

The Lords demurred to find it holograph, the sum being a substantial part of a writ. No. 300.

*Harcarse, No. 504. p. 141.*

1684. December 17. CUNNINGHAMHEAD against LINDSAY.

No. 301;

The improbation pursued by Cunninghamhead against Mr. Charles Lindsay, Minister at Covington, is advised; and the Lords found the fitted compt and reckoning only not probative, and null; though there were pregnant documents *ex comparatione literarum*, and other indirect articles and adminicles against it; but found the discharge probative, though there was as much to say against it, as against the fitted accompt.—But the Lords took this middle way, as a trysting method in a dubious case; as they had done before in 1674, between Sir William Fleming and Commissary Nimmo. *In dubiis eligenda est via media*. And this *judicium rusticorum* exactly divided the sums in question into two halves, so that Mr. Charles Lindsay gained about 5000 merks, and lost as much of his claim.

*Fountainhall, v. 1. p. 321.*

1686. January.

ALEXANDER GORDON of CAMDELL, against ANGUS MACPHERSON.

One having alleged that a bond, on which he was pursued, was null, as wanting witnesses, and not holograph; the pursuer offered to prove, by the defender's oath, that he subscribed the bond. No. 302.

Answered: *Non relevat*, unless the pursuer could say, That the defender promised payment, or that the sum is resting owing.

The Lords sustained the answer.

*Harcarse, No. 207. p. 47.*

1695. December 26. BEATIE against LAMBIE.

No. 303.

The act 5th, Parl. 1681, which declares, That writs shall be null unless the witnesses be designed, goes upon the supposition, that there must be two witnesses, and as the want of the designation of the witnesses is not suppliable by a condescence, far less will a proof be admitted that there were *de facto* witnesses, when none are named in the deed. But as these nullities amount not to a *dene-gatio actionis*, but resolve into an exception; the act does not say, that the subscriber of the writ may not be barred from his exception by homologation; and if by homologation, which is but an implied acknowledgment of the verity of the deed, *multo magis* by a direct acknowledgment upon oath; and therefore a contract