

No 601. Hamilton, it was *alleged* for the said daughters, That they ought to have allowance of 1000 merks due to their father by Sir Daniel Carmichael by a decret and discharge thereof sent to the said Walter by his servant conform to a back-bond granted by him, and the said Walter's own receipt contained in a missive letter; as likewise, they craved allowance L. 25 Sterling, conform to the said Walter's receipt in his said missive letter, of a bill drawn upon one M^r Neich who was debtor to Andrew. It was *replied*, That Sir Daniel Carmichael's sum was not paid upon the discharge sent to Walter, but upon an assignation made to Sir Daniel himself, so that unless it were proved *scripto*, that Walter received the money, there ought to be no allowance thereof; *2do*, As to all these receipts contained in missive letters, by the custom of merchants they are not obligatory, unless the bills themselves, with their receipts in whose favour they were drawn were produced; *3tio*, All the receipts not being relative to the foresaid two bonds, could not be ascribed in part of payment thereof, because the said Andrew was debtor *aliunde* in greater sums, as might appear by Walter's count-book, bearing the particular sums and dates thereof for merchant-ware received at diverse times, and that at same time when Sir Daniel Carmichael paid those, other sums were paid, these articles were exchanged as being thereby satisfied. THE LORDS having taken the depositions of many witnesses *ex officio*, and given commission to two merchants to examine both Walter Hamilton and Andrew Reid's count-books, and to give their opinion anent the custom of merchants where there are receipts in missive letters relating to bills of exchange or other orders for payment of sums, if they be obligatory, without the bills or orders themselves be produced; whereupon the two merchants did differ in opinion, and were directly contrary; there being a new commission granted to other two merchants, who did agree that Walter Hamilton's count-book ought to make faith, and that Andrew Reid's book was suspected, there being many leaves torn out thereof; they did discern Reid's daughters to make payment of these two bonds without any allowance, which was hard, seeing it was clearly proved by the depositions of the witnesses, that Walter Hamilton was present when Sir Daniel paid the money, and was a witness inserted in the assignation; and Walter's own servant declared, that at that same time he brought home a bag of money; and these other sums, to which they did ascribe the payment thereof, were only instructed by Walter's own count-book, which is of a dangerous consequence.

Gosford, MS. No 313. p. 138.

No 602.

Consigned
sums for re-
demption be-
ing taken,
and annual-

1671. February 14.

APPLEGIRTH *against* LOCKERBY.

In a count and reckoning at the instance of Applegirth, for declaring two apprisings led by Lockerby satisfied, this query was moved by the auditor, whether a sum consigned by umquhile Applegirth for redeeming a part of the

lands wadset to Lockerby, conform to the reversion in the wadset, might be proved to be uplifted by Applegirth from the consignatar by the oath of the consignatar, and of the clerk of the process who received the money, or only by writ, Applegirth the consignatar being dead.

THE LORDS considering that it was ordinary to take up sums consigned for redemption of wadsets, being upon the peril of the consigner, did appoint the oath of the consignatar and clerk to be taken, for proving that the money was taken up by Applegirth from the consignatar, and that Applegirth, and not the consignatar, put it in the clerk's hands, and that the clerk gave it up again to Applegirth.

Stair, v. I. p. 720.

1672. February 7.

STARK of Killermount *against* NAPIER.

THERE was a minute of contract *anno* 1614, betwixt umquhile Stark of Killermount and Margaret Douglass, wherein he disposed to her certain tenements, and she with two cautioners were obliged to pay him 4500 merks; this Stark as representing his father, pursues Wrightshouses as representing his father as one of the cautioners for payment; the pursuit commenced *anno* 1660, the prescription being saved by the minority of the pursuer. The defender *alleged*, That the sum was satisfied, and though after so long time his discharge was lost, yet he condescended upon these presumptions and adminicles for satisfaction; *imo*, Silence for forty-six years, of which the defunct lived fifteen or twenty, and though the sum bore no annualrent, he used no diligence; *2do*, There is produced a discharge of Stark's part of the minute, bearing, that he had fulfilled and quit the possession. There is also produced a bond of that same date of 4000 merks, granted by the same Margaret Douglass, and the two cautioners in the minute, with a third added; and for the other 500 merks, the term of payment thereof by the minute was past, and there is produced a discharge of the bond of 4000 merks, which, though repeating the sum but once, it calls it 3000 merks, yet that is but the error of the extractor out of the register; for the discharge agrees with the bond of 4000 merks in the date, the principal, and the cautioners, and bears that the bond discharged is registered; so that except the extract of a bond of 3000 merks among the same parties, and of the same date, could be shown, this discharge must discharge the bond of 4000 merks, which bond of 4000 merks must be presumed in satisfaction of the minute, and that the odd 500 merks has been paid, the term being past, and that Stark would never have quit the possession unless he had got payment; so that this bond being of the same date with the discharge, acknowledging his quitting of the possession, it must be understood to be given for the price, except it could be shown that there was

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rent taken therefor since consignation, the taking up thereof was found proveable by the consignatory's and clerk's oaths, the consigner being dead.

No 603.

Payment of a bond was sustained upon most preguant presumptions; which were not offered to be taken off.