

annualrent, granted by the creditor to the cautioner in the bond, and insisted upon the same as a sufficient interruption. *Answered*, A holograph writ does not prove its date against third parties. *Replied*, The defender, in this case, is not a third party in the sense of the brocard. A discharge granted to a cautioner is equally available to the principal, and as a holograph receipt granted to a cautioner is a good proof of payment in every question with the principal; if it prove for him that payment was made, it must prove against him that interruption was made, because this very payment makes interruption. THE LORDS found the prescription interrupted by the holograph discharge. See APPENDIX. *Fol. Dic. v. 2. p. 260.*

No 510.

1743. *January 5.* NORRIS against HEIRS of SIR JOHN WOOD.

No 511.

ROBERT NORRIS pursued the Heir of Sir John Wood for payment of three promissory notes, not holograph, but signed in Ireland, which is there held sufficient. *Alleged*, That they were not probative of their dates; and therefore could not affect the heir, as being presumed on deathbed. *Answered*, That the *lex loci contractus* must be considered; and in England or Ireland such promissory notes would be considered as equivalent to bills of exchange. THE LORDS found the notes not probative of their dates against the heir, and that they could not affect the heritage.

Fol. Dic. v. 4. p. 168. G. Home.

* * * This case is No 27. p. 4466. *voce* FOREIGN.

S E C T. V.

Accounts, Account-books how far Probative.

1631. *January 20.* CREDITORS of BROWN competing.

No 512.

IN a competition of creditors upon a defunct's executry, one having no document for his claim, but an account ingrossed by the debtor in his count-book, the LORDS thought it hard to bring him in *pari passu* with others who had more formal documents, but declared, that if he could prove the delivery

No 512. of the particulars mentioned in the account, and give his oath in supplement, they would bring him in equal with others.

Fol. Dic. v. 2. p. 260. Durie. Spottiswood.

* * * This case is No 4. p. 2428., *voce* COLLUSION.

No 513.

Date of a discharge in a merchant's account-book, being atracted by witnesses, was found to prove against the merchant's assignation.

1662. February 4. SKENE *against* LUMSDEN.

ANDREW SKENE having charged Alexander Lumsden for payment of a sum, for which he was cautioner for his brother, Mr Thomas Lumsden, he suspends upon this reason, that the cause of the bond was two bills of exchange, which were protested. The suspender *answered*, He offered him to prove they were paid, after the protest, by him who drew the bills, or by Mr Thomas Lumsden, in whose favour the bills were drawn. The suspender *replied*, That the allegiance ought to be repelled, because he was assigned to the protested bills for relief of this cautionry, and intimated his assignation to Skene, who delivered the bills, and got the bond charged on. The charger offered him to prove payment before that assignation, or intimation, and, *ad modum probationis*, produced an instrument under the seal of Campvere, and a declaration of the Conservator there, bearing, that upon inspection of Mr Thomas Lumsden's count-books, they found that he had acknowledged two or three sums paid in part of these bills, and exprest the dates thereof prior to the assignation. The suspender *alleged* the count-books could not prove, unless they were produced, cognosced, and proved to be Lumsden's count-books. *Secondly*, They could not prove *contra tertium*. *Thirdly*, The question being *de data*, and they holograph, they could not prove their date. *Fourthly*, These testificates can prove nothing, unless they had been taken upon processes, or by commission.

" THE LORDS found the testificates could not prove, but that the count-book being cognosced, might prove against the assignee, being brother to Lumsden, and the books out of his hand since he was broken; for amongst merchants' count-books or writs without witnesses by their custom are sufficient; and ordained Lumsden and his brother to depone upon the having of the books, to produce them if they had them, and if not, granted commission to the Magistrates of Campvere and Conservator, to cognosce the books, and to report what they find of this matter in them."

1662. July 19—SKENE having charged Alexander Lumsden upon a bond granted by Mr Thomas Lumsden, as principal, and the said Alexander as cautioner, he suspends on this reason, That the cause of the bond was bills of exchange, drawn by Verhage upon Kezar in Campvere, to be paid to Skene or his order; which bills Skene ordered to be paid to Mr Thomas Lumsden's wife, and Mr Thomas granted the bond charged on for the said bills, which bills