

No 287. thought, if what was owing by the husband be not pursued for within three years after the first husband's death, that the currency and continuation of the furnishing and accompt to the relict will not stop and hinder the husband's accompt from prescribing *quoad modum probandi* by witnesses; and this being reported, "the LORDS found so" on the 28th July 1680.

1680. July 28.—THOMAS WILSON merchant against George Tours, and Aikman's relict, "THE LORDS find the furnishing of wine and ale to the wife in her widowhood, does not make up a current accompt with the wine and ale furnished to her first husband in his lifetime, so as to hinder triennial prescription; and therefore find the furnishing in the first husband's time prescribed *quoad modum probandi* by witnesses, unless it was interrupted *debito tempore*. And as to the moveables of the house, find it relevant to Wilson to prove that he only lent the same; and repel their allegeance of a right on prescription and possession, that being only presumptive, and elided by the offering to prove *lent*. *Item*, Repel the defence for Janet Dick, that the moveables intromitted with by her were heirship moveables, in respect she had no right thereto." See PROOF.

*Fol. Dic. v. 2. p. 121. Fountainhall, v. 1. p. 84. & 110.*

No 288.

Furnishing after three years cannot be proved by witnesses, either by way of action or exception; but a person having writ to a merchant desiring him to furnish necessaries to his wife, and to place it to his account, the suit here being founded upon writ, the quantity was found probable by witnesses after three years.

1681. July 5.

DICKSON against M'AULAY.

MARION DICKSON, as executrix to Mr William Cockburn her husband pursues George M'Aulay for the entertainment and furnishing to his wife and his son, for the expenses of christening, nursing, and burying of him, and for probabation produces a letter of the defender's to Mr William, "to let his wife want nothing necessary, and to place it to his accompt." The defender *alleged* compensation, because he entertained the defunct's unmarried daughter Catharine Cockburn for the space of two years, and likewise Patrick Cockburn his son for the space of six months in his sickness. The pursuer *answered*, That the entertainment and furnishing by the defender is only probable *scripto vel juramento*, being long past three years since it was done. It was *replied*, That the pursuer's debt is not totally proved by writ, but witnesses must prove the quantities, and it is also past three years; and albeit the defender hath no action for the furnishing made by him, but by oath or writ, yet it is competent by way of defence, and the defender was *in tuto* not to pursue, because he knew that the pursuer would have compensated against him, and he did also conceive that if the pursuer at any time should insist, his compensation would take effect by exception,

THE LORDS found that the pursuit being founded upon writ, viz. "the defender's missive letter," the quantities might be proved by witnesses, even after

three years ; but the defender having no writ, his furnishing being past three years, could not be proved by witnesses, either by way of action or exception. No 288:

*Fol. Dic. v. 2. p. 120. Stair, v. 2. p. 885.*

1682. November.

TUTOR OF CRAIGIEVAR *against* GRAY.

No 289.

ONE having writ to a young man, desiring him to come and attend his son, and he should have 100 merks of fee ; and the said person having accordingly served five years, he pursued the writer of the letter for the 500 merks. *Alleged* for the defender, That servants' fees prescribe in three years. *Answered*, The pursuer doth partly prove his claim by writ, viz. the letter. THE LORDS found the libel relevant to be proved only *scripto vel juramento*, in respect it is usual for masters to pay their servants yearly without receipts, and there was no writ after the service, acknowledging the fee to be resting.

*Fol. Dic. v. 2. p. 120. Harcarse, (PRESCRIPTION.) No 760. p. 215.*

1685. February.

ARMOUR *against* BOICK.

No 290.

JAMES FOULIS having paid the freight, expense, and charges of some goods that came from the plantations to England, consigned to him for the use of some Glasgow merchants ; and having shipped these goods in a Scots bottom for Scotland, with bills of loading to the merchants, and a general accompt of charges, which was paid by some of the merchants, who recurred against the rest by an action for paying in their proportions ;

*Alleged* for the defender ; That the said accompt was unnecessarily paid to Foulis, seeing it was prescribed *quoad modum probandi*, by the elapsing of three years between the furnishing and the payment.

*Answered* ; The goods for which the freight and charges were paid, being the return of an outward cargo furnished by Mr Foulis, a factor, in obedience to the joint commission granted to him by the defender and pursuers : *2do*, The accompt was of money expended by Mr Foulis as a factor, and not of goods furnished by him as a merchant, which only falls under the act of Parliament.

THE LORDS sustained the answer ; and found, That, by the law of burghs, factors advances was to bear annualrent from the time of their furnishing the money, though no annualrent was pactioned.

*Harcarse, (PRESCRIPTION.) No 772. p. 219.*