

1752. December 21.

CUMMING against MARSHALL.

No 156.

Where a sum in bank-notes is commissioned to be sent by the post, what evidence is necessary that the commission was executed?

In a count and reckoning, exception was taken by the defender to an article of L. 100 Sterling, entered as a sum sent in bank-notes by the pursuer to the defender by post, 29th October 1751; with respect to which, it was acknowledged that the pursuer, by letter, was commissioned to send that sum by the post in bank notes; but as the bank-notes came not to the defender's hands, he had no reason to suppose the commission was obeyed. It was answered, That the defender's letter of commission, dated 28th of October 1751, came to the pursuer's hand upon the 29th, the evening of which an answer, inclosing the bank-notes, was, with the pursuer's other letters, put into the post-house by his son, or one of his clerks; That a copy of the answer was engrossed in the pursuer's copy-book of letters, and the L. 100 entered that very evening in the pursuer's cash-account. A proof being allowed before answer, the pursuer was not able to bring any direct evidence of a letter being put into the post-house addressed to the defender, and inclosing bank-notes; and no wonder, for, from the proof, it appeared to be his practice in remitting bank-notes, to inclose the same with his own hands in the letters writ by his clerks, and also to put the seal upon them himself. In advising the proof, it was the opinion of the Court, that the pursuer's books, with his oath in supplement, if required, was sufficient evidence that the commission was obeyed. An example was given of notifying the dishonour of a bill of exchange, where a copy of a letter to the drawer or indorser, engrossed in the copy-book of letters, is sufficient evidence; without necessity of bringing parole evidence that the letter was writ and delivered at the post-house.

Fol. Dic. v. 4. p. 159. Sel. Dec. No 30. p. 33.

* * * The Faculty Collection report of this case is No 30. p. 10095. voce PERICULUM.

No 157.

A debtor offered to prove by witnesses, that tho' he did not pay the debt instantly on the delivery of the goods, he, according to what was usually done, paid it a few days after.

1786. March 11.

CHARLES MACDONALD against ALEXANDER CALLENDER.

CALLENDER, a butcher in Falkirk, purchased a parcel of sheep from Macdonald, a grazier in Stirlingshire, as the latter was passing through that town on his way to the Edinburgh markets. Macdonald afterwards pursued Callender for the price; who, in defence, offered to prove by witnesses, that though he did not pay the money instantly on the delivery of the sheep, he, according to what was usually done, paid it a few days after, when the pursuer had returned from Edinburgh. To this mode of proof the pursuer objected; and

Pleaded; It might be relevant to prove by witnesses payments made *unico contextu* with the delivery of moveables purchased. But in the present case,

an interval of time is said to have elapsed between the one and the other; which, though short, is evidently not to be distinguished in this matter from a longer period.

Now, payment of debts, even constituted without writing, unless they are below L. 100 Scots, cannot be proved by witnesses; Act of Sed. 8th June 1597; Erskine, b. 4. tit. 2. § 21. The mere delivery of moveables is a fact that can hardly be misapprehended by witnesses when it is seen; but the payment of money they cannot understand by mere observation, or without a previous knowledge of the cause from which it arises.

Answered; The supposition, that payments beyond L. 100 Scots cannot be proved by witnesses, appears not to rest on any sufficient ground. On the contrary, it seems more reasonable to admit that kind of evidence in every case, where it is not known or presumed that the parties had meant to disallow it, and where the facts or things to be enquired about, are of such a nature as to be sufficiently understood or distinguished by witnesses; a doctrine which is likewise better supported by authority; Stair, b. 4. tit. 43. § 4. The payment of money arising from any well-known or accustomed transaction, such as sale, being of that description, is proveable by witnesses; 19th June 1605, No 54. p. 12301.; 16th December 1626, Finlayson *contra* Executors of Lauder, No 63. p. 12304.

In the present case, however, the payment of the money is to be viewed rather in the light of one of the mutual prestations of a bargain of moveables, than as made in discharge of a prior debt.

THE LORD ORDINARY allowed the proof of payment by witnesses.

A reclaiming petition being presented, the COURT considered the payment as the counterpart of the bargain; and refused the petition without answers.

Ordinary, Lord Justice-Clerk. Act. Stewart. Alt. Dean of Faculty. Clerk, Menzies.
S. Fol. Dic. v. 4. p. 159. Fac. Col. No 270. p. 417.

1794. June 21. TRUSTEE FOR RAE'S CREDITORS *against* GORDON.

No 158.

A debtor, during the dependence of an action, being appointed to consign in the hands of the clerk of the Court; it was afterwards disputed, how far this order had been obeyed; and the debtor *contended*, That he had consigned a part, which he offered to prove by witnesses, and had retained the rest in satisfaction of a counter-claim. *Pleaded* in objection, That consignment is a judicial act which can be proved only by the records of Court; and, at any rate, a parole proof of payment is incompetent in so far as the sum exceeds L. 100 Scots. THE LORDS found the proof by parole evidence was competent.

Fol. Dic. v. 4. p. 159. Fac. Col.

* * This case is No 5. p. 3078. *voce* CONSIGNATION.

No 157.
The Lords allowed the proof of payment by witnesses.