ed *ex officio*, if there was any depositation, and what were the terms and conditions on which it was made, and how it came out of their hands, which was looked on as a great preparative, if it should be followed in other cases.

No 108.

Fol. Dic. v. 2. p. 217. Fountainhall, v. 2. p. 207.

1706. *January* 15.

JOHN SPENCE, Procurator-fiscal of Brechin, *against* CHRISTIAN DUNCAN, Relict of Mr William Chaplain, now Spouse to Mr Andrew Geddie, Minister at Farnall.

No 109.
Super-intromission over and above what was contained in fitted accounts allowed to be proved *scripto*, but not by witnesses.

THE deceased James Carnegie of Balnamoon being confirmed executor to his father, who died in April 1700, John Spence, Procurator-fiscal of Brechin, his creditor, in L. 1000, confirmed himself in the terms of the act 41st Parliament 1695, executor *ad omissa* to the father, and pursued Christian Duncan, as executrix testamentary to Mr William Chaplain, for the crop 1699 of the lands of Balnamoon, omitted by the young Laird out of his father's testament, and intromitted with by Chaplain.

This defence being proponed for Christian Duncan, That her husband was only a servant to the Lairds of Balnamoon; and as he had intromitted with the rents of that estate, so he had counted and cleared, and made *bona fide* payment to, and obtained a general discharge from the last Balnamoon who was heir and executor to his father;

Alleged for the pursuer, The discharge being relative to particular fitted accounts, can only exoner, in so far as is stated in these accounts; and that, notwithstanding of a general clause in the said discharge, discharging all other accounts and intromissions whatsoever; in regard the last Balnamoon having no direct right to the crop 1699, unconfirmed in his father's testament, could not, in prejudice of creditors, discharge at random all intromissions by a general clause; though the charge be sustained, as to what is instructed to have been particularly counted for upon the pretence of *bona fides*, in paying to one who had a shew or colour of right. And the pursuer offered to prove super-intromission by Chaplain, over and above what is contained in the fitted accounts, *prout de jure*, as intromission with rents and bargains of victual are probable.

Answered for the defender, Mr Chaplain having intromitted as servant to both the old and young Balnamoon, by their verbal order, and not *suo nomine*, that was not properly his, but Balnamoon's intromission by him as the hand, for which the defender cannot be liable, although her husband had obtained no discharge, since he is presumed to have delivered the rents to his master as he received them; and far less can she be liable, when he was honourably dismissed by his master with a general discharge, November 25. 1671, Irvine *contra* Falconer, No 95. p. 11424.; February 17. 1676, Abercromby *contra* Atchison, Div. 5. § 7. *h. t.* And though witnesses be competent to prove receipt of victual, where usually, for commerce-sake, writ is not interposed, and the

No 109. seller wants the price; yet they cannot be admitted, in this case, to take away writ, viz. the general discharge subsequent to the intromission.

THE LORDS found Mr Chaplain's super-intromission over and above what is contained in the fitted accounts relevant to be proved by the pursuer *scripto*, but not by witnesses, in respect of the general discharge; though, *regulariter*, the uplifting of victual rent may be so proven; besides, such a thing might expose servants to great danger, who commonly, by their master's verbal order, take in and deliver the rents without any receipt.

Forbes, p. 67.

