

During all this time, Tolquhon's bond to Mitchel was never produced; but now being found, Pitfoddels discovers, though it bore not annualrent, yet he was denounced upon it in 1652; and so, by the act of Parliament 1617, it must bear annualrent from the denunciation, for which he raises a new pursuit, as executor-creditor confirmed to Mitchel. *Alleged* for Tolquhon, No annualrent can be due; because the bond, horning, and denunciation are all prescribed, and nothing done thereon within the 40 years. *Answered*, The prescription was interrupted by Pitfoddels arresting 1000 merks due by Tolquhon to Mitchel, and obtaining a decret of forthcoming; which being suspended, the same was discussed within the 40 years. *Replied*, In all these decreets of forthcoming, there is neither mention nor production of this bond of 1200 merks by old Tolquhon to Mitchel, but only the sum of 1000 merks arrested in his hands, which might be another sum; and he suffering himself to be holden as confessed thereon, it can never be applied to this bond, unless it had expressly mentioned the same; and that there must be a specific application of the title necessary for interrupting, was found, 11th February 1681, Kennoway *contra* Crawford, No 9. p. 5170.; and the act 28th, 1469, introducing personal prescriptions, requires that a document be taken on the writ within the 40 years, which cannot be alleged in this case; and lawyers are very positive that sums are presumed to be different in such cases; and Menochius de arbitrariis judicium quæstionibus, lib. 2. cas. 213., states many cases, quando summæ eadem vel duplicatæ præsumuntur, and particularly that *due sententiæ* presume *summarum deversitatem*, &c. *Duplied*, Prescription is odious; and therefore, where one raises a pursuit, intelligitur omnes causas et actiones cum eorum mediis in judicium deduxisse quoad interruptionem temporis, l. 3. C. De annali except. THE LORDS found the bond prescribed, seeing no document had been taken on it within the 40 years; and that the decreets of forthcoming on a sum libelled in general did not interrupt *quoad* this bond, though this seems to contradict Justinian's decision in the foresaid l. 3. But it agrees with the tenor of our old act of Parliament, and the LORDS would not take upon them in this case to extend it.

*Fol. Dic. v. 2. p. 127. Fountainhall, v. 2. p. 44.*

1704. February 15. JOHNSTON *against* KENNEDY.

LORD TILlicouLTRY reported Johnston *contra* Kennedy. Robert Johnston of Straiton pursues Sir Archibald Kennedy of Colzean, for payment of 10,000 merks, contained in a bond granted by his grandfather and others, *in anno* 1651, to Fergus Macubine, and whereto James Johnston writer to the signet, the pursuer's father, was constituted assignee. *Alleged*, *imo*, The bond was prescribed, not being pursued for within the 40 years. *Answered*, There is an inhibition

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Serving and executing an inhibition against a debtor, is a sufficient interruption of the prescription of a

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bond, which  
is the  
ground of  
that inhibi-  
tion.

