

No 305.

1728. *December 26.* M'KENZIE *against* TOWN of BURNTISLAND.

A PENSION of 40 merks *per annum* being established by an act of a town-council, in favours of an advocate; in a process for payment, this case was found not to fall under the triennial prescription. See APPENDIX.

Fol. Dic. v. 2. p. 120.

* * * A similar decision was pronounced February 1730, Lockhart *against* Duke of Queensberry; see APPENDIX.

No 306.

1731. *July.* CRAWFORD *against* SIMPSON.

A CONTRACT of indenture to endure for 12 years, in which the master became bound to pay to his apprentice a certain sum yearly, was found to fall under the triennial prescription. See APPENDIX.

Fol. Dic. v. 2. p. 120.

1736. *July 22.* MARGARET DOUGLAS *against* JOHN Duke of ARGYLE.

No 307.
Found in conformity with
Ross *against*
Master of Salton, No 286.
p. 11089.
The triennial
prescription
runs during
the *annus de-
liberandi.*

ANNO 1704, Colin Campbell brought a process before the Commissaries of Edinburgh, for cognoscing that he was creditor to the deceased Archibald Duke of Argyle, for four and a half years' wages preceding January 1702, when he left the Duke's service. After advising the proof adduced, the Commissaries decerned for L. 90 Sterling; and Margaret Douglas, as assignee to the decret, brought an action on the passive titles, for payment of the said sum, against John Duke of Argyle.

Amongst other defences pleaded for the Duke, it was *argued*; That, supposing a paction of agreement for wages had been proved, which did not appear from the proof adduced, yet, by the act 83, Parl. 6. James VI., Colin Campbell could only have right to fees within three years of the citation before the Commissaries, and consequently was entitled to no more than a year and a half's wages, the libel not being raised till the beginning of December 1704.

Answered for Margaret Douglas; That giving, but not granting, the act should be so construed, as to restrict the fees to three years before the citation; yet that must certainly comprehend all the fees that became due within three years backward; and therefore would carry a year immediately preceding the three, for this plain reason, that the prescription can never debar the servant from payment of that fee which became due within three years of the citation, and consequently must comprehend the fee of one year further back than the three; because a servant cannot pursue for the year's fee till first the service is

performed ; so that, according to this computation, instead of one year and a half's fee, there will be two and a half due. No 307.

2do, It is acknowledged by the defender, that Archibald Duke of Argyle died in October 1703 ; of course, the year after that, as being the *annus deliberandi* indulged by law to the defender, to consider whether he would enter heir to his father or not, cannot enter *in computo* of the three years ; because, during that year, he could not be pursued *cum effectu*, as was found 16th July 1708, Thomson, No 295. p. 11093. Setting then aside this year, the pursuer is entitled to three years and a half fees ; so that the remaining dispute is *de minimis, de quibus non curat prætor*.

THE LORDS found the process did only interrupt the prescription, as to what fees fell due within three years of the commencement of the process ; and found the prescription did run during the *annus deliberandi*.

C. Home, No 32. p. 62.

1737. January 14. FERGUSON against MUIR.

HOUSE rents prescribe *de anno in annum* though the tenant continue in possession ; and the tenant's removal does not give commencement to the prescription, as in land rents ; though it was argued, that possession ought to be an interruption in this case, as well as the contracting new articles in the case of merchant-accounts. See APPEEDIX. No 308.

Fol. Dic. v. 2. p. 121.

1740. February 19. DRUMMOND against STEWART.

IN an action for payment of an account of disbursements laid out about 30 years ago by the pursuer, upon his friend's affairs as *negotiorum gestor*, the question was, whether this fell under the general words in the act 83d, Parl. 6th, Ja. VI introducing the triennial prescription, " other like debts not constitute by writ ;" upon which the Court was much divided, insomuch, that upon advising a petition against the Ordinary's interlocutor sustaining the prescription, of eleven Lords then present, besides the President, five voted for altering the interlocutor, three for adhering to it, and three were *non liquet*. No 309.

But upon advising the petition against this interlocutor, the LORDS by a much greater plurality, " adhered to their former interlocutor," upon this ground, that by other like debts was to be understood other debts of the like nature with those particularly expressed in the statute ; and as all the particu-