1677. *November* 13. Captain THOMAS WILSON *against* GEILLS FERGUSON and JOHN DALZEEL, her Husband.

CAPTAIN THOMAS WILSON pursues Geills Ferguson and John Dalzeel, her spouse, for payment of L.1138 Scots, owing for ale furnished by him to the said Geills her first husband, and then to herself.

ALLEGED for the defenders,—The account is prescribed by the 83d act Parliament 1579, since it was not pursued for within three years of the furnishing. ANSWERED,—Though the first articles of the account pursued on exceed three years, yet there are several articles of it within three years of the intenting this process, viz. some furnished in December 1673, and the summons is executed in November 1676, within the expiring of the three years; and there being a continued tract of trust, without interruption of a week all the space of the running account, it ought to be reputed as one entire debt, and have the benefit of an account-current, to be provable by witnesses. The defender OPPONED the act of Parliament.

This point being taken to interlocutor by Craigie, and enforced in the informations to the Lords, from sundry grounds in law, (which are to be seen in the information,) and particularly from Joannes a Sandes *Decisiones Frisiæ*, lib. 5. tit. 6. definit. 2. the Lords sustained the currency of the account *quoad* the whole, and repelled the allegeance, in respect of the answer.

Then it was ALLEGED for the defenders,—That as to those articles of the account that fell within the three years preceding the citation they would not controvert but the same might be proven *prout de jure;* but as to the furnishing that was without the three years, it could not have the same privilege, unless the pursuer would offer to prove, not only the furnishing and delivery of the drink, but likewise that the price thereof was yet resting owing unpaid, and that only *scripto vel juramento* of the defender: otherwise it would be of a most dangerous consequence, if, upon the pretence of a current account, (suppose of 30 years together, whereof the last two or three articles are within the triennial prescription, and all the rest prescribed,) it were sufficient to prove single delivery and furnishing of ale *prout de jure* and by witnesses all that space, without proving that the same is owing, whereas it is to be presumed that much of it is from time to time paid. (See *4th June*, 1679, *Ewart.*)

ANSWERED,—The pursuer opponed the Lords' interlocutor, by which they had found he was in the case of a current account, and that the currency was sufficient to interrupt prescription; and in all debts that had *tractum temporis*, it is the last act that consummates and makes up the conjunction of parts, and one entire debt; and the pretended inconveniency meets not here, where the oldest article is not above seven years; and the inconvenient on the other hand is to be pondered, that this would tend to loose all confidence and society. And to oblige them to prove, in such a case, that the debt was yet resting owing unpaid, were to prove a negative, which, *de jure*, proves itself, except they subsume on payment. And, likewise, it would evacuate the act of Parliament, that allows all counts that are really within three years, or by law and interpretatively reputed such, to be proven by witnesses; and this allegeance downright contradicts the Lords' interlocutor.

The Lords found the whole count probable by witnesses, and that the pursuer needed prove no more but the delivery of the drink.

Then ALLEGED absolvitor for the defenders,—Because they offered them to prove by witnesses beyond exception, that the general and known custom of the

whole brewers of Edinburgh is to count with their customers and clients (callants) by two nick-sticks, one kept by either party; and that, when they pay the brewers, they get no other discharge but the breaking of the said nick-sticks, which is esteemed equivalent to a discharge. And that *de facto*, in this case, he offered to prove, by the pursuer's servants and several others, that there were nick-sticks from time to time used betwixt the pursuer and defenders; and that, accordingly, they counted with the pursuer and his clerk to the brewery, called Alexander Wilsone, and thereupon the whole nick-sticks were broken of consent of the said clerk. ANSWERED for the pursuer,—That the lawyers told us of many ways of probation, either for constitution or dissolution of debts, as *scripto, juramento, per testes, confessione, per adminicula et conjecturas*, but I had never met with the probation by nick-sticks; that being *vana et levis præsumptio*, and used only *tanquam libri idiotarum* by such as could neither read nor write, and not by such as kept count-books; and nick-sticks could be no sure rule, since they were kept by the most inferior servants, who carried the ale to the customers' houses. See the answers beside me.

The Lord Craigie found the allegeance thus complexly taken, relevant, viz. that it is the general known custom of all the brewers of Edinburgh to count by nick-sticks only with their customers and clients, whereof one is kept by the brewer and the other by the customer; and that when the customer or client pays the brewer, they get no other discharge but by breaking of the nick-sticks, to be proven by famous witnesses beyond all exception; and that there were nick-sticks used from time to time betwixt the defender and pursuer, to be proven by the pursuer's servants or others; and that thereupon the whole nick-sticks were broken, and that after counting with the clerk of the brewery, in presence of the pursuer or his said clerk, they being silent and not contradicting, to be proven *prout de jure*.

