

No 513.

den, at that time factor at Campvere, his count-book, that albeit the bills were once protested, yet they were paid before assignation, or intimation.

THE LORDS before answer, having granted several commissions to the Magistrates and Conservator at Campvere, to view and examine the count-book which was at Campvere, they reported, that in such a page of the book there were three articles of receipt, in part payment of the bills, after which pages the book was continued, and several counts written therein, and that it was authentic and unvitiated, and all written with the hand of John Muir, Mr Thomas' stepson, who was his book-keeper, and that they had been a long time since out of Mr Thomas' hands about the time he bankrupted, and that they had examined upon oath him who drew the bill, and him upon whom the bill was drawn, both of whom had sworn payment was made; the question was, whether Mr Thomas's count-book could prove against Mr Thomas' assignee? It was *alleged*, It could not, seeing it had no more effect than as holograph discharge, which might be made up after the assignation, and therefore proves not against the assignee. It was *answered*, That though a holograph discharge will not prove alone, yet if by other adminicles, writs, or witnesses, it appears that the date is true, at least is prior to the assignation or intimation, it will be sufficient against the assignee; so the adminicles here are pregnant and strong, to prove the time of payment contained in the count-book.

THE LORDS found the count-book and adminicles sufficient here against the assignee, especially considering that the cedent was his brother, and that it was not presumeable, that he would do any deed, in making up these receipts in his count-book, in prejudice of his brother.

*Fol. Dic. v. 2. p. 260. Stair, v. I. p. 91. 129. & 154.*

1662. November 20. ALISON WARDLAW against ROBERT GRAY.

No 514.

A count-book written by the hand of a person of discretion, found sufficient to prove payment of his rent, against his executor-creditor.

ALISON WARDLAW, as executrix creditrix confirmed to her husband, and having confirmed the rents due to him by Robert Gray pursuer therefor, the said Robert *alleged* absolvitor, for a part of the rents, because paid, which he offered to prove by the defunct's count-book in the pursuer's hands, which count-book is written with the defunct's own hand, and bears several receipts paid by the defender at several times. The pursuer *alleged*, That the count-book cannot prove, because it wants a subscription, and count-books do only prove *contra scribentem*, in the case of merchants who kept exact current count-books, which is a special privilege of theirs, and was never extended to any other case, nor to any other person, for a discharge subscribed before witnesses would not liberate if it were not delivered to the other party, much less can a count-book. *2do*, Whatever it could work against the writer and his heirs, yet not against assignees or executors creditors, who are in effect singu-

lar successors for their own payment, otherwise no assignee could be secure, but after the assignation the cedent might write receipts in his book; but though he should grant a holograph discharge bearing date before the assignation, it would not prove against the assignee. The defender *answered*, That the count-book was sufficient to prove liberation, being by a judicious person, though not a merchant, for it could be done to no other intent than to preserve the memory of the payment made, which though most ordinary amongst merchants, is no special privilege of theirs; and albeit an undelivered discharge would not be sufficient, yet that being but *unicum chirographum*, requiring delivery, hath no effect without delivery; but a count-book contains many writs, and requires no delivery; and albeit it should not prove against an assignee, as neither would an holograph discharge, yet it is sufficient against an executor creditor, who can have no right till the defunct be dead, and so there can be no hazard of receipts posterior to their right; and therefore against an executor creditor a holograph discharge would prove.

“THE LORDS found the allegiance of the count-book written with the defunct’s own hand sufficient to instruct payment of the articles mentioned therein; but seeing the defender who paid was on life and present, ordained him to make faith that he truly paid accordingly.”

*Fol. Dic. v. 2. p. 260. Stair, v. 1. p. 143.*

1665. July 1. Mr JAMES NASMITH *against* ALEXANDER BOWER.

THIS being a concluded cause, a question arose upon the probation, an account being produced between two merchants, referred to Bower’s oath, that it was his hand-writ, and yet resting, he deponed it was his hand-writ, but not resting. The question arose, whether he behoved to condescend and instruct how it was paid; because, though the account written with his hand unsubscribed, was of itself sufficient probation, the quality was not competent, but he behoved to prove payment, it being alleged that a merchants’ hand-writ is sufficient, and that a note on the back of a bond, or foot of a count, by the debtor’s own hand-writ, though not subscribed, has been found probative.

“THE LORDS found, that if this had been a current count-book, it would have been probative, but having been only some few schedules of paper, found it not probative without subscription, albeit it was acknowledged by the oath to be the deponent’s hand-writ.”

*Fol. Dic. v. 2. p. 260. Stair, v. 1. p. 293.*

No 514.

No 515.

An account on several pieces of paper, not probative to instruct a debt against the writer of it, who acknowledged that he had written it, but that he had also paid it.