

THE LORDS sustained the answer; but found the defenders were not obliged to do diligence for compt-book debts that were not mentioned in the inventory. No 47.

Harcarse, (TUTORS and CURATORS.) No 980. p. 277.

* * * Fountainhall's report of this case is No 44. p. 3507., *voce* DILIGENCE.

1713. December 10.

JAMES HALYBURTON of Fodderanie *against* Mr JAMES COOK of Ardlar.

No 48.

JAMES HALYBURTON of Fodderanie sold a piece of land to Mr James Cook, who, 1st February 1707, granted bond to Fodderanie for 33,500 merks as the price, with this provision, That whatever sums Mr Cook had advanced either to him, conform to his bills, bonds, or receipts, or paid to his creditors by his order or warrant, should be allowed in part payment. Mr Cook being charged upon his bond, suspended; and, at discussing of the suspension, he had paid not only 7500 merks to Fodderanie himself, but also to Turnbull of Smiddiehill, his creditor, L. 1000, secured by an heritable bond and infestment, and L. 220 by another heritable bond; and to one Jack, another creditor, 1000 merks; of all which the suspender craved allowance, and produced discharges to vouch the payments.

Alleged for the charger, The discharges granted by Smiddiehill and Jack, bear receipt of the money from Fodderanie himself.

Answered for the suspender, The discharges being in his hand, presume that the payments were made by him; and he fortified this presumption by a probation of witnesses, clearing that he had given bonds and bills in lieu of the discharges.

Replied for the charger, The discharges bearing the money received from him by Turnbull and Jack, cannot be redargued, but by his writ or oath, conform to the Lords interlocutor in Nisbet against Johnston, mentioned below; because, *1mo*, Writ is not regularly to be taken away by witnesses. Which general writ in this case is fortified by the act of the Parliament, appointing declarators of trust to be vouched by writ or oath of party; and, by a special clause in the bond charged on, that the suspender should have allowance only of debts paid to the charger's creditors, by his order or warrant, which the suspender hath not to justify his pretended payments to Turnbull and Jack; *2do*, The sums contained in those discharges ought not to be allowed as separate articles of payment from the other receipt of 7500 merks, granted by the charger to the suspender in a few days after. For, though a posterior greater receipt might not be presumed to include a prior smaller receipt, still extant in the hands of the payer, yet here, where the instructions of the anterior payments are conceived simply

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and directly in the charger's own favour, the suspender can never be heard to found thereon as made by himself; there being nothing more ordinary than for one man to disburse another man's money, and take receipts thereof in the other's name, which, though in the payer's hand, would never be a ground of action, or exception to him against the person in whose name it is conceived; which is conform to the decisions betwixt Gordon of Troquhen and M'Ghie of Balmagie, 27th November 1711, Div. 5. *h. t.*, and betwixt Nisbet of Dirleton and Johnston, 26th July 1711, *IBIDEM*.

Duplied for the suspender, Though writ be not taken away by witnesses, it is elided in some cases not only by witnesses but by presumption; and the presumptions concurring for Mr Cook are stronger than the presumption arising from the tenor of receipts; in so far as, *imo*, He being debtor to Fodderanie for the price of the land, and the payments made to his creditors by heritable bonds, he, Mr Cook, had a prior interest to disburden his purchase; *2do*, Had the money been paid by Fodderanie, or included in the general discharge of 7500 merks, it cannot be thought that the receipts would have remained in the suspender's hand, but the charger would certainly have got them up; *3tio*, The suspender hath also proved by witnesses, that he actually paid the money, or gave security to the original creditors in lieu of the discharges. Now, albeit the simple having of a writ will not infer that the haver paid the money, contrary to the tenor thereof; yet a person obliged or concerned to pay another's debt, having the instructions retired, is presumed to have paid it. Trust, again, in a general sense, might be extended to all cases where there is any trust, as to obligations betwixt tutors and pupils, constituents and factors, merchants and correspondents, clients and their doers: But it cannot be thought, that here the Parliament 1696, making a correctory statute, which is to be strictly interpreted, meant to comprehend such cases. It concerns only deeds of trust made use of to found action of declarator of trust; and not the present case, where the suspender is defending himself *via exceptionis*; the clause in the bonds for allowing only debts paid by Fodderanie's warrant, importing only that he may object if he can, against any debts paid without his order, that they are not good debts. Besides, the probation adduced bears, that the payments were made by his order. The practise of Troquhen and M'Ghie doth not meet; for the taking one receipt, bearing simply from himself, and a second, bearing partly from himself, partly from another, and the *correus* not having any of the other's effects, are *circumstantiatae differences*: Besides, exception is more favourable than action. The other case, betwixt Dirleton and Johnston, is as little to the purpose; because there the payment was officious, without any warrant; and it doth not appear that the tenant was debtor to the master in the equivalent of the sums paid; nor were the debts paid, cesses or ministers stipends, which affected the subject of the tenant's possession, as the debts paid by the suspender did his purchase.

THE LORDS found, That the discharges by Smiddiehill and Jack produced by

Mr Cook the suspender, who was debtor to the charger, are not in the case of the 25th act of the Parliament 1696, anent back-bonds and trusts; and found, That those receipts are not presumed to have been included in the general discharge of 7500; merks and therefore allowed the sums contained in those receipts, except the charger offer to prove by the suspender's oath, that they were therein included. THE LORDS also found it proved, That notwithstanding the narrative of the controverted discharges bears the payments to be made by Fodderanie's money, yet the payment was made out of the remaining price due by Cook to Fodderanie, after purchasing the lands from him, unless Fodderanie would redargue the same by Cook's oath.

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Fol. Dic. v. 2. p. 135. Forbes, MS. p. 10.

1747. June 5.

ELIZABETH CAIRNS, and JOHN COCHRAN of Waterside, her Husband, *against*
The CREDITORS of GARROCH.

No 49.

JAMES CAIRNS of Minnibowie, 24th December 1694, granted a factory to Alexander Cairns of Garroch, over all the effects which he should have at his decease, narrating, That by his testament he had made him tutor to Alexander and William his two sons, whom he had excluded from the administration of their estates, till they should be 25 years of age.

On the back of this factory there appeared in Minnibowie's hand, of the same date, a list of debts belonging to him, entituled, 'List and account of bonds, pertaining to James Cairns of Upper Minnibowie, whereof I have given a factory to Alexander Cairns, my brother's son, which he is to hold account for, anent his intromissions therewith, conform to the said James his testament and factory relating thereto.'

A factor having stated in his accounts interests of sums of his constituent, as in his hands for a continued time, they were presumed to have remained in his hand, unless he could have shown how they were discharged.

In the list were the following articles,

Item. Be the said Alexander Cairns of principal sum - L. 600 0 0
Annualrent all paid till Candlemas 1695.

Item. The said Alexander hath of the said James, his money lying beside him, to be lent upon good security, - 466 13 4

Below the list was an entry, written by Garroch, and subscribed both by him and Minnibowie, '18th December 1695, counted with my uncle, and he is paid off all his annualrents for 1600 merks, until Martinmas last 1696, except 40 merks.' And lower, there was this other, written and subscribed by Garroch and Minnibowie, '23d January 1699, counted with Minnibowie, and he is paid off all annualrents for 1600 merks, till Martinmas 1698, except L. 40 retention allowed; and I allege L. 12 Alexander got is not allowed me hitherto, and due.'