

No. 212. tion, having compared the same with the other not controverted subscriptions; the pursuer making faith, that this is the same letter which he received from the deceased Viscount, his servant or messenger.

Stair, v. 1. p. 728.

No. 213.

1674. *November 7.* BOYD *against* STORIE.

Discharges by a master to his tenants sustained against him, though neither holograph nor having witnesses.

Dirleton. Stair.

* * This case is No. 297. p. 12456. *voce* PROOF.

No. 214.

A commission from one merchant to another sustained, though subscribed only by initials without witnesses.

1676 *January 11.* THOMSON *against* CRICHTON.

Patrick Crichton having delivered certain goods to Francis Thomson, who was bound to Bourdeaux, gave him commission to sell them, and to return tobacco and wine with the product; but Francis having gone to Ostend Patrick sent him a second commission, to sell his goods, and to return such goods as he thought would be most profitable in Scotland, and Francis having loaded several goods at Ostend, sent them home, in a Dutch ship to Scotland, and came himself another way. The ship having arrived before Francis' return, his wife did deliver a part of the goods to Patrick Crichton, as the product of his goods. The said Francis Thomson, after his return, pursues the said Patrick Crichton for delivery of the goods, which he had unwarrantably gotten from his wife, pretending that they were the return of his own goods, before the Dean of Guild of Edinburgh, and obtained a decret. Patrick Crichton suspends, and alleges the decret was null, wanting probation, there being nothing to instruct the commission sent the charger at Ostend, but a paper subscribed only with the initial letters, *P. C.* without witnesses. And though bills of exchange amongst merchants are used to be sustained without witnesses by the common custom of nations; yet they were never sustained by initial letters only; *2do*, The ground of the decret is, that by the second commission Francis Thomson bought Holland and Damask, with the product of the suspender's money, and that the same was taken by violence, by a Dutch privateer; and there was nothing adduced to prove the same, but an attest of the Dutch skipper and mariners, which could not prove, unless they had deponed judicially as witnesses; *3tio*, There is nothing to prove that the product of the suspender's goods was the Holland and Damask, but the charger's assertion, whereby he would impute the loss of that parcel, taken by the privateer, to the suspender only, his goods being safe in the same cargo, which cannot be allowed, unless it were instructed by

bills of loading, letters of advice or invoices, that the parcel of Holland and Damask was shipped upon the account of the suspender, It was answered for the charger, that subscription by initial letters is ever sustained, where the parties are accustomed so to subscribe; and here the first incontroverted commission is in the same way subscribed, and adminiculated by letters at the same time, which came with the post, mentioning the second commission; and by the oath of the writer of the second commission, acknowledging that it was his hand-writ, and that he was ordinary writer for the suspender, but saw him not subscribe. To the second it was answered that there could be no other probation of the privateer's taking away of the Holland and Damask but the Dutch skipper and mariners, who going presently back from Scotland, could do no more but attest it upon oath. To the Third, that the charger being intrusted by the second commission to act at discretion, the suspender cannot refuse his oath.

The Lords sustained the second commission subscribed by the initial letters, adminiculated as a foresaid. They sustained also the testificate of the Dutch master and mariners upon oath. Francis Thomson also deponing that the parcel of goods was lost, and that he got no benefit thereof. But the Lords found, That that parcel should not be lost to Crichton the suspender but to Thomson who inloaded the same, unless that he instruct that they were loaded upon Crichton's account, by bills of loading, or invoices, as was customary in the time of war.

Stair, v. 2. p. 395.

* * * Gosford reports this case :

In a suspension and reduction pursued at the instance of Patrick Crichton, of a decret obtained before the Dean of Guild at the instance of the said Francis for the price of certain goods intromitted with by him, upon this reason, that he granted a commission to the said Francis to carry a parcel of goods to Bourdeaux, and with the product thereof to bring some wines, brandy, and tobacco, which he never did, but upon the contrary sold the same at Ostend, and with the product thereof sent home a parcel of Damask, and other goods, which were delivered to him by Francis his wife after arrestment, by a verbal order of a Bailie of Edinburgh; notwithstanding whereof, upon a pretence that he had granted a second commission, and that accordingly the said Francis had bought goods and shipped them for Scotland, which were taken by a privateer, albeit the said second commission could not be binding, being only subscribed by initial letters, yet the Dean of Guild gave decret against them. It was answered, That the decret was most justly pronounced, notwithstanding of the reason libelled, because, as the decret bears, the defenders did judicially confess the reason of the second commission, which was written by his own procurator, and did not object against the same, so that there was no necessity to prove the subscription; likeas, the first commission was only subscribed by initial letters. It was replied, That any acknowledgment being only the assertion of a procurator in an inferior court, could not militate

No. 214. against him, unless he had subscribed the same, and therefore he ought yet to prove the same by the suspender's oath. The Lords having considered the decret, bearing, that the suspender had failed in the probation of any order from the charger for the delivery of the goods, and that the product was taken by a privateer coming to Scotland with other merchant goods put on board that same ship, and that the first commission was only subscribed by initial letters as well as the second not controverted; they did assoilzie from the reason of reduction, and found that the subscribing with initial letters was binding and sufficient, and so found the letters orderly proceeded.

Gosford MS. No. 831. p. 524.

1676. July 19.

FORREST *against* VEITCH.

No. 215.
A tripartite
minute among
merchants
was sustained
without wit-
nesses.

In a competition for a sum due by Sir George Maxwell, who became debtor for Sir Robert Stuart and others, and got up their bonds granted for the price of a bargain of victual sold by James Sanderson to them, and sent him to Ireland for the garrisons there, for which the Parliament of England and the said Stuarts gave bond; the bargain being made with Sanderson, and the bonds granted in his name, there is a writ produced by way of tripartite contract by Sanderson, James Ker, elder, and James Ker, younger, bearing, "That albeit the bonds were only in the person of Sanderson, yet that all the three were sharers in the bargain of victual, and in the right of the bonds," and Barbara Forrest, relict and executrix-creditrix to James Ker, younger, craved the sums now remaining as her husband's share, the shares of the other two being paid before. It was alleged, That this tripartite contract was null, as wanting writer's name and witnesses. It was answered for Forrest, That she designed the writer, and this being a writ amongst merchants *in re mercatōria* for a bargain of victual, and subscribed by three parties, it was abundantly valid, and much more than a bill of exchange without any witnesses at all.

Which the Lords found relevant, and sustained the writ.

Stair, v. 2. p. 454.

No. 216.
A merchant's
account
found proba-
tive by the
subscription
of the debtor,
though with-
out witnesses.

1678. January 2. M'LURG *against* The EARL of DALHOUSIE.

John M'Lurg, merchant in Edinburgh, pursues the Earl of Dalhousie as representing his brother Robert Ramsay, for payment of an account of furniture subscribed by the said Robert. It was alleged for the defender, That his brother's pretended subscription could not prove, because it wanted witnesses. It was answered, That bills of exchange and merchants counts are always sustained by