

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.

*2do*, 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, *1mo*, They exactly quadrated with the account given in; *2do*, My Lord needing frequent advances, it was impracticable to have formal receipts; *3tio*, 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 receive; 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.

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-

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No 211.  
A translation  
to a bond  
being taken  
by one of a

## No 211.

company of merchants, blank, and so found among his papers after his death, the Lords, nevertheless, found, that it was presumed to have been purchased with the money of them all.

ciety, as appears by their books, whereof Irving of Drumcoltran, and Bailie Reid, were two obligants.

The Countess of Nithsdale having assigned this bond to William Alves, who granted a translation blank in the assignee's name, which blank translation, with the bond and assignation, were found amongst the writs of Commissary Charteris ;

Some years after Commissary Charteris's decease, there is a process raised at the instance of John Irving of Drumcoltran, which is now carried on by his and Bailie Reid's children, for declaring, that the blank assignation lying by Commissary Charteris was for the joint behoof of Commissary Charteris, the said John Irving, and Bailie Reid ; which he inferred from the qualifications following, viz. the blank translation was purchased by the sum of 4400 merks, borrowed from Sir David Cunningham of Milncraig, upon a bond granted by the said Commissary Charteris, John Irving, and Bailie Reid, and that individual money was paid in to William Alves, who thereupon delivered the blank translation to Mr Patrick Richardson, who had the trust of Milncraig's bond from the obligants, then in Dumfries, and which Mr Patrick Richardson received the blank translation from William Alves, and sent it in a letter directed to Drumcoltran and Bailie Reid ; but sent the same under a cover, directed to Commissary Charteris, who was equally concerned ; for the blank translation being procured by the money lent upon Irving, Reid, and Charteris's bond, the right thereof did, *ipso jure*, fall to the borrowers and obligants in that bond : And the fact of the qualifications above alleged is instructed, *1mo*, By the oath of Mr Patrick Richardson, the common trustee, who depones upon the sending of the bond from the country to him, the borrowing of the money, and the paying it in to William Alves, and the sending the said translation, with the bond and assignation, under a cover, to Commissary Charteris, as above related ; and William Alves depones, that he was paid in ready money to the full avail of the sums contained in the translation, and that he received the money from Mr Patrick Richardson ; *2do*, Both their testimonies are confirmed by the dates of Sir David Cunningham's bond, which is at Dumfries, the 23d of December 1695, and the blank translation, which is at Edinburgh, the 26th of the said month and year, as soon as the bond could be transported from Dumfries to Edinburgh ; and, *3tio*, The sum in the translation and in Milncraig's bond, quadrate exactly with one another, reckoning the bygone annualrents and the expense of registration and horning included.

It was *answered* for the Children of Commissary Charteris ; That the bond being found blank among the defender's father's papers, did belong to him as fully as if his name had been inserted, more especially because it was to a blank person, his heirs and assignees, in the singular number, and could not be calculated for the use of three assignees ; *2do*, No mention of this pretended trust during the lifetime of Commissary Charteris, who lived some considerable time after, nor during the life of his relict. The Commissary and his

relict had not the same reason to insist against the partner's obligants in the bond assigned, because he was manager and debtor to the Company, and *sic intus habuit*; 3tio, The qualifications are not relevant, nor sufficiently proved, in as far as Mr Patrick Richardson's deposition is doubtful and vacillant in several particulars, and William Alves knows nothing from whom the money was borrowed but by hearsay; 4to, *Esto*, the money were proved to have been borrowed on the common account, yet there might have been a separate security for the value of Drumcoltran's and Bailie Reid's shares, which might have been afterwards satisfied and retired; in which case, Commissary Charteris having the blank translation in his custody, he would retire the separate security to the co-obligants, without any further document than the translation itself to make his right good; and it is of dangerous consequence to take away clear rights by conjectures and presumptions, which do not conclude with any certain evidence.

It was *replied*; A blank bond does indeed presume property in the haver, but that is only *præsumptio juris*, which can be elided by a stronger presumption, as in this case; for though Richardson, the common trustee, might have managed with greater caution, by either inserting the whole three in the translation, or leaving a blank for his or their heirs as well as for the name, yet the matter of fact proved does necessarily infer and demonstrate a joint concern, and Mr Richardson's deposition is firm and positive in all the points above related, and in every thing that was of moment, such as the purchasing the translation by the money belonging to the said three obligants, and consequently the translation purchased must belong to them; and his testimony is confirmed by William Alves deponing that Richardson procured and delivered him the money; and the agreement betwixt the sum in Milncraig's bond, and the sum in the translation, and the date, is in place of 1000 witnesses. 2do, The joint interest of the three obligants being once established, there is nothing to take it off; for it can never be presumed, that Irving and Reid had any separate security granted to them and retired, there being no manner of document to give the least ground of debt in that matter; for it is not so much as alleged that Commissary Charteris did bestow any of his private stock for making that purchase, nor did he fill up his own name as he would have done in a right originally acquired for the behoof of him and other two, in case he had afterwards satisfied the interest of these two; neither did he ever state the purchase of that debt to the Society in their books, or in the accounts of his management, as he ought to have done, if the right had been his own; nor is there any other vestige of evidence among his papers, to testify how he came by that blank right. 3tio, The silence of the pursuers for some years is no argument; because the Society was dissolved, and the subject of debate amongst the partners was only settled by decret-arbitral within these two or three years.

No 211. "THE LORDS found, That the qualifications above-mentioned did sufficiently prove, that the blank assignation was purchased by money borrowed from Milncraig on Charteris, Irving, and Reid's bond, and that therefore the blank translation did belong to the said three obligants; and found no document or ground to presume that Irving or Reid did receive any relief or satisfaction for their becoming bound in Milncraig's bond, and therefore declared."

*Fol. Dic. v. 2. p. 152. Dalrymple, No 114. p. 158.*

\* \* Bruce's report of this case is No 16. p. 1671, *voce* BLANK WRIT.

No 212.

1728. December 7. CAMPBELL *against* COCKBURN.

THE question occurred about a bill accepted by two debtors, retired with a blank indorsation, and found in the custody of one of them, whether this possession did not imply that the money was paid by him alone, so as to found an action of relief against the other, or whether the presumption must run, that both contributed equally to the discharge, since it did not relate to either in particular? The last presumption was sustained. *See* APPENDIX.

*Fol. Dic. v. 2. p. 152.*

No 213.

1731. January 29. GORDON of Gartie *against* SUTHERLAND of Kinminnity.

AN heir of entail having, after the decease of the maker of entail, borrowed money, and having also paid the defunct's debts, the LORDS presumed, that the debts were paid out of the borrowed money, and therefore found, that the borrowed money was a burden upon the entailed estate. Against this a contrary presumption was *urged*, That if the money had been advanced to pay the tailzier's debts, the creditor would not have failed to take an assignation to these debts for his security, which he not having done, the presumption ought to lie against him. *See* APPENDIX.

*Fol. Dic. v. 2. p. 152.*

1758. February 14. MAGNEIL *against* LIVINGSTON.

No 214.

A WIFE, who had a small separate fund of her own, exclusive of her husband's *jus mariti*, having, by a trustee for her behoof, purchased in debts affecting her husband's estate; "the LORDS found, That the presumption was, that