

1712. *January 18.*

MITCHEL of Bredhead *against* ANDREW M'ADAM, Writer in Edinburgh.

No 300.

The exception or defence, whereby an agent refuses to deliver up papers until payment of his account, does not prescribe as to the manner of probation.

MITCHEL of Bredhead pursued Andrew M'Adam, for exhibition and delivery of his writs, who pretended to *jus detinendi*, till he be paid of his fees as agent for the pursuer in his business, conform to an account given in.

*Alleged* for the pursuer; The account is prescribed *quoad modum probandi*; except as to his oath, not being sued within three years; which prescription is not hindered by a writer's having his client's papers in his hand to which his account related, November 29. 1709, Mason *against* Earl of Aberdeen, No 298.

P. 11094.

*Answered* for the defender; The decision cited doth not meet; for the Earl of Aberdeen was pursued *per modum actionis* for payment of a writer's account; whereas here the defender pursued to deliver up his client's writs, says only by way of defence, he cannot be obliged to do it till once the account be paid. Which defence is perpetual, and doth not prescribe; though action upon the account be prescribed as to the manner of probation. THE LORDS found, That the exception or defence, whereby Andrew M'Adam claims payment of his account, doth not prescribe while the papers are in his custody.

*Fol. Dic. v. 2. p. 121. Forbes, p. 576.*

1714. *December 3.*

CHILDREN of Bailie SMITH *against* The EARL of WINTON.

No 301.

Salaries to a factor found liable to the triennial prescription *quoad modum probandi*; but in an action of count and reckoning for years during which no accounts had been fitted, the salaries were allowed as articles of discharge.

IN this case, mentioned 1st December 1714, No 2. p. 9275. *voce* NEGOTIORUM GESTOR, the said pursuers having also insisted for payment of several years salaries due by the Earl to their father, as factor, manager, and overseer of his Lordship's whole affairs, both in the late Earl's time, and since his decease, in the time the present Earl was abroad, and also since his return, to the day of the Bailie's death;

*Answered* for the Earl; That the act of Parliament anent short prescriptions of three years, cuts off the claim.

*Replied* for the pursuers; That though servants' fees be there mentioned, yet as the words that immediately precede, (men's ordinaries) seem not so very intelligible, if taken distinctly and separately from the succeeding words; so the reading of the act ought to be, (men's ordinary servants' fees,) as Sir George Mackenzie, in his Observations on that act, and Sir James Stuart, in his Abridgment, read it; which would clearly make a distinction betwixt ordinary servants, and such as served in Bailie Smith's rank and quality. And this because ordinary servants are not presumed to be able to want their fees for any

considerable time, which takes not place with respect to such as act in Bailie Smith's quality. No 301.

*Duplied* for the defender; That the LORDS have found even the fees of a chamberlain or grieve only probable by witnesses, for three years before citation, as 12th February 1680, Ross *contra* The Master of Salton, No 286. p. 11089.

*Triplid* for the pursuers; That the ground of that decision was the presumption that the fees must necessarily have been paid, seeing nothing had been demanded for so long a time; but, in the present case, there was no ground for that presumption, in regard of the Earl's circumstances; for, from the late Earl's death, till this Earl's return, nothing could have been paid. Nor does the present Earl allege, that he paid any thing since his return. And as to the time before the late Earl's death, at fitting accounts there is no allowance mentioned for salary; only the late Earl promised to pay it; so that the *ratio decidendi* in the decision adduced, is the presumption of bygones being paid; whereas here, that presumption is taken off by a much more pregnant presumption of the salaries being yet owing.

THE LORDS found the salaries due to the pursuers' father for his service preceding the last three years, before the citation in this process, prescribed *quoad modum probandi*, otherwise than by writ, or the defender's oath, that the same are still resting owing.

1715. *January* 18.—IN the foresaid action, as mentioned 3d December 1714, where the LORDS found the salaries due to Bailie Smith for his service, preceding the last three years, before citation in this process, prescribed *quoad modum probandi*, the pursuers reclaimed; and

*Alleged*, That whatever might be said as to the first two years, whereof the accounts are fitted; yet as to the second two years, whereof the accounts are not yet cleared, there could not be the least ground for finding the salaries for these years prescribed, since these came plainly to the case between Sir David Nairn and the Duchess of Buccleuch, No 7. p. 451.; for the accounts not being cleared, the salary due at that time can never be looked upon as prescribed.

*Answered* for the defender; That though a salary for these two years might be claimed when the pursuers come to count for the Bailie's intromission, yet that is not the present case, which is a pursuit for a great many salaries alleged due, which law presumes to have been paid; and the most the pursuer can urge, is, that the LORDS would reserve the consideration of the said two years salaries till they be called to count for their father's intromissions; before which time, it is no less ill founded to claim payment of these, than the other various claims; for it is presumed the factor *intus habet* to pay his own salary; and it is a piece of novelty to demand payment thereof, otherwise than by an action of exoneration and count and reckoning.

No 301.

*Replied* for the pursuers ; That the point came very well here to be decided ; for if these two years be due, and are preserved from the prescription, then there is place for an action for them. The speciality in the case of Sir David Nairn and the Duchess of Buccleuch consisted in this, that prescription could not be objected against Sir David, in regard he had been an intromitter, and was bound to charge and discharge himself, and so could not separate the salaries from the account, which in effect is an interruption of the prescription. Indeed, the pursuers could not hinder the Earl to answer *intus habetis*, and therefore they were ready to subject themselves instantly to account for these two years ; but if the Earl will not answer, as he may, and admit the count and reckoning, there is no reason, why this article of salaries may not now be claimed by way of action.

THE LORDS found, Prescription can take no place in any action of count and reckoning for the said two years intromissions, but that the same may be allowed as articles in the discharge ; but their Lordships, upon hearing parties next day, restricted the L. 100 Sterling libelled, of yearly salary for the two years not accounted for, to 800 merks yearly.

Act. Falconer.

Alt. Horn.

Clerk, Gibson.

*Bruce, v. I. No 14. p. 19. & No 29. p. 38.*

1715. June 23.

JAMES FORREST *against* The RELICT and CHILDREN of JAMES CARSTAIRS.

No 302.

A person having been alimmented in a boarding-house ; in a process against his representatives for the same, the Lords restricted the libel to three years preceding the citation, upon the presumption, that the pursuer would not lie longer out of his money, and that former scores were cleared.

JAMES FORREST pursues the Relict and Children of James Carstairs, as representing him, who represented Julian Finlay his mother ; which Julian did represent Mr Thomas Finlay, late schoolmaster in Drumeldrie, libelling, that the said Mr Thomas was several years boarded and entertained in the pursuer's house, where he died ; and concluding for payment of 200 merks yearly, during his abode there.

The defenders, denying the passive titles, *alleged* ; That the defunct being major, and no paction libelled, there was nothing due.

It was *answered* ; That the presumption of alimmenting *gratis* can take no place in this case ; because the pursuer did keep a public-house near the school, where several of the scholars were boarded, and the defunct, the schoolmaster, had his entertainment there also, being a convenient place both for him and his scholars, that they should be near the school and boarded together. And this is my Lord Stair's opinion, that the presumption of entertaining *gratis* ceases, where those who entertain are in use to furnish provisions for money.

“ Which the LORDS sustained.”