

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.

No 518.

* * * Dirleton reports this case :

1677: June 8.—THE LORDS found, upon the advising of a concluded cause, after debate *in præsentia*, in the case in question, that *liber rationum*, and a count-book of a merchant, containing an article of debt, due by him to the pursuer, was a sufficient probation in respect the said count-book was written with the merchant's own hand, and he was known to be a person of great honesty and exactness; and the article was so clear, that the time therein mentioned, he stated himself to be debtor in the said sum, all bygone annualrents being paid; and in another part and article of the said book, he did acknowledge that he had borrowed the said sum, and was special as to the time, and there was a great confidence and near relation betwixt him and the creditor; and therefore the LORDS decided as said is, in respect of the said circumstances; but thought it hard, that count-books in Scotland, where there is not that exactness that is elsewhere in keeping books, should have that faith that is given to them elsewhere.

In præsentia.

Act. Mr Robert Stewart.

Alt. Gunninghame.

Clerk, Hay.

Dirleton, No 452. p. 220.

1680. December 17.

STUART against AGNEW.

No 519.

An account subscribed without witnesses, and not holograph, was sustained after the death of one of the parties.

JAMES STUART, as assignee by his father Sir James, pursues Agnew of Seuchan, as representing his father, for payment of the balance of an account betwixt his father and John Denholm, who was sub-collector to Sir James, of the maintenance *in anno* 1648, and 1649, which balance contained L. 4000 and odds, as resting by Seuchan then collector of the shire of Wigton. The defender *alleged*, That this account is null, wanting witnesses; and though counts amongst merchants, and bills of exchange, discharges to tenants, and the like, in which witnesses use not to be adhibited, are sustained, yet so considerable a sum in this case cannot be proved by account, having no witnesses. It was *answered*, That by the same custom counts betwixt collectors and sub-collectors, are not accustomed to have witnesses, and yet were ever still sustained where the accountant's being sub-collector, was notour or proved, which did ever adminiculate the account; and though such subscriptions may be more easily improved, than where there are witnesses affirming, as *comparatione literarum*, and other evidences, yet they prove as probative writs till they be improved.

THE LORDS repelled the defence, and found the account probative, although it wanted witnesses, the pursuer's father having proved that the defender's father was holden collector, or reputed collector at that time.

Stair, v. 2. p. 818.