

1670. July 20.

The EXECUTORS of WALTER HAMILTON *against* The EXECUTORS of  
ANDREW REID.

THE Executors of Walter Hamilton pursue the Executors of Andrew Reid, for payment of a bond of L. 122 Sterling, and of a bond of L. 18 Sterling, due by the said umquhile Andrew Reid to the said umquhile Walter Hamilton. The defenders *alleged*, That they ought to have allowance of L. 50 Sterling, paid to Walter by John Fleming, by Andrew Reid's order, and L. — Sterling paid to M'Neich upon a bill drawn by Walter Hamilton upon Andrew Reid, to be paid to M'Neich; and for proving thereof, produced missive letters written by Walter Hamilton to Andrew Reid, the one bearing that Fleming had paid a part of the L. 50, and he doubted not but that he would pay the rest; and the other bearing, that M'Neich had got payment. It was *answered* for the pursuers. That the missive letters could not instruct a discharge or abate those clear bonds, because they did relate to bills and orders upon which payment was made, and except those bills and orders can be produced, the letters relating thereto can have no effect, for it must be presumed that the bills and orders have been retired by Walter Hamilton, as having been allowed in other bonds, which then have been delivered by Walter to Andrew Reid, it being the ordinary course amongst merchants to interchange bills and bonds without any other discharge, neither do they take notice of their missives relating to such bills or orders, nor can it be supposed they can remember the same. The auditors in this account having taken the opinion of several knowing merchant anent their customs in this point, they did all report in writ, and did all agree in this, that missive letters relating to bills, orders, or discharges, had no effect unless the bills, orders, or discharges were produced, and that merchants neither did, nor could have, notice of such missives to retire or interchange the same; they did also visit Walter Hamilton's count-book, by which there appeared several other bonds and accounts betwixt the parties besides these; and in which also, the sums contained in these letters were set down as payment in part of the other bonds and accounts, whereby it appeared that the bill and order mentioned in the letter were interchanged with the former bonds.

THE LORDS found that the missive letters relating to the bill and order had no effect, unless the bill and order were produced.

*Fol. Dic. v. 2. p. 268. Stair, v. 1. p. 699.*

\* \* Gosford reports this case:

1670. July 21.—IN a count and reckoning betwixt the said parties, Reid's daughters being charged with two articles, one of a bond of L. 122 Sterling, and another of L. 18 Sterling, granted by their father to the deceased Walter

## No 601.

In a suit for payment of a bond, the defender alleges payment, by bills drawn on him. He produces letters relative to the bills; but these, without production of the bills themselves, are held to be of no avail.

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<sup>r</sup> 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