I ALLEGED, his consenting to the breaking the nick-sticks could only be proven by his oath or writ, since it was *magis actus animi* than *facti;* and naked consent fell not *sub sensu aliquo corporeo*, upon which witnesses can only depone; and that it might be easily mistaken, and as liable to it as promises were, which, therefore, our law permits only to be proven *scripto vel juramento*. Yet Craigie sustained it relevant that they were present, silent, and not contradicting; seeing *qui tacet in actu eum tangente, et quem impedire potest, sibi præjudicat, et consentire videtur*. See Dury, *26th July*, 1631, *Shaw* and *Bishop of the Isles, L.* D. *De Regulis juris*. And so he found it probable by witnesses.

Then the defender ALLEGED,—That some of the ale in the count was furnished in her first husband's time, and he being dead, and she not representing him, she could not be liable. ANSWERED,—The allegeance ought to be repelled; because she was not only *præposita negotiis*, (but this makes her husband's representatives liable,) but also had accepted of a disposition from her first husband with the burden of his debts, at least of this. The Lords found this of the disposition relevant. But what if she ascribe her possession to a right of liferent, and not to this disposition, and so elude the passive title? 1*mo*, Her taking seasine was an using of that disposition. 2*do*, Then let her renounce her disposition of property, that the pursuer may have access to affect the same. The seasine alone will not prove, though it bear the right was clogged with the debts, for it is only *assertio notarii*, and the ground of it in the defender's own hands must be produced.

That same day having been assigned to the defenders for proving their exception and defence about the nick-sticks that was assigned to the pursuer for proving his libel and the furnishing, and the diligence for proving the said defence not being

debite executed to the day, and so the term being circumduced against them for not proving; they gave in a bill to the Lords, bearing, that in case the pursuer had led no probation for proving his libel, they had no necessity to prove their defence that elided it; and that the pursuer had only on the very day of the act led his witnesses, so that they were secure till then; and that he had a diligence; therefore craved the day might be prorogued to him for proving his exception. The Lords granted them a farther day for leading their witnesses, providing they closed their probation before the pursuer's probation came to be advised, so that he might not be delayed; otherwise, the Lords declared, they would have no respect thereto. It seems, indeed, to be an error in our form, that where both a libel and exception are admitted to probation, one day should be assigned for proving of both; for there should be a longer day given to the defender in that case, to the effect he may first see whether the pursuer proves his libel or not; for if the pursuer prove it not, why should we burden the defender with the superfluous probation of his exception?

This action, and its probation, came to be advised in the Innerhouse on the 26th of February, 1678, (so that in the space of four months and less the haill process was carried on and the same advised by the course of the roll,) and the Lords found the pursuer's claim and furnishing, with the passive title of accepting a disposition, fully proven; and the defence upon the custom of the nick-sticks, &c. not proven; and therefore decerned. *Advocates' MS. No.* 651, *folio* 305.

1677. *November* 13 and 14. THE KING'S ADVOCATE and SOLICITOR *against* STRAUCHAN of Kinnaldy.

November 13.—THE Advocate, and Sir William Purves as his Majesty's Solicitor, pursues Strauchan of Kinnaldy for the casualty of ward and marriage, fallen by the decease of ——— Bannerman of Elsick, who stood last infeft as the King's vassal in these lands, and who had disponed them in favours of this Kinnaldy a little before his death. *Vide supra*, No. 571, *Alex. Arbuthnot* against *Barclay*, 14*th June*, 1677.

It was ALLEGED,—That no casualty was due by Elsick's decease; because he was denuded by disposition, whereupon resignation had followed in exchequer before his death; and so the King having accepted of his resignation in favours of a third party, Elsick was denuded and discharged of any thing could befal the King by his decease, and the other came to be in place of vassal. Whereunto it was

REPLIED for the King, by Sir George M'Keinzie, his advocate,—That the rule in law to know if those casualties of ward and marriage were befallen to the superior, yea or not, was, to consider whether the person by whose decease they are contended to be opened and devolved, stood last infeft, yea or not; or if he had infeft another publicly holden of the superior. And it impinges on the principles and foundations of the feudal law to assert, that a naked resignation, without any more following thereon, does so denude, as to intercept the casualties falling by the decease of the resigner; for however these casualties be odious, and so not to be extended, yet this is no stretch, but a most natural and genuine consequent of feudal rights; by which a resignation is an incomplete step, and gives no real right to the property,