No 209. money simply from Troquhen, without the foresaid addition of for himself, and in name and behalf of Balmaghie.

Fol. Dic. v. 2. p. 152. Forbes, p. 550.

*** Fountainhall's report of this case is No 72. p. 3539, *voce* Diligence.

1714. *July* 22.

Viscount of Garnock, and his Curators, *against* James Wilson, late Factor to the deceased Viscount of Garnock.

No 210.
A factor's possession of bonds or bills granted by his constituent, does not presume that he paid them.

In the compt and reckoning at the instance of the Viscount of Garnock, against James Wilson, as chamberlain and factor to the late Viscount, the defender craved, *1mo*, Allowance in his accounts of several bonds and bills due by the Viscount, and now produced by the defender, without any discharge thereof by the creditors bearing receipt of the money from him.

Answered for the pursuer; The defender's simple having of the bonds and bills is no proof *per se*, unless he instruct, that he actually paid the money; because a factor's custody of his constituent's bonds is all one as if they had been in the constituent's hands. Nor does the simple having of a writ give any interest therein to any person, unless it be granted to, or someway conveyed to the haver; for otherways, the party in whose favour it is conceived, might recover it by action out of the haver's hand. It is true, that such action would not lie against a factor for recovering out of his hand a bond granted by his constituent, for this reason only, that a factor's custody is understood the constituent's custody, and a writ in the factor's hand is, in the interpretation of law, *instrumentum penes debitorem*; and as law presumes thus against the creditor, so it presumes also against the factor, that the constituent's bond lying by him, hath been paid and retired by the constituent himself, unless the contrary be instructed; seeing law requires diligence and exactness in factors, any obscurity arising from their fault should be interpreted against them; and hence the factor had it in his power to put this question out of doubt, by taking receipts from the creditors to him, in name of his master, which he hath neglected to do.

Replied for the defender; The retired bonds and bills being in the compter's own hands, who was under the character of chamberlain, it is presumed he retired them as chamberlain; because, it is usual for such to pay and retire their constituent's obligations, without taking formal receipts, especially where these obligations are not recorded, and the haver of the principal writ is presumed the payer. Were it a menial servant, having no other trust, who produces such retired bonds, it might be said, that he was only the hand that transmitted the money from the Viscount. But when one has a written factory for up-

lifting the constituent's writs and effects, it is presumed, that payment has been made by him as such; and chamberlains use to keep by them the retired instructions of their masters' debts till compting, as sufficient vouchers of their discharge; for a chamberlain may have access to tack, rentals, and such like documents, concerning his trust of uplifting the subject standing out; but he is not presumed to have access to other writs that do not concern his trust.—Nor are chamberlains to be considered as tutors and curators, or others having universal mandats from persons absent, whose administration leads them to the charter chest. No 210.

THE LORDS found, That the factor's simple having of bonds or bills, does not presume, that he paid them.

2*do*, The compter discharged himself with the advances of money to my Lord himself from time to time, for which he hath no formal receipt, but only a book of memory which his Lordship kept, wherein he set down, with his own hands, the several payments, and other loose pieces of paper within the leaves of that book written with his Lordship's own hand; which the compter contended was a sufficient proof for these articles; because, 1*mo*, They exactly quadrated with the account given in; 2*do*, My Lord needing frequent advances, it was impracticable to have formal receipts; 3*tio*, What one sets down in his day-book, or book of memory, proves against himself, though not for him; for it is not to be presumed, that he would set down, with his own hand, what he did not reeeive; and the loose notes being found in his book, are of the same force.

Answered for the pursuer; A compt-book is not *per se* sufficient, without being otherwise adminiculated, as was decided 20th January 1631, Ogle's Creditors *contra* Brown, No 4. p. 2428.; far less can the accompt-book be sustained here where the defender produceth a great many receipts under my Lord's hand, and craves allowance, both of those receipts, and the sums in the accompt-book; for it is probable the payments stated in the accompt-book were included in the receipts where these are posterior. Besides, the book and schedules could at most be sustained only in so far as they are proved to be my Lord's holograph, and bear the receipt of money from the defender.

THE LORDS sustained the book, with the scrolls and loose papers within the leaves thereof, mentioning or acknowledging payments or disbursements made by the factor; the factor always giving his oath in supplement thereupon.

Fol. Dic. v. 2. *p.* 152. *Forbes, p.* 96.

1714. *November* 18. IRVINGS & REID *against* CHARTERIS. No 211.

A translation to a bond being taken by one of a

THERE being ten merchants of Dumfries in co-partnery, six of that number borrowed 4000 merks from the Countess of Nithsdale, for the use of the so-