

No 297.

as serjeant, which she *contended* was sufficient to found her claim, unless the defenders prove payment.

*Alleged* for the defenders; The action is prescribed *quoad modum probandi*, not being commenced within three years, conform to the act 83d, Parl. 6. James VI. concerning the prescription of servants fees and the like debts, not founded on writ; for a soldier's pay is a debt like unto a servant's fee, both being alimentary, and neither using to be founded on, or discharged by writ, or presumed to lie long over unpaid; so, in a case betwixt Captain Dundas and Lieutenant-General Holburn, the Captain was presumed to have got his share of levy-money, since he did not question it *de recenti*.

*Answered* for the pursuer; There is no parity betwixt an ordinary servant's fee and arrears of pay due to the Queen's servants or soldiers; because no Lieutenant-General or Colonel can be pursued for these till he receive them from the government, which is sometimes eight or nine, or more years, as the government thinks fit to delay the same. So a soldier's arrears were found not to fall under the three years prescription, in the case of Captain Slezer and Robert Forrest *anno* 1701, and in that betwixt General Ramsay and Serjeant Heriot in the year 1705.—See APPENDIX.

THE LORDS found, That the three years prescription takes not place in the case of a soldier's arrears, which is not like an ordinary servant's fee.

*Fol. Dic. v. 2. p. 120. Forbes, p. 346.*

1709. November 29.

JEAN MASON, Relict of Mr William Thomson, Writer to the Signet, *against*  
The Earl of ABERDEEN.

No 298.

Action upon a writer's accout found to prescribe *quoad modum probandi*, notwithstanding his having his client's papers in his hands *jure hypothecæ*. The triennial prescription was found interrupted by a single article contracted within the three years.

IN the action at the instance of Jean Mason, as executrix to Mr William Thomson, against the Earl of Aberdeen, for payment of an accout for writings, expeding charters, taking infeftments, and such like business done by the defunct for the Earl;

*Alleged* for the defender; The accout is prescribed *quoad modum probandi*, not being pursued within three years of the date of the last article therein.

*Replied* for the pursuer; Prescription cannot take place; because the writs relative to the accout were in Mr Thomson's custody at his decease; and by law he had *jus hypothecæ*, &c. therein, for payment of his accout; for where a creditor has right to retain a subject belonging to his debtor, he cannot be thought negligent in delaying to sue for payment; nor could he well seek payment of his accout, till once the writs were called for. So that the very having of the writs doth interrupt any prescription that can be obtruded against the articles as to the manner of probation.

*Duplied* for the defender ; Writers cannot plead any hypothec from the sole having of an employer's writs, unless they make appear that a debt is resting ; hypothecation being but an accessory security. If the mere having of the writs did interrupt the prescription, no person that had been employed as a writer, could ever thereafter be used safely as agent or otherways, in business formerly expedite by himself.

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THE LORDS found, That Mr Thomson's having the Earl's papers in his hand *jure hypothecæ*, doth not hinder prescription to run ; and that therefore the pursuer behoved to prove the compt to be resting owing by the Earl's oath.

But thereafter, December 13. 1709, the pursuer *pleaded*, That the currency of the accompt was continued by an article of a discharge of a back-bond granted by the Earl to Sir James Elphinston, and drawn by Mr Thomson within three years of commencing the process.

*Alleged* for the defender ; It is not a single *item* in three years that will make an accompt current, but a closs track of employment ; for, when people have occasion but for a single paper once in a year, it is usually paid at delivery, seeing the matter will not furnish out an account ; and it may be said that a current accompt, as allusion, requires continued employment and currency, the insensible gain whereof is understood to stop the advancer's craving.

*Answered* for the pursuer ; There is no fixed time known in our law or practice, for the connecting articles in accompts, which happen according as people have occasion to call for things ; and it is sufficient for the creditor in an accompt, that he was ordinarily employed by the debtor when he had business.

THE LORDS found, That the single article of the discharge being subscribed by the Earl, is relevant to continue the currency of the accompt ; and were clear that there is no distinction to be made betwixt merchant and writer accompts.

*Fol. Dic. v. 2. p. 121. Forbes, p. 356.*

1711. February 21.

JOHN WATSON, MASON in Broomhill, *against* THE LORD PRESTONHALL.

IN a suspension at the instance of the Lord Prestonhall of a charge given to him by John Watson, for payment of L. 219 : 17 : 2, resting to the charger, for building some mason-work, conform to a contract entered into betwixt the charger and the suspender ; the pursuer offered to prove by witnesses, that he had performed the work. It was *alleged* for the suspender, That the performance of the work not being proved by the contract, is prescribed *quoad modum probandi* by witnesses, since it was not insisted upon within three years, act 83d, Parl. 6th, James VI. But the LORDS found, That the said act of Parliament took no place here, the bargain being proved by writ.

No 299.  
The performance of a bargain entered into by writ, falls not under the triennial prescription.

*Fol. Dic. v. 2. p. 120. Forbes, p. 502.*