

charges, allowing and deducing the retention. ANSWERED,---What was *per errorem* paid or remitted, may, *condictione indebiti*, be repeated; neither can that import a discharge of the right founded in her contract of marriage.

The Lords thought, however these discharges might preclude her *quoad* the years when she had allowed it, yet it could not as to others, and ordained them to be farther heard as to that point,

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1702 and 1704. GRIZEL KININMOUNT of that ilk *against* COLONEL FORBES of PITTENCRIEFF.

1702. *December 3.*—GRIZEL Kininmount of that ilk gives in a petition against Colonel Forbes of Pittencrieff, showing that her lands of Urquhart, lying contiguous with the said lands of Pittencrieff, the Colonel, under pretence of working his own coal, had invaded hers, and made use of her workmen's sinks: and craved he might be stopped.

The Lords would stop no work unheard; but allowing him to see, he had complained that they had taken the start of him, though he had more just reason to complain than she: for one Robertson, the Lady Kininmount's tacksman in her coal of Urquhart, had, under pretence of working her coal, entered far within Pittencrieff's march, and, under ground, wasted and embezzled his coal; for remedy whereof he had applied to the Justices of Peace at Dunfermline, and obtained their warrant to skilful men to try the matter of fact; upon whose report the Justices found Robertson's encroachment, and discharged his farther working; which act the lady had suspended.

The Lords saw a necessity for a new visitation; and named some of their number for that effect, who declined it at this season of the year; and, it requiring dispatch, they appointed Mr Alexander Gibson of Dury, one of their clerks, to go on Saturday next, and cause visit it, and bring back his report on Tuesday thereafter, without further delay: for though the Lords usually name some of their own number, or country gentlemen, in such cases, and use not to burden their clerks with such commission, they serving the lieges in another capacity, yet, in this case, they employed him, which seldom uses to fall out. But the Lords would invert neither of their possessions, *novi operis nunciatione*, till the matter were tried.

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1704. *January 28.*—In the mutual declarators of property, pursued betwixt Colonel Forbes of Pittencrieff and the heiress of Kininmount, (mentioned 3d December 1702,) for her lands of Urquhart, lying contiguous with Pittencrieff; the Lords having advised the indenture of marches, being a decreet-arbitral of division in 1578, with the testimonies of the witnesses, they found the gushet in controversy belonged in property to the Colonel, as a part of his lands of Pittencrieff, conform to the probation of the march-stones. The value of which ground, being a moor, was inconsiderable; but having a coal, Robertson of Gladney, the lady's tacksman, had wrought under it, for which the Colonel had a process of damages depending. And the Lords having refused a new visitation to perambulate the ground, in this process, it having been done twice al-

ready, Alexander Murray of Melgum, for himself, and in name of the heiress of Kinninmount, his lady, protested this day, for remedy of law, to the Parliament.

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1704. *February 2.* HELEN INNES *against* THOMAS HAMILTON.

HELEN Innes, relict of John Hendshaw, wright, against Thomas Hamilton. Hendshaw being, in 1694 and thereafter, employed by the said Thomas Hamilton, in repairing some houses in Edinburgh, his account of wages and furniture amounted to £360 Scots; and being forced to pursue the said Thomas for payment, before the Dean of Guild in 1699, and dying *medio tempore*, Helen Innes his relict, with her children, transfer the process, and at last obtain a decret; which Thomas suspended, on thir reasons: *1mo*, That the account was prescribed, *quoad modum probandi*, by witnesses, not being insisted for within the three years, conform to the Act of Parliament 1579; and though some few of the last articles of the account were made of a date within the three years, yet the bulk were without that space, and thir were but added industriously to interrupt the prescription. And that this was the design was evident, for none of these articles, that were made within the three years of intending the process, are so much as proven or mentioned by any of the witnesses led; so that their depositions relating allenary to the articles before the three years, it is a demonstration that it was truly prescribed, and so could not have been proven by witnesses, had it not been for the adjection of these last articles, which are not so much as proven, though, being last furnished, witnesses would have remembered them best, if true. And, if this artifice were allowed, a merchant or tradesman's account shall never prescribe; for it is easy to add some articles within the three years, by which addition he gets the whole current account admitted to his probation by witnesses; whereas, if these were not added, it could only be proven *scripto vel juramento*. *2do*, The probation adduced is only in general, That Hendshaw wrought several weeks at these houses; but does not prove the particular articles libelled.

ANSWERED,—There is as much probation in this case as the nature of the thing can possibly allow; for, *1mo*, The Dean of Guild and his Council visited the work; then, *2do*, They examined witnesses thereupon; *3tio*, They called for the defunct's count-book, and compared it with the account pursued for, and found it all written with his own hand, and to quadrate both in dates and sums: And though count-books cannot prove *pro scribente*, but rather against the writer, yet here much regard is to be had thereto, seeing he is dead several years ago; and it cannot be made up *ex post facto*, as might be alleged if he were yet in life; *4to*, In supplement of all, they had taken the widow's oath of knowledge on the furnishing; so that few decreets have so full a probation. And the witnesses being examined on the whole account, their depositions relating to the whole do confirm these articles within the three years, as well as those before.

The Lords, having called for the probation to be transmitted, and having read it, found these last articles that preserved the account from prescription were not specially proven; and that a man's count-book, though an adminicle, yet could not prove for him. The vote was stated, Turn the Dean of Guild's decret