

this is inconsistent with the second presumption, which ascribes it as part of the price. To the *third*, Such count-books may be made up at will; and the pretence of taciturnity is irrelevant, being within prescription; likeas, it was not so overlooked but it was confirmed in the charger's father's testament. Presumptions have been by all lawyers sustained to take away bonds as well as a positive probation, the one being as pregnant to convince the mind of a Judge as well as the other. See Menochius De præsumptionibus, lib. 10. præsumpt. 5. et 135. where he shews, creditor solutum et satisfactum quando præsumitur? And Mascardus De probationibus is large on the same subject; and our decisions agree therewith, 12th January 1666, Stevenson *contra* Crawford, *infra h. t.*; 6th February 1668, Chisholm *contra* Renies, No 80. p. 12314.; the Duke of Hamilton *contra* Cunningham, in 1688; and Mercer of Clavage *contra* Lady Aldie, 15th December 1682, No 605. p. 12708.; and many others, where evidentiæ facti fidem facit iudici as much as a discharge of the debt could do; as in Solomon's decision about the true mother of the child; yet the LORDS, in this case of Houston's, found the presumptions (though pregnant), not sufficient to take away this bond; and thought it safest not to use too much arbitrariness in disposing upon the lieges' rights.

No 606.

Fol. Dic. v. 2. p. 265. Fountainball, v. 1. p. 783.

1709. February 9.

ROBERT WATSON of Muirhouse, and his Tutors, *against* ROBERT SMITH,
Merchant in Edinburgh.

IN the action at the instance of Robert Watson and his Tutors against Robert Smith, for payment of L. 402 : 16s. Scots, contained in a bill drawn by the deceast Robert Watson of Muirhouse, the pursuer's father, and accepted by the defender;

Alleged for the defender; He had paid the whole bill except L. 63 : 16s. Scots to the pursuer's father, as is clear from the several payments marked on the foot of the bill, and the balance of L. 63 stated due in figures, which he offered to prove by witnesses, was the defunct's hand-writ; and further, he offered to prove by witnesses, that he had made payment conform to the stated account. So the LORDS in a like case, February 19th 1708, Millar against Bonnar, No 523. p. 12626., found an account neither subscribed nor written in a count-book, but on a scroll lying by the writer at his death, probative against his heirs.

Replied for the pursuer; *imo*, The account subjoined to the bill might have been relative to some other extraneous affair, since it doth not expressly relate

No 607.

Partial payments marked on the foot of an accepted bill in the creditor's hand-writing, were sustained in a process at the instance of the creditor's heirs.

No 607.

to the bill. *2do*, The proving figures to be holograph is impossible, and of dangerous consequence. *3tio*, The decision betwixt Miller and Bonnar differs *toto celo*, for in that case there was a holograph account of debit and credit; whereas here there is no mention of payment made to the defunct, but only some figures set down, which seems rather a scheme how payment was designed by the debtor in the bill; especially considering that he hath no receipt.

Replied for the defender; The deceast Robert Watson acted herein like other rigid creditors who use to note payments made on the bill, but not to grant receipts, industriously to oblige the debtor, out of fear to be charged for the whole, to pay the balance more quickly. *2do*, Figures being mixed with some words may be proved to be holograph, as well as writ; the former being capable of as many varieties by their peculiar strokes as letters. *3tio*, The account exactly agreeing with the sum in the bill, and the interest stated accordingly, doth clear that the one relates to the other; *hoc maxime attento*, that it appears from the defunct's books, that he had no other dealing with the defender for several years before; and it is not probable that he would have inserted an extraneous account upon a principal bill.

THE LORDS sustained the defence, in respect the bill whereupon the account was stated, was still in the possessor's own hand.

Fol. Dic. v. 2. p. 269. Forbes, p. 321.

No 608.

A bill with a receipt of contents, written and subscribed by the creditor, and found among his papers after his death, not sufficient to exoner the debtor, in respect law presumed that the receipt was written *spe numerandæ pecuniæ*, and that payment was never made, seeing the bill and receipt were undelivered.

1709. July 20.

JANET COCHRAN, Relict of James Allan Writer in Edinburgh, *against* JOHN PRINGLE, Litster there.

IN the action at the instance of Janet Cochran, as having rights to all her husband's moveable debts, against John Pringle, for payment of L. 90 Scots contained in a bill drawn by David Forrester upon, and accepted by the defender, payable to James Allan the pursuer's husband; the LORDS found it not relevant to assilzie the defender, that the pursuer's husband had written and subscribed upon the bill a receipt of the contents; in respect the bill with the receipt upon it was found among the husband's papers after his death; and therefore the receipt was presumed to have been written *spe numerandæ pecuniæ*, and not being delivered, law presumes that payment was never made.

Fol. Dic. v. 2. p. 269. Forbes, p. 349.