

No 512. of the particulars mentioned in the account, and give his oath in supplement, they would bring him in equal with others.

Fol. Dic. v. 2. p. 260. Durie. Spottiswood.

* * * This case is No 4. p. 2428., *voce* COLLUSION.

No 513.

Date of a discharge in a merchant's account-book, being atracted by witnesses, was found to prove against the merchant's assignation.

1662. February 4. SKENE *against* LUMSDEN.

ANDREW SKENE having charged Alexander Lumsden for payment of a sum, for which he was cautioner for his brother, Mr Thomas Lumsden, he suspends upon this reason, that the cause of the bond was two bills of exchange, which were protested. The suspender *answered*, He offered him to prove they were paid, after the protest, by him who drew the bills, or by Mr Thomas Lumsden, in whose favour the bills were drawn. The suspender *replied*, That the allegiance ought to be repelled, because he was assigned to the protested bills for relief of this cautionry, and intimated his assignation to Skene, who delivered the bills, and got the bond charged on. The charger offered him to prove payment before that assignation, or intimation, and, *ad modum probationis*, produced an instrument under the seal of Campvere, and a declaration of the Conservator there, bearing, that upon inspection of Mr Thomas Lumsden's count-books, they found that he had acknowledged two or three sums paid in part of these bills, and exprest the dates thereof prior to the assignation. The suspender *alleged* the count-books could not prove, unless they were produced, cognosced, and proved to be Lumsden's count-books. *Secondly*, They could not prove *contra tertium*. *Thirdly*, The question being *de data*, and they holograph, they could not prove their date. *Fourthly*, These testificates can prove nothing, unless they had been taken upon processes, or by commission.

" THE LORDS found the testificates could not prove, but that the count-book being cognosced, might prove against the assignee, being brother to Lumsden, and the books out of his hand since he was broken; for amongst merchants' count-books or writs without witnesses by their custom are sufficient; and ordained Lumsden and his brother to depone upon the having of the books, to produce them if they had them, and if not, granted commission to the Magistrates of Campvere and Conservator, to cognosce the books, and to report what they find of this matter in them."

1662. July 19—SKENE having charged Alexander Lumsden upon a bond granted by Mr Thomas Lumsden, as principal, and the said Alexander as cautioner, he suspends on this reason, That the cause of the bond was bills of exchange, drawn by Verhage upon Kezar in Campvere, to be paid to Skene or his order; which bills Skene ordered to be paid to Mr Thomas Lumsden's wife, and Mr Thomas granted the bond charged on for the said bills, which bills

were protested upon Kezar's not paying of the bills, as the protest bears; to which protested bills Mr Thomas Lumsden assigned the suspender, and whereupon he now *alleges* that he must have allowance of the bills protested, being the cause of the bond, and therefore Skene himself is liable for the bills which must compensate the charger. The pursuer *answered*, That the reason ought to be repelled, because he offered him to prove, that albeit the bills were protested for not payment by Kezar, on whom they were drawn, yet Mr Thomas Lumsden having gone back to Verhage who drew them, Verhage paid Mr Thomas, and that before the intimation of the suspender's assignation. *2dly*, That Mr Thomas Lumsden being factor in Campvere, in his factor-book, upon the 100th page thereof, there are four posts of payment paid by the said Verhage to Mr Thomas Lumsden at diverse times, conform to the Magistrates of Campvere their report upon the Lords' commission, bearing, that the said factor's count-book is authentic and unvitiated, and that Verhage who drew the bills, and Kezar upon they were drawn, had both sworn before them, that Verhage had paid the same to Lumsden; so the question was upon the manner of probation; whereanent the suspender *alleged, imo*, That count-books not being subscribed, were not probative writs, even against the merchant himself. *2do*, That at least they cannot prove against the suspender his assignee. *3tio*, That they could be no better than holograph discharges by the cedent, which cannot instruct their own date against the assignee, and so cannot prove the same to have been before the intimation. As for the testimonies of Verhage and Kezar, their testimonies cannot take away writs, and yet are suspected being both debtors for the bills; and that it was not instructed who wrote the book, whether Lumsden himself, or his ordinary book-keeper.

