No 4.

1694, Ogilvie against Scot, *voce* HOMOLOGATION.——THE LORDS did not proceed give answer to this second defence, which at least would have founded a *jus retentionis* till he was relieved of his cautionries; because they were clear to determine the first point of the two general discharges, which they found very ample and comprehensive, and to extend even to this bond now pursued for; and therefore found the defence on the discharges relevant and proven; and assoilzied.

Fol. Dic. v. 1. p. 341. Fountainhall, v. 1. p. 677.

1696. *January* 15.

Sir DAVID CARNEGIE of Pittarrow *against* The EARL of SOUTHESK.

No. 5.
Against an action for payment of a considerable sum of debursements, the defence was laid on a decree-arbitral, ordaining the parties to discharge each other of all accounts, &c. Answered, the decree proceeded on special claims; and it was offered to be proved, that this article was neither *actum* nor *tractatum* at the time. The Lords sustained the defence.

THE LORDS advised the debate between Sir David Carnegie of Pittarrow and the Earl of Southesk, if Pittarrow's compensation was to be sustained on the bond to pay the third part of the expenses which he should depurse in reducing the decreet of Parliament, evicting from him the lands of Craig; and whereof he gave in a general account of 10,000 merks expended by his father, and L. 17,000 by himself. *Alleged*, Absolvitor; because both parties having entered into a submission of all their claims to Sir George Lockhart and Sir John Cunningham in 1681, whereon followed a decreet-arbitral, ordaining them to discharge one another of all counts and reckonings; and this behoved also to be included, especially seeing there was nothing excepted but their reliefs of cautionry. *Answered*, That decreet proceeded on special claims, whereof this article of the expense of the process of Craig was none; and if Harry Douglas, Sir G. Lockhart's servant and others were examined, it would appear this debt was neither *actum* nor *tractatum*, nor under consideration at the time.——THE LORDS thought it dangerous to loose decreets-arbitral, and general discharges, on such expiscations, and that such eminent lawyers would not have inserted a general clause to operate nothing; therefore they found it sufficient to cut off all the depursements prior to the said decreet-arbitral, but that it did not strike off the bond itself; so the expenses wared out by Pittarrow on that plea since 1681 were yet entire, and might be claimed. The next question occurred, how his account should be proven, and if he was bound to give in a special condescendence of his expenses? Pittarrow obtruded the obligement, that his honest word and declaration was to be taken without any farther instruction or probation. Southesk *urged*, That did not impede why he should not be more special; and it was not enough to give in an exorbitant article of L. 17,000 in gross, without some more satisfying account.——THE LORDS ordained him to give in a more particular account, and to be as special in it as he could. Some moved he should in supplement depone anent the verity of his expenses; but it was thought the clause in the obligement exonered him from any further verification than

his subscribed declaration; though, if the Lords had any jealousy, they might also require his oath *ex officio*, especially if any of it was clandestinely done, and conveyed for corrupt and unavowed ends.

No 5.

Fol. Dic. v. 1. *p.* 341. *Fountainhall, v.* 1. *p.* 700.

1705. *June* 29. TALBOT and his Factors *against* GUYDET.

No 6.
A discharge was granted of a sum, and a general clause subjoined, discharging all other demands. Found, that the discharge comprehended a sum eight times greater than the sum expressly discharged, tho' the greater sum was not mentioned in it.

I REPORTED Captain Maximilian Talbot, and Chappel and Christie his factors, against Major Baltizar Guydet. Talbot and his factors pursue the Major for payment of L. 400 Sterling, contained in his ticket. *Alleged*, 1*mo*, The ticket is null by the laws of Scotland, having neither the writer's name nor witnesses; it is true there is adjected to it these words, '*teste* John Perry supernumerary;' but as he is but one witness, so he has made affidavit, that he never subscribed any such paper, nor was present at any transactions betwixt them; and whereas it bears to be signed at Stockton in the bishopric of Durham, he declares he never was in that town in his life; likeas there is a testificate produced under the hand of one Henry Morton, servant and clerk to the said Mr Talbot, bearing, that he knew the Major never owed his master more than L. 50 Sterling; but, on the contrary, Talbot was offering to borrow from Guydet 3 or L. 400 of his debentures. 2*do*, *Alleged*, Absolvitor; because he produced a general discharge from Talbot of all claims or demands. *Answered*, This writ being signed in England, was not to be regulated by the Scots municipal law, requiring the writer's name and witnesses; but was of the nature of bills of exchange, which were, by the law of nations, exeemed from any such solemnities; and such notes and precepts are become now the common known instruments of securities amongst persons of all ranks, though they be not merchants; and as to Perry's and Morton's declarations, they are most suspect, as officious and ultroneous, and so *prodiderunt testimonium*, and deserve no credit; and Perry, who emits the oath, seems to be a different man from the signer of the ticket, there being two of that name; neither is any regard to be had to the discharge produced, for it is only of L. 50 Sterling, and the general clause of all other demands subjoined thereto, can never extend to discharge and cut off an obligement of L. 400 Sterling; seeing, if that had been intended, it would have mentioned the greater sum, and not the lesser; as was found by the Lords between Haliburton and Hunter, No 25. p. 5042.; and by the analogy of law, and the act 62d, Parliament 1503, remissions are appointed to express the greatest crime, and will not comprehend any greater than that particularly specified therein; so, *a paritate rationis*, a discharge should mention the greatest sum, and not, after enumeration of lesser debts huddle up the greater in a mysterious generality, where it was neither *actum*, *tractatum*, nor *cogitatum*. *Replied*, As this ticket was not probative by the law of Scotland, so neither was it agree-