

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

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.

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 286.

Servants' wages prescribe *de anno in annum*; and so every year's wages runs a separate prescription.

No 287.