“ THE LORDS found the probation sufficient against the assignee, the charger also proving that the books ~~were written~~ by Lumsden himself, or by his ordinary book-keeper; and thought that the book proved against this assignee, being Mr Thomas' own brother, and no suspicion he would wrong him, and there being four several posts of payment in several months, besides the depositions of the foresaid persons.”

1663. January 8.—SKENE having charged Alexander Lumsden for payment of a bond, for which he was cautioner for Mr Thomas Lumsden his brother, Alexander suspends on this reason, that the bond was granted for a bill of exchange, drawn by one Dutchman upon another, to be paid to Skene or his order, which bill Skene ordained to be paid to Anna Balty, spouse to Thomas Lumsden, for which this bond was granted; *ita est*, the said bills of exchange were not paid but protested, and are assigned by Mr Thomas Lumsden and his spouse, to the suspender; at least, if any payment was made to Mr Thomas Lumsden the cedent, it was after the assignation to Alexander Lumsden the suspender, and intimation. It was *answered* for the charger, That the reason ought to be repelled, because he offered him to prove, by Mr Thomas Lums-

No 513.

den, at that time factor at Campvere, his count-book, that albeit the bills were once protested, yet they were paid before assignation, or intimation.

THE LORDS before answer, having granted several commissions to the Magistrates and Conservator at Campvere, to view and examine the count-book which was at Campvere, they reported, that in such a page of the book there were three articles of receipt, in part payment of the bills, after which pages the book was continued, and several counts written therein, and that it was authentic and unvitiated, and all written with the hand of John Muir, Mr Thomas' stepson, who was his book-keeper, and that they had been a long time since out of Mr Thomas' hands about the time he bankrupted, and that they had examined upon oath him who drew the bill, and him upon whom the bill was drawn, both of whom had sworn payment was made; the question was, whether Mr Thomas' count-book could prove against Mr Thomas' assignee? It was *alleged*, It could not, seeing it had no more effect than as holograph discharge, which might be made up after the assignation, and therefore proves not against the assignee. It was *answered*, That though a holograph discharge will not prove alone, yet if by other adminicles, writs, or witnesses, it appears that the date is true, at least is prior to the assignation or intimation, it will be sufficient against the assignee; so the adminicles here are pregnant and strong, to prove the time of payment contained in the count-book.

THE LORDS found the count-book and adminicles sufficient here against the assignee, especially considering that the cedent was his brother, and that it was not presumeable, that he would do any deed, in making up these receipts in his count-book, in prejudice of his brother.

Fol. Dic. v. 2. p. 260. Stair, v. I. p. 91. 129. & 154.

1662. November 20. ALISON WARDLAW against ROBERT GRAY.

No 514.

A count-book written by the hand of a person of discretion, found sufficient to prove payment of his rent, against his executor-creditor.

ALISON WARDLAW, as executrix creditrix confirmed to her husband, and having confirmed the rents due to him by Robert Gray pursuer therefor, the said Robert *alleged* absolvitor, for a part of the rents, because paid, which he offered to prove by the defunct's count-book in the pursuer's hands, which count-book is written with the defunct's own hand, and bears several receipts paid by the defender at several times. The pursuer *alleged*, That the count-book cannot prove, because it wants a subscription, and count-books do only prove *contra scribentem*, in the case of merchants who kept exact current count-books, which is a special privilege of theirs, and was never extended to any other case, nor to any other person, for a discharge subscribed before witnesses would not liberate if it were not delivered to the other party, much less can a count-book. *2do*, Whatever it could work against the writer and his heirs, yet not against assignees or executors creditors, who are in effect singu-