

of Jasper Johnston, who had it in his power to have retired them, and taken in lieu thereof an assignation from the creditor; which he scrupled as little to grant, as the declaration aforesaid; *2do*, Tenants usually take discharges of cesses, ministers' stipends, or the like, in their master's name; and yet having these in their custody, never fail to get allowance of the same as so much paid of their rent; so that Craigtintny's name has been inserted only for the more easy expediting of the account betwixt him and Jasper his tacksman.

*Fol. Dic. v. 2. p. 151. Forbes, p. 537.*

**No 208.**  
duced with the discharges an *ex post facto* declaration under the creditor's hand, that he was paid by the tenant.

1711. November 27.

RODGER GORDON of Troquhen, *against* JOHN M'GHIE of Balmaghie.

RODGER GORDON of Troquhen, and the deceased Alexander M'Ghie of Balmaghie having granted bond to Mr John Birnie for 1000 merks principal, bearing annualrent, Troquhen pursued John M'Ghie, now of Balmaghie, as representing Alexander M'Ghie, his grandfather, for payment of the equal half of some years annualrent of the bond, which the pursuer *alleged* he had paid to Birnie the Creditor, conform to several discharges produced, whereof some bear receipt of annualrents by Mr John Birnie, from Troquhen for himself, and in name and behalf of Balmaghie; and some bear only receipt of the annualrents from Troquhen, without the addition of for himself, and in name and behalf of Balmaghie.

*Answered* for the defender; The pursuer can only ask re-payment from the defender of annualrents whereof the receipts bear the money received from Troquhen. For annualrents paid upon discharges mentioning receipt of the money from the pursuer for himself, and in name and behalf aforesaid, are presumed to have been advanced by both equally; and Troquhen has been only the carrier.

*Replied* for the pursuer; The tenor of the discharges mentioning the money to be received from the pursuer, prove it was his money, unless redargued; for the addition, In name and behalf of Balmaghie and Troquhen; sheweth only, that the debt was totally extinguished as to the creditor. And had the half of the money been Balmaghie's, the discharge would not have born simply, Received from Troquhen, but received from Troquhen and Balmaghie.

THE LORDS found, That the defender ought not to refund to the pursuer the half of the annualrents, whereof the discharges bear receipt of the money from Troquhen, for himself, and in name and behalf of Balmaghie; but only that he should refund to him the half of those annualrents paid upon receipt of the

**No 209.**  
One of two *correi debendi* took receipts for money, some of them bearing for himself and for behoof of the other, others of them not mentioning this. The former were presumed to have been advanced in proportion by the other party.

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, *imo*, 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 compters 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-