

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

had uplifted the said share from the Commissioners of the Equivalent; the pursuer offered to prove payment of the L. 150 Scots, by an account of charge and discharge betwixt him and William Bonar, all written with William's hand, wherein the article of L. 150 is stated, and credit given for it to James Millar. Which holograph account and the bond jumping exactly together in the sum, were fund lying by William Bonar at his death, and recovered by a diligence from Alexander Swynton the defender's factor.

*Alleged for the defenders;* The pretended account of charge and discharge is but an unsubscribed scroll, consequently null, and not probative, by the act 80. Parl. 6. James VI. and the act 5. Parl. 3. Charles II. It is not sufficient to prove that the same is holograph, because, *comparatio literarum* (the ordinary mean of proving writs holograph) is so fallible and uncertain, that little stress can be laid upon it. Nor could holograph proved by a party's oath make the scroll of an account probative against him; 1st July 1665, Naysmith *contra* Bower, No 515. p. 12621.; 2d January 1677, McLurg *contra* Earl of Dalhousie, *voce* Writ. Yea, 16th December 1680, Lockhart *contra* Lockhart, (*IBIDEM.*) a subscribed account wanting witnesses was found not probative, being written by one who was no merchant. Again, my Lord Stair (*Instit. Tit. Probation by Writ*) says, That unsubscribed holographs do not prove, unless written on count-books or authentic writs; and in the case betwixt Purveyance and Knight, June 8, 1677, No 518. p. 12623. it was thought hard that count-books in Scotland, where they are not so exactly kept as elsewhere, should prove a debt against the owner of the book. Nay, this is a case of so general concern, that persons of all ranks might easily be ruined, if scrolls of accounts, which are written very oft *spe numerandæ pecuniæ*, or upon other suppositions, or even count-books not regularly kept, (though more authentic than scrolls,) should be sustained to prove against them.

*Answered for the pursuer;* An unsubscribed holograph account is probative in law against the writer's Representatives; 20th November 1662, Wardlaw *contra* Gray, No 514. p. 12620.; 17th December 1675, Laurie *contra* Drummond, No 517. p. 12622.; and lately betwixt Mr Andrew Hay and the Executors of Sir Patrick Aikenhead, (*See APPENDIX.*) and betwixt Chisholm and Ainsly of Blackhill, No 522. p. 12626. The reason is founded both in law and equity; such accounts being understood framed to no other end than for preserving the memory of payment made, which no man is presumed to do to his own prejudice.

THE LORDS found the account probative of the pursuer's claim, he proving that the same is holograph, and was found lying by William Bonar at his death; in respect the bond and the account jumped together in the sum.

*Fol. Dic. v. 2. p. 261. Forbes, p. 246.*

No 523.

stated paid, and credit given to the debtor for it, sustained probative of the payment against the representatives of the creditor, the debtor proving that the account was the creditor's holograph writ, and found lying by him at his death.