

ready, Alexander Murray of Melgum, for himself, and in name of the heiress of Kinninmount, his lady, protested this day, for remedy of law, to the Parliament.

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1704. *February 2.* HELEN INNES *against* THOMAS HAMILTON.

HELEN Innes, relict of John Hendshaw, wright, against Thomas Hamilton. Hendshaw being, in 1694 and thereafter, employed by the said Thomas Hamilton, in repairing some houses in Edinburgh, his account of wages and furniture amounted to £360 Scots; and being forced to pursue the said Thomas for payment, before the Dean of Guild in 1699, and dying *medio tempore*, Helen Innes his relict, with her children, transfer the process, and at last obtain a decret; which Thomas suspended, on thir reasons: *1mo*, That the account was prescribed, *quoad modum probandi*, by witnesses, not being insisted for within the three years, conform to the Act of Parliament 1579; and though some few of the last articles of the account were made of a date within the three years, yet the bulk were without that space, and thir were but added industriously to interrupt the prescription. And that this was the design was evident, for none of these articles, that were made within the three years of intending the process, are so much as proven or mentioned by any of the witnesses led; so that their depositions relating allenary to the articles before the three years, it is a demonstration that it was truly prescribed, and so could not have been proven by witnesses, had it not been for the adjection of these last articles, which are not so much as proven, though, being last furnished, witnesses would have remembered them best, if true. And, if this artifice were allowed, a merchant or tradesman's account shall never prescribe; for it is easy to add some articles within the three years, by which addition he gets the whole current account admitted to his probation by witnesses; whereas, if these were not added, it could only be proven *scripto vel juramento*. *2do*, The probation adduced is only in general, That Hendshaw wrought several weeks at these houses; but does not prove the particular articles libelled.

ANSWERED,—There is as much probation in this case as the nature of the thing can possibly allow; for, *1mo*, The Dean of Guild and his Council visited the work; then, *2do*, They examined witnesses thereupon; *3tio*, They called for the defunct's count-book, and compared it with the account pursued for, and found it all written with his own hand, and to quadrate both in dates and sums: And though count-books cannot prove *pro scribente*, but rather against the writer, yet here much regard is to be had thereto, seeing he is dead several years ago; and it cannot be made up *ex post facto*, as might be alleged if he were yet in life; *4to*, In supplement of all, they had taken the widow's oath of knowledge on the furnishing; so that few decreets have so full a probation. And the witnesses being examined on the whole account, their depositions relating to the whole do confirm these articles within the three years, as well as those before.

The Lords, having called for the probation to be transmitted, and having read it, found these last articles that preserved the account from prescription were not specially proven; and that a man's count-book, though an adminicle, yet could not prove for him. The vote was stated, Turn the Dean of Guild's decret

into a libel, or allow a farther probation to support and adminiculate the decret?—And it carried for the last, the probation already produced having been very expensive, and was not to be wholly laid aside, but to stand as probative, *pro tanto*.

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1704. *February 17.* The LAIRD of GRANT *against* The LORDS of the TREASURY.

By the 12th and 25th Acts of Parliament 1698, a poll is imposed; and because the honour and justice of the nation was concerned to pay the arrears due to the officers who had raised regiments at the Revolution, and clothed them on their own expenses, therefore the Parliament specially destinate and allocates the poll money for payment of these *primo loco*. The poll having been roused, and set to William Cochran of Fergusly for £20,000 sterling and some more, and the Lords of the Treasury having uplifted and disposed on the said tack-duty, Grant, who had clothed one of these regiments at his own charges, pursues the Lords of the Treasury for payment to him of £1855 sterling, resting to him on that account, as they who farmed the said poll, and received the tack-duty; which was the fund destinate by the Parliament for his payment.

ALLEGED,—The Lords of Session were not judges competent to this pursuit, but only the Lords of Treasury and Exchequer, who cognosced all questions anent the revenue and patrimony of the crown, by the 18th Act of Parliament 1633; and they could only make their accounts before auditors named by her Majesty, or the present commission of Parliament, for examining the arrears and public accounts; and all who have pensions might as well pursue the Lords of the Treasury for payment, as Grant may do; and this were to bring the whole administration of the Treasury to the Lords of Session their examination and control, and would create a great confusion and interfering of jurisdictions: and though the poll was destinate to special uses, yet its management was left to the Lords of Treasury.

ANSWERED,—Grant is not craving them to give in their accounts before the Lords of Session; but this being a civil right conferred on him by the Acts of Parliament, and they being debtors by intromitting with his money, there can be none more competent for this than the Lords: and when Hugh Wallace of Ingliston, as cash-keeper, was pursued, and proponed the like declinature, That he was only accountable to the Lords of Treasury, the same was repelled, and he forced to answer. And it seems unequal to send him to the Exchequer, where the Lords of Treasury, who are his parties, have the greatest stroke, and who have a negative by withdrawing; and the commission of Parliament have no power to determine, but only to report.

The Lords, generally, thought they were competent, this not being the Queen's cause, but that of private persons: yet seeing Grant had not libelled their misapplying the funds, or malversing in the trust reposed in them by the Parliament, though he offered to prove it by way of reply; therefore the Lords waved the cognizance of the affair at this time, and remitted the cause to the Parliament.

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