

1675. December 16.

SOMERVILLE *against* The EXECUTORS of MR JOHN MUIRHEAD.

JAMES SOMERVILLE pursues the Executors of Mr John Muirhead, for payment of an account of writing by the pursuer for the defunct. It was *alleged*, That this account was only probable by writ, seeing the defunct, whose oath could only prove, is dead, and that there are three years past after the most of the articles of this account; and therefore by the act of prescription anent merchants' accounts, it is not probable by witnesses. It was *answered*, That the three years have been always accounted from the last article of an account current; for the statute speaking expressly of the prescription of the probation of an account, the years of prescription cannot be enumerated from the date of every article; for an account necessarily comprehends more articles, and therefore continues always an account while it is current. It was *replied*, That though it hath been so reckoned in accounts of merchants' books, stablers, &c. yet this was never extended to writers' accounts; for seeing employment must be proved in them, which is a mandate, it cannot be proved by witnesses. It was *duplicated*, That the statute bears, not only merchant-accounts and others specially, but a general clause of all such like, and that there is no imparity or specialty in the accounts of writers, agents, factors, or procurators; for the reason of the whole being, that *de jure communi* witnesses are receivable in all probations, which our custom hath limited, that where writ useth to be adhibited, and is neglected, witnesses are rejected; and by this statute is limited to three years in the matter of accounts, which is not as to every article, which is no account; but to an account consisting of articles, and so long as it is current it is always esteemed one account; but what count is a current count, is a part of the probation of the reply, and is much *in arbitrio judicis*, according to the nature of the particulars in the account; neither will it be inferred that an account will be still current, although betwixt every article there be almost three years, for thereby an account current might last 40 years; and as to the employment, it may be proved by the writs that were written by the hand of the pursuer or his servants.

THE LORDS found the answer of an account current relevant, though a writer's account, reserving to themselves upon inspection of the account, whether it were current or not.

*Fol. Dic. v. 2. p. 120. Stair, v. 2. p. 385.*

\* \* \* Gosford reports this case :

IN an action pursued at Somerville's instance, for payment of the sum of L. 214, as being employed by the defunct John Muirhead, as his ordinary writer, and having written diverse securities betwixt him and the Earl of Carnwath, which

No 285.  
Prescription was found to militate against writers and agents, but not to begin to run till after the last act of current employment.

No 285. did depend several years before his death, for which he had given in a special account, condescending upon the several writs and securities which did amount to that sum; it was *alleged*, That by the act of Parliament anent prescription, made by King James the VIth, Parl. 6. cap. 83., all such actions for counts do prescribe, if they be not intended within three years, unless it be proved *scripto-vel-juramento*; whereas the defunct, who is alleged to have employed the pursuer, is now dead, and witnesses cannot be received to make up such a debt against the Executors, and many of the articles of this account are alleged to be above three years before his death; likeas, it was farther *alleged*, That a writer's account could not be sustained after three years, to be proved *scripto-vel-juramento*, the act of Parliament only giving that liberty to merchants' accounts, servants' fees, and the like, making no mention of writers' accounts; and that it ought to be presumed, that the pursuer was truly paid of this account, in so far as it was presently offered to be instructed, that during the running of that account, the pursuer did grant bond to the defunct for the sum of 500 merks, being borrowed money, which certainly he could never have done, if there had been money due to himself for writing accounts. It was *replied*, That the account libelled being a current account, did not prescribe, but three years after the writing of the last articles, as hath been often found in the case of merchants' accounts, servants' fees, or others; and there is the like reason for writers' or agents' employments, who are not in use during the currency of their employments to take bonds or tickets for their accounts; but it is sufficient that, within three years after their last employment, that they pursue and may prove what they libel by witnesses; and as to the granting bond during the currency of the account, it could not infer any payment thereof, seeing the bond did bear for borrowed money, and the pursuer did not thereby prejudge himself of what was due by his employment. THE LORDS having considered the act of Parliament, did find, that, not only merchants servants, and others named, ought to pursue within three years, but likewise that the act did bear, 'and others of that nature,' so that writers not being in use to take bonds or tickets during their employments, were well founded upon the said act of Parliament, to pursue for their accounts; and as it hath been sustained, that prescription begins not to run but three years after the closing of the current accounts of merchants, servants' fees, or men's ordinaries; so it ought to be sustained in this case, of a writer's account to be proved by witness, and the action being intended within three years of the last employment, was probable by witnesses; neither did they regard the presumption founded upon the bond being for borrowed money, no way relating to the account; albeit it was of weight, being proponed for minors, who knew nothing of the verity of the said employment; but to take that off, they ordained the pursuer to give his oath upon the verity of that account, that he never got payment thereof any manner of way.