

No 387.

1728. November 26. FRASER *against* M'KENZIE.

AN apparent heir, in possession of an estate by singular titles, having thereafter purchased in an apprising, it was found, That the apparent heir's possession did preserve the said apprising from the negative prescription: It being *pleaded*, in the general, That where a possessor has many rights in his person, all of them distinct titles of possession, prescription cannot run against one of them, so long as he keeps possession; for what can he demand upon any of these titles, but to have the possession; which if he already has, there can be no occasion for an action. But afterwards, upon a reclaiming bill, the Lords found no necessity of determining this point, having taken it up upon a separate footing. (See APPENDIX.)

*Fol. Dic. v. 2. p. 125.*

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S E C T. V.

What Effect, if the Pursuer lay open to a Ground of Compensation?

1665. June 17. GIDEON MURRAY *against* BEATRIX THOMSON.

No 388.

An account was found to be prescribed *quoad modum probandi*, although the debtor had claims of compensation.

GIDEON MURRAY having obtained decret against for certain merchant ware, wherein he was holden as confest, and thereafter reponed, and the decret turned in a libel, the receipt of the goods was found probable, *prout de jure*, and was accordingly proved; and the cause being concluded, and the depositions advised, it was *alleged* for the defender, *1st*, That he produced, and instantly verified, that the pursuer had granted him a bond, after the furnishing of the account, of a greater sum, which must be presumed to have included satisfaction of the account. *2dly*, The decret was more than three years after the furnishing, and so was not probable by witnesses; but that manner of probation was prescribed by the act of Parliament. The pursuer *answered* to the first, That both those exceptions were competent, and omitted; and now, after probation taken, there was no reason to sustain that allegiance; for after litiscontestation, no new exceptions can be admitted, unless they be instantly verified and emergent, or at least new come to knowledge, as this is not; for it was obvious, being founded upon so known a law, as to the prescription: And as to the other, It is but a weak presumption, noway relevant,

unless the posterior bond had exprest to have been after count and reckoning. The defender *answered*, That the Lords might *ex nobile officio* reponne parties to defences, instantly verified, after litiscontestation; and albeit they ordinarily reponne them, when the exceptions are emergent or new come to knowledge, yet, in other cases, *ex officio*, they may, as when there is so pregnant a presumption concurring. *2dly*, Albeit prescription hinder pursuits active, yet, seeing the defender was creditor by bond, in a greater sum, the pursuer needed not pursue for the account; *quia intus habuit*; and the other party might have compensated upon the bond; and therefore, as in the civil law, *in debitis naturalibus et non civilibus licet non dat actionem dat tamen exceptionem*; so here the pursuer may except upon account after three years.

THE LORDS found the presumption not relevant; and found, that the manner of probation being prescribed, it could not be made use of, either by action or exception, albeit there was a compensation competent; yet it befel not *ipso jure*, seeing it was not liquid, but liquidable by the other party's oath. But as to reponing in this state of the process, though many of the Lords were in the contrary, yet seeing the exception was but a prescription, which is but by positive law, and odious, so that the pursuer might as well have craved to be reponed against the prescription, as the defender against his omission of a palpable defence; yet, in respect of the prescription, and that the party was poor, the LORDS reponed. (See PRESUMPTION.)

*Fol. Dic. v. 2. p. 125. Stair, v. I. p. 284.*

\* \* \* Newbyth reports this case :

UMQUHLE John Wright, merchant in Dunse, and Gideon Murray, merchant in Edinburgh, having for many years traded together, after which Gideon, by his bond, dated 2d May 1650, granted him to be addebted to the said John Wright in the sum of L. 585, for the price of certain sufficient merchandize bought and received from the said John White, he obliged him to pay betwixt and the 1st June thereafter, with penalty and annualrent. The said John Wright dying *in anno* 1650, gives up, in his testament, as resting of the fore-said sum, 400 merks, with annualrents; and Beatrix Thomson, the relict, being executrix confirmed to John Wright, pursues the said Gideon for payment, and recovers decret against him; which being suspended, there was an eiked reason of compensation, viz. that the suspender obtained decret against the charger Beatrix Thomson for L. 305 resting by the defunct, which ought to compensate; to which it was *answered*, That the decret stands suspended, and is under reduction, upon this reason, that she is holden as confessed, and ought to be reponed to her oath; and that the goods for which the sum is decerned are alleged to have been recovered by the defunct *in anno* 1664, and so cannot compensate, being furnished before the granting of the bond, which was *in anno* 1650, the decret *hinc inde* being turned into a libel. THE LORDS,

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.