not obliged to pursue a possessory judgment, seeing they would have been secluded until they had reduced Balmerrinoch's apprising; and, if this were allowed, it would open a door to prejudice all lawful creditors.

The Lords did repel the allegeance, and adhered to their former interlocutor; upon that ground of law,—That where the title whereby any person enters to the possession is reduced, they, having another title, must of necessity ascribe the continuance of their possession, after reduction, to the supervenient title: as likewise, whoever grants a title of possession to another, their possession is his, and makes him liable as if he had possessed himself: so that the creditors, having an undoubted ground in law to make the apparent heir liable to their debts, as successor *titulo lucrativo*, they needed not pursue a possessory judgment against any having right from him; which were indeed to give great advantages to contrivances, thereby to enjoy an opulent estate and not to be liable to the debts.

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1677. *January* 26. ALEXANDER LEVINGSTON *against* The EARL of NEWBURGH.

ALEXANDER Levingston, having obtained a precept from the deceased Earl of Newburgh, for the payment of £30 sterling yearly out of his pay, as captain of the King's Guard; which sum was ordered to be paid by John Will, his quarter-master,—did pursue the Earl of Newburgh, as representing his father, for payment of the yearly annuities resting before his decease, extending to 2000 merks.

It was ALLEGED, That the precept could not be sustained; because it wanted both the writer's name, and no witnesses were inserted; and, the body not being holograph, it was null by our law. *2d.* It could not be obligatory; because it was never a delivered evident to the pursuer; but, being in the hands of the Earl of Newburgh's servant, was recovered, by an incident diligence, at the instance of Balmagies, for instructing a reason of compensation against Sir John Strachan, who had charged him, as cautioner for the Earl of Newburgh, Sir John being a trustee himself.

It was REPLIED to the *first*, That the subscription being true, and not denied, and granted by Newburgh when he was captain of the King's Guard, and attending that office here, and drawn upon his own quarter-master, who received

his pay, and being granted in favour of the pursuer, who was then a gentleman of the guard, and that for the entertaining of his mother, who was aunt to the Earl, the precept, being a military act, is privileged in law; and falls not within the Act of Parliament requiring solemnities in writs and obligations; the laws of all nations freeing soldiers therefrom: and if betwixt merchants, bills of exchange and precepts for payment are binding without these solemnities; and count-books being subscribed, *multo magis* ought the precepts of commanders to their own soldiers to be sustained. It was REPLIED to the *second*, That the precept was now in the pursuer's possession, and could not be taken away but by his oath, albeit it were not; yet, being a delivered evident, by Newburgh, to one who had a trust from the pursuer, as well as Newburgh, and it being recovered by an incident diligence, and thereupon a decreet *in foro* founded against this same Earl, he cannot now be heard to question the same.

The Lords did seriously consider the first point, if the precept was obligatory, neither being holograph, nor having writer and witnesses, neither being subscribed when the Earl was *in procinctu*, or on a march to a present occasion to fight; in which case the law of nations gives them liberty to make testaments, or subscribe other writs, and sustains them without the ordinary solemnities required in law; but otherwise they have not that privilege: And, therefore, they found it necessary that the pursuer should instruct the verity thereof, by proving that sometimes payment was made; or that the precept was made use of for instructing accounts given up by the quarter-master; or some other pregnant presumption; without which they thought it hard to sustain the same as a valid and a lawful deed. And, as to the *second*, they found, That, it being in the pursuer's possession, to whom it was granted, and made use of in judgment against the same defender, that it could not be taken away but *scripto vel juramento*.

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1677. *February* 6. THOMAS, JOHN, and SUSANNA MARSHALLS, *against* WILLIAM MILNE.

IN an action pursued at the said Marshalls' instance, for payment-making to the said Thomas and Susanna Marshalls of the two part of the whole lands which belonged to their father, Thomas Marshall, upon this ground,—That their father, by an assignation, did dispone his whole lands in favour of Beatrix Bell, their mother, and the said two children, to be equally divided amongst them; which sums were to be uplifted and employed accordingly by the said Beatrix, with consent of the said William Milne, and John Marshall, their uncle; notwithstanding whereof, the said William Milne did take a translation from the mother to the whole debts and bonds, as solely belonging to her; and, by virtue thereof, did intromit with several sums, and might have intromitted with the whole, the debtors being at the time responsible; but, notwithstanding, he having kept up the bonds, and never having pursued but for so much as would satisfy his own debt due by the mother, nor never having offered to make a retrocession, it was concluded that he ought to be liable *ex capite fraudis et doli*, as being nominated a trustee for the children, and without whose consent nothing could be done in law.