

Thereafter the pursuer *contended*; That interruption must be sustained in his favours from the year 1638, seeing he was in the King's army in England, and so *absens reipublicæ causa*; which the LORDS repelled, because he might have assigned or pursued, notwithstanding his being in the King's army.

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*Harcarse, (PRESCRIPTION.) No 758. p. 214.*

1698. November 24. FLETCHER of Aberlady against FLETCHER of Salton.

I REPORTED Fletcher of Aberlady against Andrew Fletcher of Salton, who had been tutor to Aberlady's uncle, and in the compt and reckoning some articles fell to be controverted. The *first* was, That Salton, the tutor, craved allowance and deduction of L. 2400 Scots, which Sir Andrew Fletcher, his pupil's father, had uplifted of his means; for proving which article of discharge, Salton produced, *1mo*, A registered factory he had given to Sir Andrew, his uncle, in March 1765, when he went abroad, to uplift his rents and annualrents, and sell his victual, &c.; *2do*, He produced a holograph compt-book, all written with the said Sir Andrew's hand, containing his whole domestic debursments *de die in diem*, and a particular account of what he uplifted of Salton's money, either from his debtors, or the baxters and brewers who had bought his victual, by virtue of the factory, with a petty account of what he had expended on his affairs, and drawing it to a balance, he was debtor in the sum aforesaid;—*3tio*, He produced a discharge given by the said Sir Andrew, as factor, to Sir George Kinnaird, of a year's annualrent of L. 8000 he owed Salton; all which conjoined with the compt-book, the factory antecedent, and the discharge subsequent, were a sufficient verification and instruction of that debt whereof Salton craved allowance from his pupil. *Answered* for Aberlady and the Laird of Culter, his tutor, That the writs produced proved no debt owing by Sir Andrew or his representatives, save only the discharge of Sir George Kinnaird's annualrent, which being subscribed under his hand, they are willing to allow; but the compt-book can never constitute nor prove a debt for Salton against Sir Andrew's heirs, for these five reasons; *1mo*, By the law of Scotland, no writ is probative unless it be subscribed, and even when it is signed, it is null, if it want the writer's name and witnesses. It is true, there is a specialty introduced in merchants' compt-books, that they prove against them, but that is when they are produced by themselves, and founded on; but this privilege was never extended to gentlemen's compt-books; for *Mascardus de probationibus*, and all the other doctors, speak of the *libri mercatorum* only, which in some cases in Italy *fidem faciunt pro scribente*, but *semper probant contra scribentem*; but with us neither prove for nor against the writer, unless subscribed, which this book is not. The *second* objection is, That it can never operate in favours of Salton, because, on his uncle Sir Andrew's death, he made himself master of

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Four years during which a party had been under forfeiture were deducted from the vicennial prescription of a holograph writ.

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all his papers, and of this amongst the rest, and is now produced by him in his own favours to prove one article for him ; and *non constat* but there might have been other books and memorials to clear and take off this debt, which the pupil, now after 23 years, cannot be burdened to instruct ; it is enough that it might have been, and the presumption lies against the tutor who intromitted with the writs *per universitatem* ; and if this were allowed, all the security which law has designed for minors may be rendered precarious ; and this was one of the reasons why a debtor or creditor to the pupil might not be a tutor by the civil law. *3tio*, This book is imperfect, wanting some leaves at the beginning, and so suspected, and not probative. *4to*, The partial discharge and intromission of Sir Andrew, the factor, with Kinnaird's annualrent, cannot adminiculate the book ; for factors liable for actual intromission have been found liable for no more, though they entered into possession, seeing *limitata causa limitatum producit effectum*, January 1685, Lady Anne Gordon *contra* the Earl of Aboyne, See APPENDIX. *5to*, Though this book were probative, yet it is prescribed by the act of Parliament 1669, declaring all holograph writs not insisted in for 20 years to prescribe, and it is more since this book was written, or the period of Sir Andrew's death. *Replied* for Salton, to the *first*, That it was not the practice to subscribe compt-books ; neither does the not-subscription lessen their faith, where they are adduced against the writer, who would insert no debt on himself if it were not true ; and there is no reason for distinguishing whether it be a merchant's compt-book or another's, 17th December 1675, Laurie, *voce* PROOF. To the *second*, Salton's coming to the possession of this book being warrantable and legal, as his cousin's tutor of law, it cannot be detorted to his prejudice ; and that there were other books and scrolls abstracted is *gratis dictum*, and not to be presumed, being a delinquency ; neither could there be any payment of it between posting it in the book and Sir Andrew's death, for Salton was not then in Scotland, and it comes down till within a month of his death, being discontinued and broke off by his sickness, and is most full and accurate till that time, To the *third* objection, It is obvious to ocular inspection the leaf wanting has been of no use, but clean paper ; for it begins with an index, and then follows page first of the compt. To the *fourth*, The discharge fortifies the book, even *quoad* the other articles ; because it quadrates exactly with one of them. As to the *fifth*, (which is the most material objection) that it is prescribed ; *answered*, *1mo*, However it might be prescribed if he were now pursuing by way of action, and adducing the book *in modum probationis* of the debt ; but when he repeats it by way of defence and exception in the compt and reckoning, only to exoner himself of a debt, it never prescribes, but he may found on it *quandocunque* he is pursued to compt ; and in effect when he turned debtor by his intromission *qua* tutor, he was also creditor by the book, and so there is either compensation or retention, and he needed not pursue for his debt, seeing *intus habebat*. *2do*, The book was made use of within 20 years for the recovery of a debt against Menzies of

