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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.

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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

account of the produce of the excise, subscribed by him and Captain Wood, and two discharges under the hand of Robert Rutherford general receiver, whereof one bore him to have received from the pursuer L. 25,000 Sterling, to account of his and Captain Wood's excise duty for the first year, and discharges them *pro tanto*; and the other bore him to have received from the pursuer and sub-tacksmen of the excise and others, the sum of L. 28,000, to account of the pursuer's and Captain Wood's second year's tack-duty of the excise, and discharged them *pro tanto*; and the said Robert Rutherford and Colin Alison, collectors of the excise, being examined upon oath, the former deponed, that the payment of the L. 26,000 was made to him by Colin Alison, collector of excise, and the sub-tacksmen, but he did not remember that he got any part thereof from Captain Wood; and Mr Alison deponed, that he, by order from the pursuer and Captain Wood, delivered the money received by his collection to Robert Rutherford, and that no part thereof was Captain Wood's proper money.

*Answered* for the defender; It cannot be supposed that the pursuer advanced any of his own money to pay this debt; *1mo*, Because the sum was considerable, which no man of ordinary conduct would have advanced out of his own money upon the account of the co-partnery, without any antecedent order from his partners; *2do*, Where one of two co-obligants pays the debt, he takes always an assignation, at least such a declaration from the creditor as might clear his relief against the other, which is altogether omitted by the pursuer; *3tio*, What could have moved the pursuer, had he made any payment out of his own money, to take the discharge as ample in favours of his partners as of himself; *4to*, It is not usual for a *correus debendi* to be precipitant in advancing his money to satisfy debts wherein others are bound with him before distress, and here was no previous distress; *5to*, Albeit Captain Wood lived and conversed daily with the pursuer for three years, in good credit and circumstances, after the date of the said discharges, yet the pursuer made no demand upon him for this great sum, nor asked any security for his proportion thereof; *6to*, The oaths of Rutherford and Alison evince that the money was paid in to Rutherford by other hands than the pursuer; *7mo*, The account the pursuer founds on for instructing the produce of the tack, is not probative, because it was made up, not conform to what was the true amount thereof, but with a particular view to be given in to the Parliament when Sir William was insisted against for payment of the tack-duty, and Captain Wood and he were using their endeavours for procuring an abatement; in which case, it was their interest to make the produce of their tack appear as low as possible. But if the pursuer would produce the private books of co-partnery, which has been so frequently desired on the part of the defender, the produce of their tack will amount to a greater extent.

*Replied* for the pursuer; That the claim was directly founded in the tenor of the receipts, and his having them in his hand; all which is supported by the

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two depositions aforesaid, which disown any part of the money paid into Rutherford to have been Captain Wood's proper money; consequently, it is incumbent upon the defender to shew that any part of the money was delivered to the pursuer by Captain Wood. It imports not, that the receipts discharge both Sir William Menzies and Captain Wood; since they being partners, payment by either did liberate both, and consequently both fell to be discharged; but that can never hinder action of recourse at his instance who made the payment. This case seems much of the same kind with that decided betwixt Sir John Swinton and the Representatives of Provost Brown, (See APPENDIX), where the Lords found that Sir John Swinton having paid money, for which he and Langton were jointly liable, though the receipts did discharge both Langton and him, and one of them bore expressly receipt of the money from Sir John in name of Langton, Sir John had his recourse, unless Langton could instruct that he delivered to Sir John that money which Sir John had paid, and taken receipts for. It is true, a great part of what was paid, was paid out of the produce of the tack, and so far as that produce goes, the pursuer claims no recourse; but the payments having exceeded the profits of the tack, in so far his action still stands good. And the subscribed accompt of the produce of the tack is most probative; seeing whatever was the occasion of stating it, the pursuer abides by it, as a true and just accompt.

THE LORDS found the documents produced not relevant to oblige the defender to make up the balance pursued for by Sir William Menzies, which he alleged was paid by him to the government more than the excise, which was the subject of the co-partnery.

*Forbes, MS, p. 86.*

No 19.

The Lords refused to allow a minor's estate to be adjudged upon a debt purchased in by the curator, and taken in an assignee's name *ante redditus rationes*, altho' the assignee had, for the said assignation, discharged an equivalent debt owing to him by the curator.

1714. July 20.

WALTER BREBNER, Writer in Largo *against* ANNA COOK and JAMES MELVILLE, Merchant in Pittenweem, Her Husband.

CHRISTIAN and Anna Cooks, daughters to the deceased James Cook in Pittenweem, being daughters to Mr Thomas Binning at Dalmarnock, in the sum of 1100 merks principal, and several bygone annualrents contained in a decret obtained at his instance against them as heirs portioners to their father; Dr Arnot, who married the eldest daughter Christian, was chosen curator to Anna Cook, acquired assignation to the said debt in name of Walter Brebner, his own creditor, upon Brebner's discharging the debt owing by him. Brebner pursued an adjudication against Anna Cook and her husband for the equal half of the sum,

*Answered* for the defender; That Dr Arnot, her curator, having transacted and paid the debt, and never, to this day, cleared his curatory accompts, he is presumed to have paid the one-half thereof for his pupil with her own means,