

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-