

obliged to warn the Earl of Dysart at all : he being heir to the disponer, and being cited in the removing upon sixty days, as use is, was sufficient.

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1704. December 7. BAXTER, Merchant in Glasgow, *against* CAMPBELL of SILVERCRAIGS.

BAXTER, merchant in Glasgow, against Campbell of Silvercraigs. There being a bill for £50 sterling, drawn by Silvercraigs on Thomas Weir, payable to Baxter, Weir suffers it to be protested; whereupon Baxter recurs upon Silvercraigs, the drawer, for payment; who ALLEGES,—That Baxter, three months after this bill was in his person, states counts with Weir, and takes a general discharge from him, bearing expressly, in the narrative, that it was after count, reckoning, and payment made betwixt them; from which it necessarily was to be presumed that the bill now charged for was included and allowed him in that account, unless Baxter instructed the contrary by production of the account then fitted, bearing no such article as this bill; and so he is *in pessima fide* to seek twice payment.

ANSWERED,—This general discharge by Weir to Baxter proves that Baxter paid all that Weir could crave of him, but by no presumption of law can it ever prove that Weir then paid all he owed to Baxter; for this were to make it equivalent to a mutual discharge; and whatever counting was betwixt them, was only verbal. And this discharge was taken by Baxter, because Weir breaking at that time, he was harassed by Weir's creditors arresting in his hands, and pursuing him in forthcomings, as if he had been Weir's debtor; for preventing of which trouble and expense, he took this discharge from Weir to free him at his creditors' hands. And if this were construed to be a general discharge of all betwixt them, it would cut off not only this bill but £500 sterling of more debt Weir owed him at the time, and for which Baxter has adjudged; so that, without a discharge from Baxter to Weir, to suppose it included by Weir's discharge, was absurd and unreasonable.

The Lords found Weir's discharge did not prove this bill was paid, unless Silvercraigs offered to prove, by Baxter's oath, that, in the account then stated betwixt Weir and him, this bill was expressed as an article, and allowed; and to depone what was the subject of that account then made. And the Lords remembered, that, the last winter-session, in a case betwixt *Steven, Tough, and Finlay*, a general discharge being founded on, they found, the same not being mutual, it could not take away a bond due by the granter, on the presumption that it bore a previous count and reckoning, and so that it was included therein: only in that case, because there were circumstances of fraud and circumvention founded on, they, before answer, ordained the writer of the discharge to be examined what was *actum et tractatum* betwixt the parties; but here, in Baxter's case, the writer and witnesses are dead, and so no light can be got that way.

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