*** Fountainhall reports this case:

THE Lord Tillicourty reported John Spence, Procurator-fiscal of the commissariot of Brechin, against Christian Duncan, relict of Mr William Chaplain, and now spouse to Mr Andrew Geddy, minister at Farnal. Spence being creditor by bond to James Carnegie, younger of Balnamoon in 1000 merks, confirmed himself executor-creditor to him on the 4th act of Parliament 1695, and pursues Christian Duncan, as representing the said Mr William her late husband, who intromitted with the rents of the lands of Balnamoon crop 1699, for payment. *Alleged*, If the said Mr William had any intromission, it was only as a servant to Balnamoon, with whom he had counted and cleared, and made *bona fide* payment, and obtained his general discharge, prior to Spence's citation in this process. *Answered*, The discharge, though general, yet was relative to fitted accounts betwixt them, which being now producsd, it appears that little of that rent 1699 is charged, and he offered to prove his superintromission over and above what was contained in these accounts, and that *prout de jure*; neither could young Balnamoon give him a valid discharge, having no right to that year's rent, it falling under his father's executry, who died in 1700; and such a transaction might be easily patched up by collusion to the prejudice of lawful creditors who had confirmed it; and to pay to one who had no right to receive it, cannot be called *bona fide* payment; and his discharge cannot defend, being *a non habente potestatem*. *Replied*, Mr Chaplain was only a servant, so his intromission was not *proprio nomine*; but as he received the rents, so he delivered them to his master, and was no more but his hand to convey them, and was not critically to enquire into his master's right of uplifting, or exacting, no more than tenants paying their master, though he be denuded by public infeftments, or a gift of liferent-escheat, if it be not intimated to them, as Stair, B. 1. Tit. Of Liberation from Obligations, (p. 157.) shews, was done in the case of Loudon against the tenants of Jedburgh, *voce* TEINDS; and a deposed minister's discharge was found good before intimation, 10th January 1679, College of Aberdeen against the Earl of Aboyne, *voce* STIPEND; and Balnamoon was in possession, and had a colourable title, both as heir and executor, though he had omitted to make the confirmation full, which his servant was neither bound to quarrel nor know; as was found, 25th November 1671, Irvine against Falconer,

No 95. p. 11424.; and Dirleton observes the parallel case, 17th February 1676, Abercromby against Atchison, Div. 5. § 7, *h. t.* And to prove super-intromission now against him by witnesses, were to take away his written discharge by the testimonies of witnesses, which would overturn the clearest principles in our law. *Duplied*, These decisions finding servants not liable for their intromissions, because it is presumed they delivered it to their master, holds only in menial domestic servants, which Mr Chaplain was not, but lived with his wife and family by himself apart; and though erroneous payment sometimes excuses tenants *ob rusticitatem*, and their simplicity, yet that cannot be applied to Mr Chaplain, who was nowise ignorant, but managed Balnamoon's law affairs, and his discharge can go no farther than the discharger had right, or the particular articles of the count related to, bore; so that the general clause can carry no more than what is actually contained in these accounts. THE LORDS thought this might expose servants (who, by their masters' verbal order, uplift their rents, and deliver it in without any thing farther) to an evident danger; and therefore found his super-intromission could not be now proven against him by witnesses, though *regulariter* lifting of victual-rent may be so proved, yet they would not allow it here, in respect of the general discharge.

No 109.

Fountainhall, v. 2. p. 312.

1706. *June* 22.

JOHN WATSON, Governor of Herriot's Hospital, *against* The REPRESENTATIVES of the Deceased WILLIAM FORRESTER, Writer to the Signet.

No 110.
A cancelled back-bond, with notes on the back and margin thereof, bearing that the granter was to renew the same on certain terms, being recovered at the instance of the creditor, in an exhibition against the granter's representatives, the Lords allowed witnesses to be examined for proving the notes to be the granter's hand-writing.

JOHN WATSON, as debtor to the deceased William Forrester, having assigned him to several debts for his further security, got a back-bond from him to hold count; and he, William Forrester, having given allowance to one of these debtors, of L. 19 Sterling that John Watson was resting him, borrowed up his back-bond, in order to grant a new one, with the deduction of the said L. 19, but died before he renewed the back-bond, which obliged John Watson to raise an exhibition against William Forrester's children and their tutors, wherein they deponed and exhibited the retired back-bond cancelled, with notes written on the back and margin thereof, bearing, that William was to grant a new back-bond in such terms. John Watson then craved a diligence to cite witnesses, for proving that the notes on the back-bond are William Forrester's hand-writ.

Alleged for the defenders, That it seemed an unprecedented piece of form, of dangerous consequence, to make up a writ in such a manner, since an uncancelled chirographum penes debitorem repertum præsumitur solutum; and far less could a cancelled bond, with notes thereon, found in Mr Forrester's custody the time of his decease, though never so well attested, to be his hand-writ, import an obligement upon him to grant a back-bond in these terms, or fix a trust upon his heirs: et frustra probatur quod non relevat.