

had committed iniquity in sustaining the scroll of an account probative against him, only because it was written by him, though it was neither subscribed nor delivered in by him to Tait; and that the Lords, on the 1st of July 1665, *Nasmith* against *Bower*, had found such schedules not probative amongst merchants, unless it had been a current count-book, which always prove *contra scribentem*.

ANSWERED,—The account, all written by Halden, being now in Tait's hands, it presumes delivery to him, unless the contrary be proven; likeas there was another double of it in Thomas Dishington, Halden's own servant's hand, and Tait was content to produce his own count-book in fortification, where this article is so posted to Halden's own behoof.

REPLIED,—He got this account out of Sir Thomas Moncrief's hands, to whom it was given for clearing Halden's account with the Lords of the Treasury.

The Lords, for expiscating the matter of fact, ordained Sir Thomas to be examined anent his having said account, and *quo nomine* he got it; and if he gave it to Tait, and had warrant from Halden so to do; as also Dishington to depone anent his knowledge in the affair, and Tait's count-book to be inspected how this article is inserted. This was judged safer than to sustain unsubscribed accounts as probative in the general.

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1696. November 24. THOMAS LAURIE and GEORGE WARRENDER *against* ROBERT RAMSAY of BLACKCRAIG.

THOMAS Laurie and George Warrender against Robert Ramsay of Blackcraig, for payment of 3000 merks, contained in two bonds granted by Blackcraig to the deceased Gilbert Stuart, blank in the creditor's name, and afterwards filled up in Bailie Warrender's name and delivered to him. The reason of suspension and reduction was,—that when Gilbert Stuart filled up Warrender's name in thir two bonds, he gave a backbond and declaration, bearing, that these bonds were consigned in his hands for security of two bills he had given him; and it was declared, if these two bills were paid, the bonds should be void and null, and delivered back to Gilbert Stuart: *Ita est*, it is offered to be proven these bills were satisfied, and so the bonds are become extinct.

ANSWERED,—*Esto* this were true, yet, Gilbert Stuart having new dealings with Bailie Warrender, by posterior bills drawn upon him by Mr Alexander Carstairs, factor in Rotterdam, Gilbert, for his security of those new bills, consigned the same bonds in Warrender's hands; and they agreed to retire and cancel the first backbond, and Warrender grants a new one in thir terms,—that, thir posterior bills being paid, the bonds should be extinct and given up; but thir last bills were never answered, and so the bonds subsist for security thereof.

REPLIED,—They being consigned for security of the first bills, on this express condition, that, if they were paid, the bonds should be extinct, no private transaction betwixt Gilbert Stuart and the Bailie could make them reconvallesce; for it was all one upon the matter, as if they had been granted in corroboration of the bills; in which case, the bills being satisfied, the bonds behoved to fall in consequence. And what if Gilbert had taken a discharge instead of the backbond. They could never have been used again; and this was equivalent,

and the backbond became Blackcraig's evident, as well as Gilbert Stuart's; and, if conceived in his favours, could not be taken from him without some deed of his own, and his consent obtained.

DUPLIED,—Blackcraig having signed these bonds blank in the creditor's name, and delivered them to Gilbert Stuart, he has been probably debtor to him in the like sums, and gave him an absolute trust to use and dispose of the bonds as he pleased, to be a fund of credit to Gilbert, which he might transmit from hand to hand, and consign to severals, one after another, for promoting his trade; and Blackcraig is not concerned what use he made of them, seeing, if they were ten several times impignorated for facilitating commerce, yet he could pay the sum but once; which he had not yet done; and they needed not his consent to the renewing of the consignment for security of the two bills, seeing his trusting them blank to Gilbert empowered him to make use of these bonds as oft as he pleased.

The Lords found, That he was not concerned in the second transaction, and the bonds might be used for security of the two bills, without any new and special consent, the same being sufficiently transmitted by his trusting Gilbert with the blank bonds; and therefore repelled Blackcraig's reasons of suspension.

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1696. November 24. PATRICK MURRAY *against* SIR THOMAS KENNEDY.

BETWEEN Patrick Murray, the Collector, and Sir Thomas Kennedy, who quarrelled an article in his account of £413 sterling, paid to Charles Murray of Halden, his father, on this ground, that, by his commission, he was allenary bound to pay in the excise to Sir Thomas, and so he could not invert and mis-apply at his own hand.

ANSWERED,—The payment was warrantable and legal, *1mo.* Because Halden was a partner in the tack, and his share will, in the event of the count and reckoning, be more; and he paid others without any special order from Sir Thomas; and these are not quarrelled, so it is invidious to refuse this. *2do.* By a stated account, Sir Thomas acknowledges he has received up all the instructions of the articles of the account, except this of Halden's; *ergo*, there was no more objected against it but the want of instruction, which is now produced.

REPLIED to the first, *Non constat* what his share will be, and whether there will arise profit or loss from the tack; and he was precisely bound to count and pay in to Sir Thomas, and no other; and any payments made to others which were allowed him, was not *qua* partners, but as commissaries or receivers. *2do.* The declaring, at the foot of the account, that this was not instructed, cannot import the passing from any other objections against the relevancy, and allowing of the article.

Yet the Lords found this, conjoined with his father's being a partner in the tack, was a sufficient acknowledgment of the payment, and so the article could not be now quarrelled.

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