

leave that foundation-stone too arbitrary and uncertain. *Duplied*, The ground whereon prescription, both by the common and our law, stands, is, that by parties' so long silence, they are presumed to derelinqish their rights. Now, Pitmedden, by his several letters within the years of prescription, gave evidence enough, *rem pro derelicto habere* was none of his intention; and if the other party, by craving time to search his papers, induced my forbearance, *non debet lucrari ex suo facto*, so as now to obtrude prescription occasioned by himself. THE LORDS, by plurality, of seven against six, thought the limits of interruption should be fixed, and therefore repelled this, as not a legal and sufficient interruption, and found the bond was prescribed.

No 430.

Fountainhall, v. 2. p. 281.

1706. July 2.

ISOBEL SCOTT, Relict of Andrew Angus, Town-Clerk, in Selkirk, *against*
ADAM BRYDEN, Tenant in Henderland.

JAMES MENZIES writer to the signet, being debtor by bond to Isobel Scott in the sum of L. 370 Scots, she raised horning thereon, in the year 1690, and arrested in the hands of Adam Bryden, as debtor to Mr Menzies, and obtained decret of furthcoming in the same year, before the commissary of Peebles; which decret being suspended, and at discussing of the suspension turned into a libel; it was then *alleged* for the defender, That the pursuer's arrestment was prescribed by the act 9th Parl. 2d Cha. II. and so no decret of furthcoming could proceed upon it.

THE LORDS found, that prescription was interrupted by the commissaries decret; albeit it was *alleged* for the defender, That the commissaries decret was found null; and a null decret could no more interrupt prescription, than a null execution.

Fol. Dic. v. 2. p. 128. Forbes, p. 116.

* * * Fountainhall reports this case :

1706. July 4.—Isobel Scott, relict of Andrew Angus, town-clerk of Selkirk, being creditor by bond to James Menzies, writer to the signet, in L. 300 Scots, arrests, *in anno* 1690, with Adam Bryden tenant in Henderland, the like sum owing by him to Menzies; and, in the 1692, recovers a decret of forthcoming in absence before the commissary of Peebles: This lying over till 1699, is then suspended, and the decret turned to a libel; and then it was *alleged* for Bryden, The decret being now out of doors, the arrestment laid on in 1690, was prescribed by the 9th act of Parliament 1669, not being pursued for, nor insisted on for the space of five years after its date. *Answered*, This ought to be repelled, for the decret was within two years after the date of the

No 431.
Prescription of arrestment, interrupted by a decret in absence pronounced by a commissary beyond his instructions, and afterwards turned into a libel.

No 431. arrestment, though the decret was turned into a libel, because obtained in absence, yet it was a standing decret till 1699, and so was a sufficient interruption of the prescription. *Answered*, This decret being null, as being given *a non suo judice*, viz. the commissaries, above their instructions, and against James Menzies, who was both a member of the College of Justice, and dwelt not within that jurisdiction, it can never be a decret, and so no interruption at all; and the like was found betwixt Scott of Bowhill, and Grieve of Pinnacle. *Replied*, The commissary was most competent to the principal party cited, who dwelt within his bounds, and Menzies was only cited *pro interesse*, and summoned by letters of supplement, which was sufficient; and any interpellation was sufficient to interrupt prescription, even defective and null executions, and for the practick alleged, it was neither produced, nor did it meet this case. THE LORDS repelled the defence, and found the arrestment not prescribed, but sufficiently interrupted by the decret, though afterwards turned into a libel.

Fountainhall, v. 2. p. 340.

* * * A similar decision was pronounced in a case respecting the vicennial prescription of holograph writs, 21st March 1707, Corbet against Hamilton, No 106. p. 2642.; *voce* COMPENSATION.—RETENTION.

No 432.

1708. July 16. & 17. THOMSON *against* EARL of LINLITHGOW.

A GENERAL charge to enter heir was not sustained as sufficient to interrupt the triennial prescription of an account.

Fol. Dic. v. 2. p. 127. Fouutainhall. Forbes.

* * * This case is No 58. p. 4504., *voce* FOREIGN.

No 433.

1708. February 20.

GIDEON ELLIOT, Chirurgion Apothecary in Edinburgh, *against* The REPRESENTATIVES of Captain WILLIAM VEACH.

IN the pursuit at the instance of Gideon Elliot against the Representatives of Captain William Veach, for payment of an account of medicaments furnished by the pursuer to the defunct; the LORDS found, that the three years prescription of the said account *quoad modum probandi* by witnesses, was interrupted by a letter from him to the pursuer, acknowledging debt in general, and that he had ordered his payment by a friend.

Fol. Dic. v. 2. p. 129. Forbes, p. 247.

* * * A similar decision was pronounced, February 1730, Chalmers against Ogilvie, see APPENDIX.