served on the bond in 1669, which does sufficiently interrupt the prescription. *Replied*, An inhibition is only a prohibitory diligence, that none contract with the debtor during the years wherein the bond does not prescribe; for *esto* an apprising were led after the inhibition, that hinders indeed the bond from prescribing, yet if no summons be raised on the inhibition, the preserving the bond from prescription, will not save the inhibition; for the old act of King James III. anent prescription, requiring some document to be taken within the 40 years, must be either by a charge of horning, or citation on a summons against the debtor, or payment of annualrent, or such other certioration, as imports the creditor's demanding payment; and therefore the registration of a bond within the years of prescription, though a document, whereby the creditor owns his bond, yet was not found by the LORDS a sufficient interruption. *Duplied*, There could not be a clearer intimation of a creditor's mind to prosecute his debt, than to inhibit his debtor, wherein a copy is given him, which is not in the registration of a bond, and so makes a plain difference betwixt these two cases. THE LORDS found the serving and executing an inhibition against the debtor was a sufficient interruption of the prescription of the bond, the ground of the inhibition. Then *alleged* farther, This interruption was prescribed, because it was not renewed within seven years, as is enjoined by the act of Parl. 1669. *Answered*, That act related only to interruptions made by citations in processes, and not to this case, which could not mean that inhibitions should be renewed every seven years, though a summons of reduction *ex capite inhibitionis* might be raised within seven years. THE LORDS found this interruption did not fall under the said act 1669. Then Colzean *alleged*, The debt was paid by Bargeny, who took a blank assignation thereto; and James Johnston being his writer, got the custody of his papers, and that amongst the rest; and that it was lying blank beside the said James, the time of his decease, and is filled up with his name since, and was not in any list or inventory of his debts, nor did he ever crave it, though he demanded payment of lesser sums from Colzean, as appears from his letter produced; and when Girvanmains, one of the cautioners in the bond, his estate was publicly roused, James Johnston never once appeared to give in his claim, as a creditor. *Answered*, He needed say no more but produce the bond and assignation now in his hands, which cannot be taken from him by presumptions; and the pursuer was left very young when his father died, and he must not suffer for his tutors' negligence in pursuing this debt. THE LORDS thought there was ground for suspicion, and therefore resolving to expiscate the case, they allowed a probation before answer, where this assignation was found, and when it was filled up, and what may be found among Bargeny's papers to shew it was retired, and likewise the pursuer to adduce what evidence he can to astruct and adminiculate the same. As to the foresaid point, that a decret of registration was not a sufficient interruption, the LORDS decided so in the same James Johnston's case, against the Lord Belhaven, 12th January 1672, No 416. p. 11237.; and likewise found a re-

duction within the *quadriennium utile* for reducing deeds in minority, did not interrupt the prescription of that privilege of revoking and reducing, unless it was renewed every seven years, in the Earl of Forfar's process against the Marquis of Douglas, in 1700.

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*Fol. Dic. v. 2. p. 127. Fountainball, v. 2. p. 223.*

1705. July 4.

The LORD and LADY PITMEDDEN *against* GEORGE MONRO of Lymlair.

THE Lady Pitmedden as executrix to Mr William Lauder her father, and her husband for his interest, having pursued George Monro of Lymlair, for his father's debt by bond upon the passive titles; it was *alleged* for the defender, That the bond was prescribed, no diligence being done thereon, for the space of more than 40 years.

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Communing  
by missive  
letter not sus-  
tained as an  
interruption  
of prescrip-  
tion.

*Replied* for the pursuers; That they had interrupted prescription by intimating their claim upon the bond, by a missive to the defender, as the defender's letter of answer bears, wherein he craved some time to search out matters, and advise with his friends; and that being indulged him, he ought not to obtrude prescription upon the 40 years expiring *medio tempore*; especially seeing he promised by that letter to do just things, and by another letter written to the pursuer after elapsing of the 40 years, desired a communing upon the matter, without mentioning the defence of prescription; now, communing by letters, is more than if they had stated accounts about the debt; and counting was sustained to interrupt prescription, July 2d 1630, Herries *contra* Scott, No 280. p. 11084.

*Duplied* for the defender; According to the 29th act, 5th Parliament, James III.; the negative prescription of exoneration from personal obligation, should be interrupted by legal diligence, or a bond of corroboration, 27th November 1630, L. Lauder *contra* L. Colmslie, No 1. p. 10655. As to the decision betwixt Herries and Scott, it hath no contingency with the interruption of prescription of 40 years, but relates only to the triennial prescription of the *modus probandi* of merchant accounts by witnesses. *2do*, Interruption of prescription by a letter is a novelty, except in the sovereign's case, which is allowed by an act of sederunt; Stair's Instit. lib. 2. tit. 12. § 27., and even then the letter requires publication at the market cross of the proper jurisdiction, where the interested party lives, 30th March 1630. The King and Earl of Monteith, Div. 16. *h. t. 3tio, Non relevat*, That the defender upon the alarm given him by my Lord's letter, craved time, unless he had acknowledged this debt, and craved time to take course with it, which would have been an interruption by way of corroboration, or renewed obligation. But on the contrary, the answer bears, that the pursuer's claim was altogether a mystery to him, and