

defender *alleging* this action to be prescribed, conform to the act of Parliament *anno 1579*, whereby such actions are declared to be prescribed, except they be founded upon writ or oath of party, and that they are not probable otherwise; the LORDS repelled this allegiance, and found this intromission and action libelled might be proved by witnesses, and that the same came not under the act of Parliament excepted upon, which extended to house-mails, merchant-accounts, and others of the like nature, under which clause they found intromission with duties and farms of lands, and victual of lands, came noways; for albeit the master should not seek his farms within three years, it was found, that pursuit therefore might lawfully thereafter be sustained, and was probable by witnesses; but in the cause *Porteous against Herries*, 11th Dec. 1632, *voce PROOF*, it was refused by way of exception, but there the pursuit was upon writ.

Act. *Nicolson.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 2. p. 120. Durie, p. 680.*

1669. February 6.

*DOUGLAS against FORSYTH.*

ANNA DOUGLAS, as executrix to Anthony Roswall, pursuing James Forsyth, as conjunct debtor with Colonel Ker to her husband in two bonds, the one of 2000, and the other of 3000 merks; as likewise in a third bond of 4000 merks, which was deposited blank in the sum and filled up by Roswall himself, having got the same *vis et modis*; and besides these bonds pursuing upon a merchant-account, extending to near L. 500 Sterling, and having proved the delivery of the goods either to Colonel Ker, Forsyth, or their order; the LORDS did find as follows; *First*, That the third bond being filled up, as said is, by Roswall himself, after the date of the whole account of L. 500 Sterling, he could never crave any more than that sum as due by that account; and in respect that bond was filled up by Roswall himself, they did decern Forsyth to be free of all annual rent until this time, that he had proved delivery of merchant goods contained in the account. *2do*, They found, that a merchant-count being current for many years, and every year there being some of the goods and ware delivered, so that there was no interruption for a whole year; that, as to the first year, albeit there was no pursuit conform to the act of Parliament within three years, it did not prescribe. This seems to be against the act of Parliament, bearing no such exception. *3tio*, They found, that Forsyth was equally bound with Colonel Ker in the whole account, in so far as extended to the bond of 400 merks, and had subscribed the same; albeit there was neither a copartnery produced, and that the articles were distinct and different, some bearing Ker's receipt, and some Forsyth's.

*Fol. Dic. v. 2. p. 121. Gasford, MS. No 108. p. 38.*

G1 O 2

No 281.

No 282.

A merchant-account being current, and not intermitted one whole year, prescription begins not to run against the account of the first year, till after all the years current.