

No 518.

* * * Dirleton reports this case :

1677: June 8.—THE LORDS found, upon the advising of a concluded cause, after debate *in præsentia*, in the case in question, that *liber rationum*, and a count-book of a merchant, containing an article of debt, due by him to the pursuer, was a sufficient probation in respect the said count-book was written with the merchant's own hand, and he was known to be a person of great honesty and exactness; and the article was so clear, that the time therein mentioned, he stated himself to be debtor in the said sum, all bygone annualrents being paid; and in another part and article of the said book, he did acknowledge that he had borrowed the said sum, and was special as to the time, and there was a great confidence and near relation betwixt him and the creditor; and therefore the LORDS decided as said is, in respect of the said circumstances; but thought it hard, that count-books in Scotland, where there is not that exactness that is elsewhere in keeping books, should have that faith that is given to them elsewhere.

In præsentia.

Act. Mr Robert Stewart.

Alt. Gunninghame.

Clerk, Hay.

Dirleton, No 452. p. 220.

1680. December 17.

STUART against AGNEW.

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An account subscribed without witnesses, and not holograph, was sustained after the death of one of the parties.

JAMES STUART, as assignee by his father Sir James, pursues Agnew of Seuchan, as representing his father, for payment of the balance of an account betwixt his father and John Denholm, who was sub-collector to Sir James, of the maintenance *in anno* 1648, and 1649, which balance contained L. 4000 and odds, as resting by Seuchan then collector of the shire of Wigton. The defender *alleged*, That this account is null, wanting witnesses; and though counts amongst merchants, and bills of exchange, discharges to tenants, and the like, in which witnesses use not to be adhibited, are sustained, yet so considerable a sum in this case cannot be proved by account, having no witnesses. It was *answered*, That by the same custom counts betwixt collectors and sub-collectors, are not accustomed to have witnesses, and yet were ever still sustained where the accountant's being sub-collector, was notour or proved, which did ever adminiculate the account; and though such subscriptions may be more easily improved, than where there are witnesses affirming, as *comparatione literarum*, and other evidences, yet they prove as probative writs till they be improved.

THE LORDS repelled the defence, and found the account probative, although it wanted witnesses, the pursuer's father having proved that the defender's father was holden collector, or reputed collector at that time.

Stair, v. 2. p. 818.

* * * Fountainhall reports this case :

OBJECTED against a fitted account, that the docquet of it wanted writer's name and witnesses. THE LORDS found this no nullity, seeing, in fortification of it, it was offered to be proved, the defender's father was sub-collector of that cess whereof it was the account, and they found the act of Parliament requiring witnesses related to bonds and writs of importance, and not to accounts. This is hard, for now since the act of Parliament, the discovering of falsehood may be elided by forging fitted accounts instead of bonds, seeing they need no witnesses, and then there will be no mean but *comparatio literarum*, which is very uncertain and vaccillant ; and why do we reject missive letters for want of witnesses as not probative, if this were good law. It is true bills of exchange for the favour of commerce need none, because they may be adminiculated by the party's books, and they require summer dispatch.

Fountainhall, MS.

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1683. March. JOHN CURRIER of Whytmure against PATRICK HALIBURTON.

A PERSON pursuing for a debt assigned to him by a merchant, it was *alleged* by the defender, That the debt stood discharged in the cedent's count-books.

THE LORDS finding that the book was an entire and fair merchant book, wherein the precise sum was marked received, of a date anterior to the intimation of the assignation, " they sustained it equivalent to a discharge."

Fol. Dic. v. 2. p. 260. Harecarse, (DISCHARGES.) No 418. p. 112.

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1685. March 20. MAXWELL against JOSEPH REID.

JOSEPH REID, Major of Carlile, and merchant there, having granted a note to Maxwell and Mulliken, declaring, That he had their bond for L. 150, for which sum he should be countable to them, or their order ; and having afterwards counted with Mulliken, and got a general discharge from him without getting up the note, (which was in Maxwell's hand) or any obligation to deliver the same, Maxwell pursued the Major.

Alleged for the defender ; That Maxwell and Mulliken being *socii* and partners in a drove of cows upon the road, any discharge of the one to that subject must oblige both. *2do*, The note being granted in England, where payment of the sums is proveable by witnesses, it ought to be sustained here.

Answered ; The note is neither discharged nor retired ; and there is no society in an obligation. *2do*, Though deeds done in England, according to the

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Payments stated in an account-book, admitted to do away the effect of a bond.