

No 388. in respect of the said Gideon Murray's tacitunity in not pursuing the executors of John Wright, for the space of 5 years, for the wares furnished *in anno* 1649, of the presumption of payment, Gideon's bond being granted *in anno* 1650, repelled that compensation; and found that, albeit it was a concluded cause, and probation renounced, they would yet repair Beatrix Thomson the pursuer to her reply of prescription, the debt for the merchant ware not being pursued *debito tempore*, which was omitted the time of the dispute; which, in my opinion was *durum*, being against the form of process, and which was *acriter contraversum*. But the Lords had respect to equity, and the presumption of payment.

*Newbyth, MS. p. 27.*

No 389. 1683. *November* JAMES BALFOUR *against* LANDAILS.

A DEBTOR by a bond pursued at the instance of an assignee, proponed compensation, upon his having alimeted the cedent several years before intimation of the pursuer's right.

*Alleged* for the pursuer; That aliment falling under King James VI.'s act of Parliament about mens ordinaries, merchant accounts, and the like, prescribes *quoad modum probandi* by witnesses, unless pursued within three years after the alimentering.

*Answered* for the defender; That he being debtor *intus habens*, he needed not to pursue. And though he could not pursue after three years, and prove his libel by witnesses, yet he could prove the alimentering by way of defence *prout de jure*, even after the three years.

THE LORDS repelled the answer, and found the defence probable only *scripto vel juramento* of the pursuer.

*Harcarse, (PRESCRIPTION.) No 765. p. 216.*

1711. *February 16.*

MARGARET BOURBON and her Husband *against* JAMES MONGOMERY, Merchant in Glasgow.

No 390.  
The septennial prescription being alleged against a cautionary obligation, the charger answered, that for a part of the time he

MARGARET BOURBON having, as executrix to Archibald Bourbon, caused charge James Montgomery for payment of L. 113 : 6 : 8, contained in in a bond granted to the defunct by him, as cautioner for William Boig, John Crawford, and John Boig; James Montgomery suspended, upon this ground, That the bond *quoad* him a cautioner was prescribed, no diligence having been done thereon within seven years after the date, in the terms of the act of Parliament 1695.