

cient, that the said pursuer offered to prove that the subscription thereof was the said umquhile Patrick's hand writ, except it had been proved also, that the whole body was written by him : Neither was it respected that the pursuer contended, that there was no necessity, that the same should be all holograph, being truly subscribed by him, and that he might cause any other write the same by his inditement, otherwise no writ should have faith betwixt factor and merchant, except that the same were written by the party's own hand, which were a great inconvenience, tending to take away all trade and credit betwixt merchants and factors ; for many times merchants that cannot write well, will direct letters to their factors, and will put to their mark to the letters ; and it were hard that sicklike letters should not be warranted to them that answers them, specially where the wares written for are truly sent and delivered, conform to the desire of the letters, as in this case controverted, where the delivery of the wines written for by the letters and the price whereof was now acclaimed, was offered to be proved by the ticket of entry written in Bourdeaux, and subscribed by the skippers, in whose ships the wine was transported, and by tickets of entry of the same wines in the custom books of Leith, subscribed by the said Patrick Ramsay, and by the obligation given and subscribed also by the said Patrick, obliging him to pay the custom for the said wines, wherein he granted that the same was entered in his name, and to his behoof, all which the pursuer contended, proved the defunct's receipt of the wines, so that there was no necessity to prove the letter holograph. All which was found by the Lords not to be sufficient, to produce this action for the prices of the wines, except it were proved, that the whole letter was holograph, which they found necessary to be proved, otherwise that the pursuer had no action in this process : Also the Lords found that the pursuit made at the stranger's instance, could not be sustained, being pursued in his own name, he not being present, without a procuratory were made by him, and caution were also found *de rata, &c.* which procuratory and caution they ordained should be found *in ingressu litis*, before the defender could be compelled to dispute ; and found it not sufficient that caution was offered before sentence ; or when litiscontestation should be made.

Act. Nicol & Belshes..

Alt. Hope & Lermouth.

Clerk, Gibson.

Durie, p. 273.

1628. January 11.

RULE against AITON.

In an action betwixt Rule and the Laird of Aiton, for payment of £900 contained in a count-book of debursing, given out by the said James Rule pursuer, for the defender, and confessed to be owing to him by the said defender, and subscribed with his hand ; the Lords found the said subscribed count sufficient to produce this action, and to be obligatory against the defender, albeit the same was not subscribed before witnesses, nor had any witnesses inserted therein, as was

No. 205.

A debtor's mere subscription to an act found probative, as he did not deny it was his hand writing.

No. 205. required by the act of Parliament 1579; and as the defender alleged, it ought to have had, otherwise that it was null; which allegiance was repelled, except the defender had therewith denied the subscription of the said count to be his hand-writ; which not being alleged, the Lords found the count not to be null, albeit it wanted witnesses, neither found it necessary that the pursuer should prove the verity of the subscription, to supply that defect of want of witnesses, except the same had been alleged not to be the defender's hand-writ, seeing the reason of the said act of Parliament requiring witnesses was, that the verity of the writs might be known.

Alt. Belshes.

Durie, p. 324.

No. 206.

1629. *February 12.*

LORD LESLIE *against* LAIRD BOQUIEN

A tack of teinds being let to the heritor, with this condition, That if he did sell the lands, the tack should be void; and the heritor having sold the lands, and the titular assigned the contract to a third party, who insisted upon the irritancy; a missive letter produced under the titular's hand, bearing his consent to the alienation of the land, was sustained, though without witnesses, as a good proof of his consent, even against the assignee, until the same were challenged in an im-probation.

Durie.

* * * This case is No. 493. p. 12604. *voce* PROOF.

1631. *July 1.*

INGLIS *against* M^cCUBINE.

No. 207.
Where the
hand writing
is denied, of
a writing
without wit-
nesses, the
party found-
ing on it
must prove it.

John M^cCubine by his ticket being bound to John Inglis, to pay to him 300 merks, and being pursued for payment, he alleged the ticket to be null, because it wanted witnesses; and the pursuer replying the same to be holograph, and so there was no necessity of witnesses, the defender alleged, that it behoved to be proved, that it was his hand-writ: And the pursuer answering, that there was no necessity to prove the same, seeing the ticket bore it all to be written with his own hand, and subscribed by him, so that he needed not to approve the same; but in respect of the foresaid tenor thereof, the defender ought to improve the same, or else it should have full faith and force; the Lords found, that where the defender, or his procuratory for him being so informed (if the defenders self be not present) denies the hand-writ in that writ, whereupon pursuit is moved against him, and where there are no witnesses therein insert (which is a necessary circumstance required to the validity thereof, and the ordinary mean whereby to improve)