No 18. 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 redditas 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 decreet 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,

which he is still presumed to have in his own hands *ante redditas rationes*; and, as he could have no action against the defender for payment of this debt, neither can Brebner, in whose name he took the assignation, to evite the exception competent against himself, *Nam quod non licet directe, non licet per ambages*; if it were otherwise, the privilege competent to minors for preventing encroachments upon their estates by their tutors and curators, might be easily eluded by their purchasing in the persons of trustees, rights to the minor's debts, and making them subsist as grounds of eviction of the minor's estate, though purged by his own means, and disappointing the minors of the benefit of eases got from the creditors. No 19.

Replied for the pursuer; Had the Doctor paid the debt, and taken a blank assignation, or taken an obligation from Binning to assign in favour of any person he should name, the defender might have had some pretence to say, that she could not be convened *ante redditas rationes*; but there is no place for it here, where the debt was in the pursuer's name, from the beginning delivered to himself, and never in the Doctor's person. Our law, which so far protects an onerous assignee, as not to allow the oath of the cedent to militate against him, can never allow a personal exception against a third party, who was neither author nor cedent to the pursuer, to militate against him; yea, a bond taken by a debtor in his creditor's name, was found not to be affected by arrestment laid on for the procurer's debt, even while it was in his hand not delivered to the person whose name was in the bond, 12th July 1677, Bain *contra* M'Millan, *voce* PRESUMPTION. Nor can the assignation to the pursuer be understood to elude the law; seeing the Doctor might lawfully pay his own debt, either by money in specie, or in case the creditor did not desire that, by procuring an equivalent right to him, and *nemini fraudem facit qui jure suo utitur*.

THE LORDS found there could be no adjudication at the pursuer's instance, as having right from Dr Arnot, the defender's curator, *ante redditas rationes*.

Fol. Dic. v. 2. p. 51. Forbes, MS. p. 92.

1714. *July* 22.

VISCOUNT of GARNOCK and His CURATORS, *against* JAMES WILSON, late Factor to the Deceased Viscount of Garnock.

No 20.
Effect of vouchers in the hands of a factor.

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 accompts 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; be-