1680. *February* 12. ROSS *against* the MASTER of SALTON.

No 286.
Servents' wages prescribe *de anno in annum*; and so every year's wages runs a separate prescription.

JAMES ROSS pursues the Master of Salton for payment of his fees, as his chamberlain and grieve for many years, and referred the modification thereof to the Lords. The defender *alleged*, 1*mo*, That the libel is not relevant, not bearing any fee promised or agreed on; 2*do*, The proving of a fee by witnesses, can only be for the space of three years before this pursuit; but for prior years they are only probable *scripto vel juramento*, conform the act of Parliament anent merchants' counts, house mails, and servants' fees. The pursuer *answered*, That his service being profitable, he ought to have a fee in recompence thereof, albeit none had been promised, as *negotium utiliter gestum*; and as to the manner of probation, albeit the act of Parliament induces a prescription as to probation by witnesses, unless there be a pursuit within three years; yet custom hath interpreted that three years is to be reckoned from the last article of merchants' current accounts, which *paritate rationis* must also hold in servants' fees which are current. The defender *replied*, That *in negotiis gestis*, expenses only profitably made induce an obligation, without any further recompence for the profit arising from such a negotiation; and therefore servants can claim no fee, unless by paction or use of payment; and as to the manner of probation, albeit custom hath extended merchants' counts not to prescribe till three years after the last article; yet there is no reason to extend the same to servants' fees, because in merchants' counts there is a count-book, wherein the counts of merchants are extant, which adminiculates the verity thereof, which is not in servants' fees; and it is presumed that these being for their necessary provision, must be paid yearly; and if anterior years be insisted for, the question then being, whether the masters' oath or the servants' shall end the controversy, it is safer to refer it to the master's oath, seeing none uses to take discharges in such cases.

THE LORDS found no fee due, unless there had been use of payment, or a particular fee named, or a reference to the Master's discretion, in which case the Master behoved once to declare his discretion, which if it were unsuitable, the Lords might extend it *ad arbitrium boni viri*; and found the fees were only probable by witnesses, three years before the citation, and as for prior years, only by writ or the oath of the Master.

Fol. Dic. v. 2. *p.* 121. *Stair, v.* 2. *p.* 755.

1680. *February* 12. THOMAS WILSON *against* GEORGE TOURS.

No 287.

IN this affair there is a current accompt with Aikman, former husband to Tours's wife. He dies, and the accompt is continued with the relict. It is

No 287. thought, if what was owing by the husband be not pursued for within three years after the first husband's death, that the currency and continuation of the furnishing and accompt to the relict will not stop and hinder the husband's accompt from prescribing *quoad modum probandi* by witnesses; and this being reported, "the Lords found so" on the 28th July 1680.

1680. *July* 28.—Thomas Wilson merchant against George Tours, and Aikman's relict, "The Lords find the furnishing of wine and ale to the wife in her widowhood, does not make up a current accompt with the wine and ale furnished to her first husband in his lifetime, so as to hinder triennial prescription; and therefore find the furnishing in the first husband's time prescribed *quoad modum probandi* by witnesses, unless it was interrupted *debito tempore*. And as to the moveables of the house, find it relevant to Wilson to prove that he only lent the same; and repel their allegeance of a right on prescription and possession, that being only presumptive, and elided by the offering to prove *lent*. *Item*, Repel the defence for Janet Dick, that the moveables intromitted with by her were heirship moveables, in respect she had no right thereto." See Proof.

Fol. Dic. v. 2. *p.* 121. *Fountainhall, v.* 1. *p.* 84. & 110.

No 288.
Furnishing after three years cannot be proved by witnesses, either by way of action or exception; but a person having writ to a merchant desiring him to furnish necessaries to his wife, and to place it to his account, the suit here being founded upon writ, the quantity was found probable by witnesses after three years.

1681. *July* 5. Dickson *against* M'Aulay.

Marion Dickson, as executrix to Mr William Cockburn her husband pursues George M'Aulay for the entertainment and furnishing to his wife and his son, for the expenses of christening, nursing, and burying of him, and for probation produces a letter of the defender's to Mr William, "to let his wife want nothing necessary, and to place it to his accompt." The defender *alleged* compensation, because he entertained the defunct's unmarried daughter Catharine Cockburn for the space of two years, and likeways Patrick Cockburn his son for the space of six months in his sickness. The pursuer *answered*, That the entertainment and furnishing by the defender is only probable *scripto vel juramento*, being long past three years since it was done. It was *replied*, That the pursuer's debt is not totally proved by writ, but witnesses must prove the quantities, and it is also past three years; and albeit the defender hath no action for the furnishing made by him, but by oath or writ, yet it is competent by way of defence, and the defender was *in tuto* not to pursue, because he knew that the pursuer would have compensed against him, and he did also conceive that if the pursuer at any time should insist, his compensation would take effect by exception,

The Lords found that the pursuit being founded upon writ, viz. "the defender's missive letter," the quantities might be proved by witnesses, even after