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ther, since the pursuer stands infeft in the estate adjudged, he hath good title to reduce all real rights affecting the same, whatever force the tailzie may have as a personal obligation against him. *2do*, An apparent heir hath no property in the rents, but only a faculty to continue his predecessor's possession, and intromit when no better right competes. Besides, Earl George having renounced to be heir in favour of Paton, who adjudged *hereditatem jacentem* in satisfaction of his debt, the estate and rents of it belonged to him till he was paid, and simply if not paid within the legal; and Paton being paid by the factor out of these rents, the adjudication became extinct. The disposition of the adjudication was in that case no more but an instruction and voucher of the payment whereupon extinction followed *ipso jure*; or like an assignation to the debtor of his own bond; and Earl George being *passive* liable to Paton the creditor, by the intromission with the rents as apparent heir, payment of the debt by the Earl's factor did extinguish it *ipso facto*.

THE LORDS found, That the pursuer being heir to the granter of the bond, on which the adjudication was led, and served in special to him in the estate adjudged, hath good interest to extinguish the adjudication by payment, notwithstanding of the disposition to the defender by her brother, the last Earl William, without prejudice to her using the said disposition or any other right as accords; and found, That the adjudication being led on a decree *cognitionis causa*, Earl George's factor's purchasing and retiring it by the rents of the lands adjudged, which were *in hereditate jacente*, and Earl William's admitting and accepting that article in the said factor's accounts, to exoner him of his intromissions with these rents, is relevant to extinguish the adjudication by payment.

*Fol. Dic. v. 2. p. 49. Forbes, p. 666.*

1713. December 10.

JAMES HALYBURTON of Fodderance, *against* Mr JAMES COOK of Ardlaw.

No 17.  
Circumstances inferring payment.

JAMES HALYBURTON of Fodderance sold a piece of land to Mr James Cook, who, 1st February 1707, granted bond to Fodderance for 33,500 merks as the price, with this provision, that whatever sums Mr Cook had advanced, either to him, conform to his bills, bonds, or receipts, or paid to his creditors by his order or warrant, should be allowed in part payment. Mr Cook being charged upon this bond, suspended; and, at discussing of this suspension, had paid not only 7,500 merks to Fodderance himself, but also to Turnbull of Smiddiehill, his creditor, L. 1000 secured by an heritable bond and infeftment, and L. 220 by another heritable bond, and to one Jack, another creditor, 1000 merks; of all which, the suspender craved allowance, and produced discharges to vouch the payments.

*Alleged* for the charger; The discharges granted by Smiddiehill and Jack bear receipt of the money from Fodderance himself.

*Answered* for the suspender; The discharges being in hand, presume that the payments were made by him, and he fortified this presumption by a probation of witnesses, clearing that he had given his own bonds and bills in lieu of the discharges.

*Replied* for the charger; The discharges bearing the money received from him by Turnbull and Jack, cannot be redargued but by his writ or oath, conform to the Lords interlocutor, 26th July 1711 (see PRESUMPTION); because, *imo*, Writ is not regularly to be taken away by witnesses, which general rule in this case is fortified by the 25th act of the Parliament 1696, appointing declarators of trust to be vouched by writ or oath of party; and, by a special clause in the bond charged on, that the suspender should have allowance only of debts paid to the charger's creditors by his order or warrant, which the suspender hath not to justify his pretended payments to Turnbull and Jack; *2do*, The sums contained in these discharges ought not to be allowed as separate articles of payments from the other receipt of 7,500 merks granted by the charger to the suspender in a few days after; for, though a posterior greater receipt might not be presumed to include a prior smaller receipt still extant in the hands of the payer, yet here, where the instructions of the anterior payments are conceived simply and directly in the charger's own favours, the suspender can never be heard to found thereon as made by himself, there being nothing more ordinary than for one man to discharge another man's money and take receipt thereon in the other's name; which, though in the payer's hand, would never be a ground of action or exception to him against the person in whose name it is conceived; which is conform to the decisions betwixt Gordon of Troquhen and M'Ghie of Balmagie, 27th November 1711, *voce* PRESUMPTION, and betwixt Nisbet of Dirleton and Johnston, 26th July 1711, *IBIDEM*.

*Duplied* for the suspenders; Though writ be not regularly taken away by witnesses, it is elided in some cases, not only by witnesses, but by presumption, arising from the tenor of receipts: In so far as, *imo*, He being debtor to Fodderance for the price of the lands, and the payments made to the creditors by heritable bonds, he, Mr Cook, had a proper interest to disburden his purchase; *2do*, Had the money been paid by Fodderance, or included in the general discharge of 7,500 merks, it cannot be thought that the receipts would have remained in the suspender's hands, but the charger would certainly have gotten them up; *3tio*, The suspender hath also proved, by witnesses, that he actually paid the money, or gave security to the original creditors in lieu of the discharges. Now, albeit the simple having of a writ will not infer that the haver paid the money contrary to the tenor thereof; yet a person, obliged or concerned to pay another's debt, having the instructions retired, is presumed to have paid it. Trust, again, in a general sense, might be extended to all cases where there is any trust as to obligations betwixt tutors and pupils, constituents and factors, merchants and correspondents, clients and their doers. But, it cannot be thought, that here the Parliament 1696, making a correctory sta-

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tute, (which is to be strictly interpreted) meant to comprehend such cases. It concerns only deeds of trusts made use of to found action of declarator of trust, and not the present case, where the suspender is defending himself *via exceptionis*. The clause in the bond for allowing only debts paid by Fodderance's warrant, imports only that he may object, if he can, against any debts paid without his order, that they are not good debts. Besides, the probation adduced, clears that the payments were made by his order. The practice of Troquhen and Balmagie doth not meet; for the taking one receipt, bearing simply from himself and a second bearing partly from himself, partly from another, and the *correus* not having any of the other's effects are circumstantiate differences; besides that exception is more favourable than action. Though the other case betwixt Dirleton and Johnston, is as little to the purpose, because there the payment was officious without any warrant, and it doth not appear that the tenant was debtor to the master in the equivalent of the sums paid. Nor were the debts paid, cesses or minister's stipend, which affected the subject of the tenant's possession, as the debts paid by the suspender did his purchase.

THE LORDS found that the discharges by Smiddiehill and Jack, produced by Mr Cook the suspender, who was debtor to the charger, are not in the case of the 25th act of the Parliament 1696, anent blank bonds and trusts; and found that those receipts are not presumed to have been included in the general discharge of 7,500 merks, and therefore allowed the sums contained in these receipts, except the charger offers 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, bearing the payments to be made by Fodderance's money, yet the payment was made out of the remaining price due by Cook to Fodderance, after purchasing the lands from him, unless Fodderance would redargue the same by Cook's oath.—See Haliburton against Cook, *voce* PRESUMPTION.

*Forbes, MS. p. 10.*

1714. July 16.

SIR WILLIAM MENZIES of Gladstones, *against* MARION JOHNSTON, Relict of Captain Alexander Wood.

No 18.

Circumstances inferring payment.

SIR WILLIAM MENZIES pursued Marion Johnston upon the passive titles, as representing Alexander Wood her husband, with whom the pursuer and others were partners in a tack of the excise, from 1st March 1699 till 1st May 1701, for payment of L. 501 : 9 : 4d. Sterling as the Captain's share for L. 2005 : 17 : 4d. advanced by the pursuer to the general receiver, in name of their tack-duty, over and above the whole produce of the tack, which amounted only to the sum of L. 48,994 : 2 : 8d; whereas, the payments made by him to the receiver extended to L. 51,000 Sterling. For instructing his libel, he produced a stated