

but the LORDS finding the law general, would not distinguish so nicely; for then it may be extended to many things else, as watches, rings, and silver-work; that because the subject is extant, therefore the prescription should not take place.

No 294.

Fol. Dic. v. 2. p. 120. Fountainball, v. 1. p. 619.

1708. July 16.

THOMSON and HAY *against* Earl of LINLITHGOW and His CURATORS.

No 295.

THE LORDS refused to deduct any part of the *annus deliberandi* after the debtor's death to hinder prescription against the creditor, because the debtor's heir was served and retoured within the year.

Forbes. Fountainhall.

. This case is No 58. p. 4504. *voce* FOREIGN.

1709. November 11. Lord and Lady ORMISTON *against* HAMILTON.

No 296.

FOUND that an accompt for a person's funeral, mournings of the family, and their maintenance to the next term after his death, taken off by a *negotiorum gestor*, who was neither heir nor executor, did not continue the currency of a former accompt due by the defunct to the same merchant to interrupt prescription thereof *quoad modum probandi*.

Fount. Forbes.

. This case is No 2. p. 4981. *voce* FUNERAL CHARGES.

1709. July 14.

POOR KATHARINE GRAHAM, Relict of John Murray, sometime Gunner in the Castle of Edinburgh, *against* The Earl of LEVEN and Major COLT.

IN the action at the instance of Katharine Graham, as executrix to her husband, against the Earl of Leven, governor of the Castle of Edinburgh, and Major Colt, paymaster to the garrison, for payment of L. 41 : 15 : 5d. Sterling resting of her husband's pay as serjeant for several months preceding September 1698, at 1s. 8d. *per diem*, conform to the establishment; the pursuer offered to prove by the muster-roll, or by witnesses, that her husband served so long

No 297.
A soldier's arrears found not to fall under the three years prescription.

No 297.

as serjeant, which she *contended* was sufficient to found her claim, unless the defenders prove payment.

Alleged for the defenders; The action is prescribed *quoad modum probandi*, not being commenced within three years, conform to the act 83d, Parl. 6. James VI. concerning the prescription of servants fees and the like debts, not founded on writ; for a soldier's pay is a debt like unto a servant's fee, both being alimentary, and neither using to be founded on, or discharged by writ, or presumed to lie long over unpaid; so, in a case betwixt Captain Dundas and Lieutenant-General Holburn, the Captain was presumed to have got his share of levy-money, since he did not question it *de recenti*.

Answered for the pursuer; There is no parity betwixt an ordinary servant's fee and arrears of pay due to the Queen's servants or soldiers; because no Lieutenant-General or Colonel can be pursued for these till he receive them from the government, which is sometimes eight or nine, or more years, as the government thinks fit to delay the same. So a soldier's arrears were found not to fall under the three years prescription, in the case of Captain Slezer and Robert Forrest *anno* 1701, and in that betwixt General Ramsay and Serjeant Heriot in the year 1705.—See APPENDIX.

THE LORDS found, That the three years prescription takes not place in the case of a soldier's arrears, which is not like an ordinary servant's fee.

Fol. Dic. v. 2. p. 120. Forbes, p. 346.

1709. November 29.

JEAN MASON, Relict of Mr William Thomson, Writer to the Signet, *against*
The Earl of ABERDEEN.

No 298.

Action upon a writer's accout found to prescribe *quoad modum probandi*, notwithstanding his having his client's papers in his hands *jure hypothecæ*. The triennial prescription was found interrupted by a single article contracted within the three years.

IN the action at the instance of Jean Mason, as executrix to Mr William Thomson, against the Earl of Aberdeen, for payment of an accout for writings, expeding charters, taking infeftments, and such like business done by the defunct for the Earl;

Alleged for the defender; The accout is prescribed *quoad modum probandi*, not being pursued within three years of the date of the last article therein.

Replied for the pursuer; Prescription cannot take place; because the writs relative to the accout were in Mr Thomson's custody at his decease; and by law he had *jus hypothecæ*, &c. therein, for payment of his accout; for where a creditor has right to retain a subject belonging to his debtor, he cannot be thought negligent in delaying to sue for payment; nor could he well seek payment of his accout, till once the writs were called for. So that the very having of the writs doth interrupt any prescription that can be obtruded against the articles as to the manner of probation.