

No 46.

\*\*\* Sir P. Home reports this case :

SIR WALTER SETON and Sir James Cockburn being sharers together in a tack of the customs, Sir Walter pursues Sir James for his intromissions with the same, amounting to considerable sums. *Alleged* for the defender, That he had already counted, in so far as he having given in an account to the pursuer of his intromissions, and subscribed the same, by which there was a certain balance due by the defender, which was carried to a second account, and the balance of that carried to a third account, which being fitted and closed by both parties, is equivalent to a discharge, seeing by the custom of merchants, the fitting and closing of the last account wherein the balance of former accounts is stated, is understood to be a closing and fitting of all accounts; and when the last account was fitted, all the instructions was given up. *Answered*, That the first account given in by the defender, albeit signed by him, yet it cannot exoner him, unless it had been likewise signed by the pursuer; and albeit the balance of several accounts be brought to the last account which is signed by both parties, yet that cannot import an exoneration to the parties for the preceding accounts, unless they had been likewise fitted and signed by both parties, *quia hoc non agebatur* by signing the last account, that all preceding accounts not mentioned in the last account should be discharged. THE LORDS found, That the balance of the first account being carried to the second, and the balance of the second to the third account, which being subscribed by both parties, did fit and close likewise the two former accounts, and that it was presumed the instructions were given up to Sir Walter, unless he offer to prove by Sir James Cockburn's oath, or by writ, that the accounts were fitted upon trust, or that notwithstanding of the fitting of the accounts, the instructions were left in the hands of Sir James Cockburn.

*Fol. Dic. v. 2. p. 135. Sir P. Home, MS. v. 1. No 560.*

1684. February.

DUFF against The TAYLORS.

No 47.

A TAYLOR having left his own incorporation tutors-testamentar to his children, and they being pursued for not doing diligence upon some notes and subscribed accounts:

*Alleged* for the defenders; That it was presumed those notes and accounts, though subscribed, not being in the inventory, were satisfied, especially bearing date some time before the defunct deceased.

*Answered*; It was not to be presumed, that men who paid debt would leave subscribed papers unretired; and people make short inventories to save charges of quot and confirmation.

THE LORDS sustained the answer; but found the defenders were not obliged to do diligence for compt-book debts that were not mentioned in the inventory. No 47.

*Harcarse, (TUTORS and CURATORS.) No 980. p. 277.*

\* \* \* Fountainhall's report of this case is No 44. p. 3507., *voce* DILIGENCE.

1713. December 10.

JAMES HALYBURTON of Fodderanie *against* Mr JAMES COOK of Ardlar.

No 48.

JAMES HALYBURTON of Fodderanie sold a piece of land to Mr James Cook, who, 1st February 1707, granted bond to Fodderanie 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 his bond, suspended; and, at discussing of the suspension, he had paid not only 7500 merks to Fodderanie himself, but also to Turnbull of Smiddiehill, his creditor, L. 1000, secured by an heritable bond and infestment, 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 Fodderanie himself.

*Answered* for the suspender, The discharges being in his hand, presume that the payments were made by him; and he fortified this presumption by a probation of witnesses, clearing that he had given 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 in Nisbet against Johnston, mentioned below; because, *1mo*, Writ is not regularly to be taken away by witnesses. Which general writ in this case is fortified by the act of the Parliament, 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 those discharges ought not to be allowed as separate articles of payment from the other receipt of 7500 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