

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.

No 48.

*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.'

No 49.

Elizabeth Cairns, grandchild and executrix to Minnibowie, obtained decret against Garroch for the last sum, and adjudged his estate; and appearing in the ranking of his creditors, it was *objected*, That the jottings on the back of the factory were not sufficient documents of debt.

THE LORD ORDINARY, 16th January 1745, ' Found that the jottings on the foot of the list of debts subjoined to the factory by Minnibowie to Garroch, were no sufficient or legal evidence that the L. 466 : 13 : 4 contained in the said list, was a subsisting debt, or still due.'

*Pleaded* in a reclaiming bill, That the jottings on the factory in Garroch's hand-writing, were an evidence that he got this sum, to be lent out upon security, and retained it for years, paying interest therefor. This was an obligation once fixed upon him, which behoved to continue unless properly taken off; and as there could be no doubt that if he had been pursued in a short time after the last accounting, he behoved to have been liable, so must he now, notwithstanding it be true that no action was brought till 1730; for it is as true that no action was raised against him on his bond for L. 600; Alexander Cairns, who succeeded his father, never having made up any titles, but received payments in general to account, all which had been allowed to Garroch out of the pursuer's claims.

*Answered*, That these notandums were no sufficient evidence of a subsisting debt, since it was probable Garroch had lent out the money afterwards, and delivered his uncle a bond therefor; at which time he had retired the receipt he had granted when he first got it.

*Observed* by the LORDS, That it was ordinary to put money in an agent's hand, without receipt, to be lent out, who delivered a bond, and got no further exoneration; and therefore it would be hard, upon any acknowledgement of his having once had the money, to make him accountable at a distance of time: But here the jottings proved he had retained it for years in his hand, and paid annualrent for it, after which it was proper he should discharge himself.

THE LORDS altered the interlocutor.

Act. W. Grant.

Alt H. Home.

Clerk, Hall.

D. Falconer, v. I. No 181. p. 244.

1788. June 13. JAMES RUSSEL, and Others, *against* PATRICK FRASER.

No 50.  
Payment of a bill presumed from circumstances, tho' the sexennial prescription had not elapsed.

FRASER granted a promissory note to Alexander Boog, who lived five years and ten months after its date in 1780, without having made any claim upon it. Action, however, for the payment was raised by Russel, and other trustees of the heir of Boog. The defender stated a variety of circumstances, from which it appeared that the debt was already paid; and

*Pleaded*, It is true, the period of the sexennial prescription was not fully