Pitfoddles, and so not prescribed. *3tio*, The summons of compt and reckoning is within the 20 years. *4to*, Salton being forfeited from 1686 to 1690, (when it was rescinded) all that time must be subduced from the prescription, *quia contra non valentem agere non currit*. *Duplied*, *Quoad* the former objections opposes the debate; and as to the prescription, it must still take place here; for whether it be used by way of defence or action, *non refert*, seeing the reason introductive of prescription is to punish negligence, which is evident on Salton's part; for he should have intented his *actio tutelæ contraria* so soon as the tutory expired, which was in 1680; and if then he had claimed this debt by the compt-book, the minor could have better cleared the matter than he can do now; so he is evidently prejudged, and this compensation being extrinsic, it should have been applied *tempore habili* by consent, or a Judge. To the *second*, The using the book against Pitfoddles does not interrupt the prescription *quoad* any articles but that one; so it may prescribe against one part, and be interrupted *quoad* another, as was found, 27th November 1630, Lauder, No 1. p. 10655.; and 5th July 1665, Mackie, No 378. p. 11204.; because *in libello articulato quot sunt res tot sunt actiones*; for though the *actio universalis* may keep up, yet the *modus probandi* of some articles may prescribe. To the *third*, The summons of compt and reckoning is no interruption, unless this article of Salton's debt had been *speciatim* inserted; see 11th February 1681, Kennoway and Crawford, No 9. p. 5170, where the reason of reduction was not filled up. To the *fourth*, The act 1690 is only of short prescriptions, which this is not. *Triplied*, The book cannot be divided, and so it interrupts *quoad* the whole; and forfeiture is discounted from the grand prescription as well as the short. See 25th January 1678, Lauderdale *contra* Tweeddale, No 374. p. 11193.

On the 30th current, this cause being heard in presence, the LORDS found the compt-book probative of the article, and repelled the prescription.

*Fol. Dic. v. 2. p. 124. Fountainhall, v. 2. p. 17.*

1803. November 23. POOR O'NEAL *against* The MAGISTRATES of DUMFRIES.

By an act of Parliament passed in the year 1795, for empowering the Magistrates of the different counties of Great Britain to levy men to serve in his Majesty's navy, it was provided, ' That the Justices of Peace, or other Magistrates aforesaid, assembled from time to time at a petty session, within the limits of their jurisdiction, shall, as often as they see occasion, or as shall be requisite, for the performance of this, his Majesty's service, issue out their warrants, under their hands and seals, thereby requiring the constables, &c. of every hundred, &c. in their several limits, every or any of them, (and who shall be aided and assisted therein by sufficient men of the same places), to make, or cause to be made, a general search throughout their several and respective

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Imprisonment not sufficient to infer the plea of *non valens agere*.

An action of reparation upon the riot act must be pursued within the year.