

* * * Fountainhall reports this case :

OBJECTED against a fitted account, that the docquet of it wanted writer's name and witnesses. THE LORDS found this no nullity, seeing, in fortification of it, it was offered to be proved, the defender's father was sub-collector of that cess whereof it was the account, and they found the act of Parliament requiring witnesses related to bonds and writs of importance, and not to accounts. This is hard, for now since the act of Parliament, the discovering of falsehood may be elided by forging fitted accounts instead of bonds, seeing they need no witnesses, and then there will be no mean but *comparatio literarum*, which is very uncertain and vaccillant ; and why do we reject missive letters for want of witnesses as not probative, if this were good law. It is true bills of exchange for the favour of commerce need none, because they may be adminiculated by the party's books, and they require summer dispatch.

Fountainhall, MS.

No 519.

1683. March. JOHN CURRIER of Whytmure against PATRICK HALIBURTON.

A PERSON pursuing for a debt assigned to him by a merchant, it was *alleged* by the defender, That the debt stood discharged in the cedent's count-books.

THE LORDS finding that the book was an entire and fair merchant book, wherein the precise sum was marked received, of a date anterior to the intimation of the assignation, " they sustained it equivalent to a discharge."

Fol. Dic. v. 2. p. 260. Harcarse, (DISCHARGES.) No 418. p. 112.

No 520.

1685. March 20. MAXWELL against JOSEPH REID.

JOSEPH REID, Major of Carlile, and merchant there, having granted a note to Maxwell and Mulliken, declaring, That he had their bond for L. 150, for which sum he should be countable to them, or their order ; and having afterwards counted with Mulliken, and got a general discharge from him without getting up the note, (which was in Maxwell's hand) or any obligation to deliver the same, Maxwell pursued the Major.

Alleged for the defender ; That Maxwell and Mulliken being *socii* and partners in a drove of cows upon the road, any discharge of the one to that subject must oblige both. *2do*, The note being granted in England, where payment of the sums is proveable by witnesses, it ought to be sustained here.

Answered ; The note is neither discharged nor retired ; and there is no society in an obligation. *2do*, Though deeds done in England, according to the

No 521.

Payments stated in an account-book, admitted to do away the effect of a bond.

No 521. solemnity there, are valid though wanting the formalities used in Scotland, yet the *modus probationis*, and effects of rights, are to be governed by our own law.

“ THE LORDS, *ex officio*, before answer, ordained the Major’s count-books to be inspected as to the payment of the debt to Mulliken, and witnesses to be examined in fortification of the said books ;” for the discharge was vitiated in the date, and not insisted in ; but payment in general proponed. And it was informed that the defender was cheated and circumvened by the drovers, to whom he had paid the money in parcels, and neglected to retire his note.

Harcarse, (PROBATION.) No 790. p. 223.

1696. February 13. AINSLY of Blackhill against ADAM CHISHOLM.

No 522.

An unsubscribed scroll of a tenant’s account, delivered to him by the factor of an estate, found probative against the landlord.

PHESDO reported Ainsly of Blackhill against Adam Chisholm, Lord Lothian’s tenant in his lands of Newton, for payment of two sums contained in a bond and a bill or precept. The defence was, by a fitted account, under your father’s hand (who was chamberlain) ~~these~~ debts are all stated and paid. *Alleged*, It is but an unsubscribed scroll, which has been only made up for memory’s sake, and is liable to several errors and corrections, and so not probative. THE LORDS thought if this scroll had been in the chamberlain’s hands, there might have been some ground of cavil ; but being delivered by him to the tenant, and all written with his own hand, the rusticity of labourers on the one side, and the nimbleness of chamberlains on the other, pleaded it should be sufficient to exoner, though it was not so authentic as a merchant’s count-book exactly kept. Some urged, that, beside the proving its being holograph, the tenant should also be burdened to instruct that was his way of counting, by giving them unsubscribed scrolls of their accounts ; but this was not required, the Lords proceeding more upon material justice in this case than strict law, according to Constantinus’ rule in l. 8. C. De judiciis, Placuit in omnibus causis præcipuam esse justitiæ æquitatisque quam stricti juris rationem.

Fol. Dic. v. 2. p. 261. Fountainhall, v. 1. p. 711.

No 523.

An unsubscribed scroll of an account of charge and discharge, wherein a sum due by bond was

1708. February 19.

JAMES MILLAR, Coppersmith in the Canongate, *against* The EXECUTORS and REPRESENTATIVES of WILLIAM BONAR, late Clerk to the Mint.

IN the action at the instance of James Millar against the Representatives of William Bonar, for payment of L. 150 Scots advanced by the pursuer to him, as the fourth part of L. 50 Sterling, which Bonar subscribed for in the books of the African Company in the name of James Millar, who by bond stood obliged to repay the L. 50 Sterling to him, upon this ground, that the defenders