

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