

of, no more than an assignation posterior to a summons executed can be sustained as an active title therein; and whatever might be done where a single person is convened in a process, or where 'tis an ordinary action for payment, yet it were hard to dispense with so necessary a point of form in an improbation, where a whole country-side is convened.

ANSWERED,—This process is not only at Mr Johnston and his factor's instance, but also carried on in his Majesty's name; and it cannot be doubted but the King has as good right to the casualties due to deans and chapters as those of archbishops and bishops; and, therefore, there can be no need of raising a new process, seeing they are willing to give them as long terms as the Lords please for production; and, in many cases, titles have been allowed to be produced *cum processu*; and if improbation of the writs of a barony be pursued, I will be permitted to reply that such a room or parcel of land is part of that barony, and will get a term to prove it.

The Lords, after a debate in presence, sustained process on this second gift, without necessity of raising a new summons thereon; but allowed them a competent time to see it in the clerk's hands.

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1699. November 21. HUGH MAXWEL of DALSWINTON *against* MAXWELL of GARNSALLOCH and OTHERS.

ARBRUCHELL reported Mr Hugh Maxwel of Dalswinton's declarator against Maxwell of Garnsalloch, Kilbean, and other heritors of the parish of Kirkmahoe, that the pursuer has right to a proportional part of the kirk, conform to his valuation and theirs; and that Garnsalloch demolish his new seat, erected only in 1607, and restrict it to the quantity and size of his old seat, &c.

ALLEGED,—That they had immemorially possessed their seats, and so prescribed a right to the same; and, for Garnsalloch's bringing out his seat, he had an ancient burial-place before it, and had only extended his seat upon his own ground so far as that went.

ANSWERED,—Church-seats are *inter res religiosas*, and so cannot prescribe, because not *in patrimonio et commercio*. *2do*. A burial-place does not obstruct hearing the minister; but to build a seat, with pillars and a cover, precludes all behind them in that gavel. *3tio*. It is offered to be proven, that, at the last reparation of the choir, it was agreed that Dalswinton should get a larger proportion for the accommodation of his tenants, because he contributed a third part of the expenses.

The Lords shunned to determine the first point, whether one might not prescribe the right of a seat as well as any other civil interest, and thought they might; as also considered that a church cannot be so exactly divided by arithmetical proportion, but sometimes one of a lesser interest might have a great share in the church, either because of his great quality, though his rent be small, or that he has many people living on his ground, or that another heritor, of more considerable rent than he, lives in another parish, and so is not so concerned: But the Lords fixed on the other two points; and found Garnsalloch must restrict his seat to what it was before the 1699; and, before answer, allowed the heritors and other witnesses present at the agreement made with the

tradesmen for repairing the church, to be examined anent what was then communed to be given to Dalswinton for his proportion, in respect he was at the greatest charge in repairing it. Some of the Lords inclined to think that Kilbean could not transfer or alienate his room in the church to Garnsalloch, but that it passed only *cum territorio*, and with the lands; but this was not decided. See Dirleton's Doubts and Questions, *voce* Prescription, Where *loca publica præscribi possunt*.
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1699. *November 23.* JOHN TOD *against* ROBERT WIGHTMAN.

ANSTRUTHER reported John Tod in Reidaiikers against Robert Wightman, merchant in Musselburgh. The said John, being a tenant in a grass-roum to the Earl of Traquaire, sold yearly his wool and cheese to the said Robert; and there was a current trade and commerce betwixt them for 24 years, *viz.* from 1674. He now pursues him for payment of all the goods he had delivered during that space. Wightman ALLEGED, on the 83d Act 1579, That all above three years before the date of the summons is prescribed *quoad modum probandi* by witnesses, and can only be proven *scripto vel juramento*. ANSWERED,—It has been a current account from the date of their first correspondence, and so could not prescribe; as has been always decided in merchants' and tradesmen's accounts; and particularly 13th *November* 1677, *Wilson against Ferguson*. REPLIED,—That takes place in petty accounts, where things are sold in small and by retail; but not where bargains are made in gross and by the bulk; and here the subject of their yearly traffic would amount to L.1000 Scots and more *per annum*; and can it be imagined that all that was trusted through such a long tract of time as 24 years? And to allow the pursuer to prove delivery of the goods by his servants, for all that space, were to ruin the defender, who cannot prove his partial payments. Likeas, the pursuer behoved to pay his rent yearly; and out of what else could that be done but the product of the ground he sold to the defender? And at this rate a merchant, buying bear or other victual, might be pursued for 20 years back, and the delivery proved by servants who bought it in. Likeas, this defender produced a letter, whereby he desired the pursuer to advance him L.50 sterling to account, and if he was not debtor in so much, he would repay it; which imported that all these bygones could not be owing. Likeas, in a former process betwixt them, the defender's oath of calumny being craved, he had deponed the balance betwixt them was very small.

Some of the Lords inclined to think that the currency of accounts, so as to interrupt prescription, could not be extended to such furnishings as this: But the Lords, on the separate grounds of the pursuer's letter, and the defender's oath, did sustain the defence of prescription for all years above the three last.
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1699. *November 28.* ANNA HAMILTON *against* LORD TORPHICHEN.

ANNA Hamilton, relict of Sandilands of Hilderston, having adjudged 10,000