

lands wadset to Lockerby, conform to the reversion in the wadset, might be proved to be uplifted by Applegirth from the consignatar by the oath of the consignatar, and of the clerk of the process who received the money, or only by writ, Applegirth the consignatar being dead.

THE LORDS considering that it was ordinary to take up sums consigned for redemption of wadsets, being upon the peril of the consigner, did appoint the oath of the consignatar and clerk to be taken, for proving that the money was taken up by Applegirth from the consignatar, and that Applegirth, and not the consignatar, put it in the clerk's hands, and that the clerk gave it up again to Applegirth.

*Stair, v. I. p. 720.*

1672. February 7.

STARK of Killermount *against* NAPIER.

THERE was a minute of contract *anno* 1614, betwixt umquhile Stark of Killermount and Margaret Douglass, wherein he disposed to her certain tenements, and she with two cautioners were obliged to pay him 4500 merks; this Stark as representing his father, pursues Wrightshouses as representing his father as one of the cautioners for payment; the pursuit commenced *anno* 1660, the prescription being saved by the minority of the pursuer. The defender *alleged*, That the sum was satisfied, and though after so long time his discharge was lost, yet he condescended upon these presumptions and adminicles for satisfaction; *imo*, Silence for forty-six years, of which the defunct lived fifteen or twenty, and though the sum bore no annualrent, he used no diligence; *2do*, There is produced a discharge of Stark's part of the minute, bearing, that he had fulfilled and quit the possession. There is also produced a bond of that same date of 4000 merks, granted by the same Margaret Douglass, and the two cautioners in the minute, with a third added; and for the other 500 merks, the term of payment thereof by the minute was past, and there is produced a discharge of the bond of 4000 merks, which, though repeating the sum but once, it calls it 3000 merks, yet that is but the error of the extractor out of the register; for the discharge agrees with the bond of 4000 merks in the date, the principal, and the cautioners, and bears that the bond discharged is registered; so that except the extract of a bond of 3000 merks among the same parties, and of the same date, could be shown, this discharge must discharge the bond of 4000 merks, which bond of 4000 merks must be presumed in satisfaction of the minute, and that the odd 500 merks has been paid, the term being past, and that Stark would never have quit the possession unless he had got payment; so that this bond being of the same date with the discharge, acknowledging his quitting of the possession, it must be understood to be given for the price, except it could be shown that there was

No 602.

rent taken therefor since consignation, the taking up thereof was found proveable by the consignatory's and clerk's oaths, the consigner being dead.

No 603.

Payment of a bond was sustained upon most preguant presumptions; which were not offered to be taken off.

No 603.

another bond or another cause. It was *answered*, That a solemn bond can only be taken away by a discharge or oath, but by no presumptions or adminicles; and that the taciturnity was by the minority of the pursuer.

THE LORDS found the presumptions and adminicles sufficient to prove the satisfaction of the minute, and that the discharge was sufficient to elide the bond of 4000 merks, unless a bond of 3000 merks could be shown, both bond and minute being so ancient, and the minute without annualrent, and extreme diligence used for the bond of 4000 merks which bore annualrent; likeas umquhile Napier's count-book bore payment to have been made, all written with his own hand, he having died long before this pursuit.

*Fol. Dic. v. 2. p. 268. Stair, v. 2. p. 65.*

No 604.

1676. February 17. ABERCROMBIE *against* ACHESON and LIVINGTON.

A TAVERNER, after she had removed from her master's service and was married, was pursued to count and reckon for ale and wine, which the pursuer offered to prove was laid in in his cellars.

THE LORDS found, That the pursuer ought to libel and prove that the debt was yet resting; seeing it was to be presumed, that servants of that quality did count weekly with their masters, and the pursuer would not have suffered the defender to go out from his service before she had counted and made payment; and it appeared that there had been former decisions to that purpose.

Reporter, *Lord Justice Clerk.*

*Dirleton, No 340. p. 162.*

1681. December 15. MERGER of Clavage *against* LADY ALDIE.

No 605.

The Lords presumed a bond paid upon strong circumstances of taciturnity, &c.

IN the action pursued by Mercer of Clavage against the Lady Aldie, it being *alleged* for the Lady, That the bond was an old bond, being granted *in anno* 1643, to the deceast William Mercer, Clavage's grandfather, never heard of now by the space of 38 years, and the creditor being in a poor and mean condition, and the debtor being solvent, it was presumed to have been paid, and that in Aldie's charter-chest there was a missive letter importing a discharge, which was lost when the charter-chest was brought over to Edinburgh, in a debate betwixt the heir male and the said Lady, as heir of line; and that she offered to prove that there was money paid by Sir James Mercer, equivalent to the sum contained in the bond, and that the creditor William Mercer declared that Sir James was not resting him any thing. THE LORDS having examined witnesses *ex officio* upon the foresaid points, they found the bond paid, and as-