

1669. February 19. LORD ELPHINSTON *against* LADY QUARREL.

No 516.

Where accounts have been made up from other accounts said to have been lost, the *casus amissionis* must be made appear, to entitle the former to credit.

THE Lord Elphinston pursuing Quarrel in a tutor-count anent the profits of the coal of Elphinston, this Query came in from the auditors, how the small articles of uncost should be proved. It was *alleged* for Quarrel, That such articles could be proved no other way but by his oath, seeing it was impossible either to use witnesses, or for them to remember such small particulars occurring every day, especially seeing it was known to all coal-masters, that such particulars were ordinarily incident. It was *answered* for the Lord Elphinston, Though these particulars were small, yet they amounted in whole to 2000 merks, and that the Tutors ought to have kept the coal-grieve's weekly books, wherein every particular was set down daily as they were expended; which if they were produced, and both the Tutors' and coal-grieve's oaths were taken thereupon, that they were truly so paid, as they were recently set down, they might be allowed; but no such books being produced, the Tutor could not give a count thereof at random, nor could his oath in astruction thereof be received, because it were impossible for him to remember these small particulars without the books. It was *answered* for the Tutor, That during the dependence of this process, the books were lost, which were made up by the coal-grieves weekly; but that he produced a book made up from these books, and was willing to give his oath that the first books were lost, and that these books, albeit they be not direct copies of the former books, yet that they were made up of the former, and did agree in the matter with them, and contained no more than they did.

THE LORDS refused to sustain this manner of probation, but ordained Quarrel to condescend *de casu amissionis*, of the first books, and adduce such proofs and evidence thereof as he could, and also to condescend who was the writer of the latter books, that he might be examined how he made up the one from of the other.

*Fol. Dic. v. 2. p. 260. Stair, v. 1. p. 609.*

No 517.

1675. December 17. LAWRIE and DRUMMOND *against* DRUMMOND.

An account-book was found probative against the writer, and his successors, as to the articles written by him, though he was not a merchant.

IN the account betwixt these parties concerning the price of the lands of Scotston, this question occurred, whether Sir Robert Drummond's count-book, bearing an account of a sum due by Buchanan to Sir Robert, which was assigned to Sir John, to have been paid to Sir Robert himself, was probative. It was *alleged*, That this could not prove, being no authentic subscribed writ, neither any authentic count-book, having no marking of the pages, and being written with several hands; and though merchants' count books unsubscribed prove against themselves, it is not to be extended to the count-books of gentle-

men or others. It was *answered*, That count-books unsubscribed have been found probative against those who wrote them; and though in this count-book there be several hands, yet this page doth notourly appear to be Sir Robert Drummond's own hand; and for adminiculating thereof, the defender is content to give his oath, and that Buchanan the debtor give his oath to whom he paid the sum.

THE LORDS sustained the foresaid article in the count-book written by Sir Robert's own hand, adminiculated as said is.

*Fol. Dic. v. 2. p. 260. Stair, v. 2. p. 386.*

No 517.

1677. June 7. PURVEYANCE against CUNNINGHAM.

HELEN PURVEYANCE pursues Agnes Cunningham, as heir to Adam Knight, to pay 500 merks borrowed by the defunct from the pursuer, and annualrents thereof since September 1673, and for instruction, produces the defunct's count-book gotten out of his heir's hands by exhibition. In which, upon several pages thereof, the defunct acknowledges the borrowing of the sum and the payment of annualrents. The defender *alleged*, That this probation was not sufficient; for, albeit *libri rationum*, merchants' count-books, orderly kept, may prove against the merchant, yet **this book** is not such, but a book of other affairs; and it were of dangerous consequence to sustain the probation of a liquid sum of 500 merks wherein bonds use to be adhibited, and not being in *re mercatoria*, to be proved this way; for though this sum had been once due, the defunct might have paid the same without taking a discharge, seeing he gave no bond, and might have forgotten it, or mentioned the payment in his private memoirs, it not being a formal count-book. *2do*, The same book bears payment of several particulars, and must prove the discharge as well as the charge. It was *answered*, That there being special confidence betwixt the parties, the defunct being the pursuer's good-brother, and the sum small, his count-book of all his affairs written with his own hand, authentic, and unsuspect, must prove against his heir. And the presumption of payment without discharge is of no moment, it being notour he died suddenly within a few weeks after the last post in his book, bearing a full account of the sum and annualrents.

THE LORDS sustained the probation circumstantiated as aforesaid, and found the book probative both for charge and discharge, and that annualrent being therein acknowledged to have been paid, they found annualrent due thereafter, and in time coming.

*Fol. Dic. v. 2. p. 260. Stair, v. 2. p. 520.*

No 518.

A defunct's account-book sustained against his heir, wherein he acknowledged that he had borrowed a certain sum, and mentioned, in distinct articles, the payment of several years' annualrents.