

No 11. but that she ought to relieve him of that proportion of the duties effeiring to the quantity, with the which the whole barony is affected, and as these lands answer to the quantity of the barony, and that the custom of payment of the whole duties out of the lands, cannot burden her with the whole, except that the whole duties acclaimed were due to be paid for the said lands alone; and found, that these words, addebted and accustomed, ought not to be severally understood, but as conjoined.

Act. ———.

Alt. *Davidson.*Clerk, *Scot.**Durie, p. 851.*

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1665. February 7.

PALLAT against FAIRHOLM.

o A person receiving goods in consequence of a letter of credit, continues liable, altho' he may have reason to expect that the writer of the letter has been received as the debtor.

THOMAS FAIRHOLM, merchant in Edinburgh, having written a letter to Peter Pallat, factor at Burdeaux, to loaden him 30 tun of wine;

The tenor of the letter is, that in respect Fairholm was not acquainted with Pallat, he had written upon the credit of his brother Ninian Williamson, factor at London, who was Pallat's ordinary correspondent, to load these wines in that ship which carried the letter, upon Fairholm's account; and bore, That Williamson had provisions to satisfy the same, and that he would either remit to Pallat, or draw upon him, as he found convenient. This letter being sent under a cover of Williamson's to Pallat, the wines were sent into Scotland, and Williamson broke about a year thereafter; whereupon Pallat pursues for his money from Fairholm, who alleged *absolvitor*, because he having demanded the wines, not upon his own credit, but Williamson's, and Williamson having sent under his own cover, as Pallat's letter bears, the said order, in which there being mention, that Williamson had provisions in his hand; his sending the letter of that tenor under his own cover is an acknowledgement, that he had those provisions, and thereby he constituted himself debtor to Pallat, and freed Fairholm; likeas, Pallat acquiesced therein, and drew bills upon Williamson, which were accepted, but not paid, and was silent, never demanding money from Fairholm till Williamson was broken; so that first, Fairholm is free by the tenor of the letter; and next, though thereby he had been bound, yet the damage sustained by Pallat's silence till Williamson was broken, whereby Fairholm was hindered to draw his provisions out of Williamson's hand, and thereby lost the same through Pallat's fault, ought to compence Pallat, and exclude him. Pallat *answered* to the first, that he opened the letters, which bore expressly the wines to be sent for Fairholm's account; so that albeit it mention Williamson's credit, and that he had provisions, it makes him but *expromissor*, and liberates not Fairholm; as to the second, anent the damage, Pallat being secured, both by Fairholm and Williamson, might, at his option, take himself to either, or to both; and cannot be accounted to have done any fault

in forbearance of either, though an unexpected accident of Williamson's breaking intervened; so much the more, as Fairholm's letter does not order to draw upon Williamson's; but bears, that Fairholm would either draw or remit at Williamson's conveniency; so that Pallat has not failed in the strict observance of the order. And if need be, Pallat offers him to prove, by the custom of merchants, in the most eminent places abroad, that such letters did never liberate the writer, and Fairholm offered to prove, that such letters did liberate the writer, unless the receiver had protested, and intimated to the writer, that he would not acquiesce therein simply, but also in the credit of the writer.

THE LORDS found, that the letter did not liberate Fairholm, notwithstanding of his forbearance to demand, and therefore repelled the defences, and decerned, but liberated Fairholm from the exchange and re-exchange, in regard of Pallat's silence; neither would the LORDS delay the matter upon the opinion of merchants.

Stair, v. I. p. 264.

* * * Newbyth reports this case :

THOMAS FAIRHOLM being creditor to Ninian Williamson in the sum of L. 800 Sterling, and knowing there was a great trade and commerce of wine betwixt the said Williamson and Peter Pallat, factor in Bourdeaux, upon the 4th September 1658, writes a letter to the said Peter Pallet, in these terms: 'Sir, Although not acquainted with you particularly myself, I have, upon my brother Ninian Williamson's credit, to write unto you that when it shall please God to send Patrick Angus safe to Bourdeaux, to load his ship, for my account, with good wine, such as you did load Archibald Angus his ship, the last year, for my brother Williamson's account, &c. ;' and in the end there are these words, viz. 'and for provision for all you load, both for William Thomson and myself, my brother Ninian Williamson will remit you the same, or order you to draw it on him, as he findeth it most convenient.' This letter being sent open to Mr Williamson, was transmitted thither, under his cover, to Pallat, and Pallat accordingly returns the wines to Fairholm, and in his letters mentions nothing at all that Fairholm is his debtor, nor by the space of 19 months does ever draw upon Fairholm, nor demand payment of the price of the wine; but, by the contrary, does draw a bill of exchange upon Williamson for the price thereof, which Williamson accepted, but thereafter the same was protested for not payment. There are mutual actions raised at these parties instances; at Pallat's, for payment upon the foresaid missive, and at Fairholm's, a declarator that he ought to be free of payment, in regard Pallat had furnished these wines upon Williamson's credit, and that he had acknowledged it by drawing bills upon Williamson for his payment. This action being a merchant business, was many days together debated *in presentia*, and the great question was the foresaid letter, written by Fairholm to Pallat, whether or no he was, upon his account,

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debtor thereby for the value of the wines loaded upon his account, and sent home by Pallat, without relation to Williamson's letter. THE LORDS assoilzied Peter Pallat from Fairholm's declarator, and decerned Fairholm to pay the price of the wines, in regard of his missive letter, which they found to be obligatory against him in law; and found that Williamson, by transmitting the letter under his cover, had only interposed his credit as surety and cautioner for Fairholm.

Newbyth, MS. p. 25.

1665. February 22. SIR GEORGE MOUAT *against* DUMBAR of Hemprigs.

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SIR GEORGE MOUAT, as assignee to a tocher of 5000 merks, whereunto umquhile Dumbaith was contractor, pursues Hemprigs, as representing him, for payment. The clause of the contract bore, that the husband should have the tocher out of the first and readiest goods of the wife's father, and that he should have annualrent therefor, but did not expressly oblige Dumbaith to pay, and therefore he is not liable personally, unless he had intromitted with the defunct's means.

THE LORDS found the defender liable, seeing the clause being *in re dotali*, it behoved to be interpreted *cum effectu*, and if it did import only a consent, not to hinder the husband, it signified nothing; and because in cases conceived *passive*, where it does not appear who is obliged, the contractor is understood obliged.

Fol. Dic. v. 2. p. 16. Stair, v. 1. p. 274.

1667. June 14. PATRICK WATT *against* WILLIAM HALYBURTON.

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Obligation
to infest.

PATRICK WATT, as assignee by Adam Watt his father, to a disposition granted by umquhile — Halyburton to him, pursues William Halyburton, as representing him, to fulfil that part of the disposition, obliging him to procure the pursuer's father infest; and for that effect, that the defender should infest himself, and grant procuratory of resignation, for infesting the pursuer. It was *alleged* for the defender, That he was not obliged to infest the pursuer, because it was his father's fault he was not infest, seeing he had received procuratory of resignation, and precept of sasine, with which he might have infest himself; and though the granter, and he the receiver, lived for twelve or fifteen years thereafter, he was negligent; *2do*. Though the defender were obliged to enter, and denude himself, yet it must be the pursuer finding caution to warrant and relieve him of the hazard of the ward and marriage, because the lands in question being ward through the pursuer's author's fault, the defender's marriage will fall; *3tio*, The defender's father's name was only borrowed by Hallybur-