

* * * Fountainhall reports this case :

No 369.

JOHN WILKIE, Taylor in Edinburgh, and George Scot, pursue mutual declarators. The first pursued *actione confessoria*, That Scot's tenement owed him and his tenement the servitude *altius non tollendi*, conform to an obligation contained in the disposition made 1607 by Mr William Adamson, then heritor of both dominant and servient tenements, to James Heriot. Scot, *actione negatoria*, contended his tenement was free; *1mo*, Because the said clause was not in the charter and sasine; *2do*, That he derived no right from Adamson; *3tio*, That he and his authors had possessed it 40 years, without any acclaiming that servitude, or its being mentioned in their writs. *Answered* to the *1st*, Servitudes were real without infeftments; for which see 26th Jan. 1622, Turnbull, *voce* SERVITUDE. *2do*, The bounding of his own lands demonstrates that it came from Adamson and James Heriot. *3tio*, In negative servitudes (such as this of *altius non tollendi*) there is no prescription, being *actus meræ facultatis*, until there can be an attempt or contravention. THE LORDS *in præsentia* assoilzied from Scot's declarator of immunity, and found his tenement liable in a servitude *altius non tollendi* to John Wilkie's land; and therefore decerned in his favours.

Fountainhall, v. 1. p. 508.

1707. December 17. Captain GORDON against Mr JOHN CUMING.

No 370.

The seven years prescription of bonds begins to run from the date of the bond, and not from the term of payment, though before that the creditor is not *valens agere*; for such are the express words of the act.

CAPTAIN Gordon, brother to Earlston, being cautioner in a bond for Sir George Campbell of Cesnock, his father-in-law, to Mr John Cuming, a creditor in a certain sum by bond, and being charged with horning for payment, he suspends, for this reason, that being *per expressum* only cautioner, he is free by the 5th act of Parl. 1695, declaring, if they be not insisted against in seven years, they shall be *ipso facto* free of their cautionry; and *ita est* this bond was in 1700; and he is at a small loss, for he has an heritable bond and infeftment in the principal debtor's lands, which has made him the more slack and negligent against Mr Gordon. THE LORDS doubted on two points: *1mo*, Whether the seven years ran from the date of the bond, or the term of payment, before which the creditor is not *valens agere*; but having read the act, it commenced from the bond, which seemed very mysterious; for some bonds bear a very long term of payment, which will render these bonds with cautioners very insignificant. The *second* was, if the minority of the principal debtor's heir will not stop this septennial prescription; but there being nothing of this alleged on, it was laid aside; all the difficulty and strait was, that the suspension was craved without caution or consignation; but there being no answer for the

charger, though intimated to him, they passed it in these terms, in respect the act of Parliament is so plain. Though the act was a great inversion of our former law, yet, if it were minded by creditors, it were an easy matter once in seven years to interpel the cautioner, or use some legal interruption against him to stop the prescription; but country people do forget the tenor of that new act, so much debording from the former law and practice, and made upon occasion of Langton and Cockburn, so interwoven as co-cautioners, and their sudden breaking, to the loss of many poor family. Since this act, few take bonds with cautioners, but bind them all as *correi* and principals, whatever bonds of relief they may have among themselves in writs apart.

Fbl. Dic. v. 2. p. 124. Fountainhall, v. 2. p. 404.

1710. February 2. ROBERT HEPBURN *against* The Duchess of BUCCLEUCH.

I REPORTED Robert Hepburn of Bearford against the Duchess of Buccleugh. Bearford held some lands in the parish of Norham off the Hepburns, Earls of Bothwell, who being forfeited, their estate was gifted to Stewart Earl of Bothwell. And he being likewise forfeited in 1591, for attempting to seize upon King James in the Abbey, and for consulting with wizards and sorcerers how long King James would live, the Earl of Buccleuch was made donatar to his forfeiture; and he, in 1633, disposes the superiority of these lands to Sir Robert Hepburn then of Bearford, with absolute warrandice, and for causes onerous; yet afterwards, the same Earl disposes the same superiority to the Earl of Winton in 1647, who transfers it to the Viscount of Kingston, his son, who raises a reduction and improbation against the vassals of the Lordship of Halls, and amongst the rest, in 1662, calls Hepburn of Bearford. The Lord Kingston having, in 1679, sold these lands to Sir James Stanefield; and Sir David Dalrymple having bought them at a roup in 1697, he wakens the old process intended against the vassals by Kingston, and amongst others insists against Bearford, who, for his own relief, raises a summons of declarator against the Duchess of Buccleuch, as representing her grandfather, the maker of the disposition, to warrant the same, and relieve him of the distress, and threatened hazard of eviction at Sir David Dalrymple's instance, as having contravened his warrandice, (though it had been only from fact and deed, as it truly was absolute), by granting a posterior disposition to my Lord Winton of the same superiority. *Alleged* for the Duchess, That he ought to have no regress against her, seeing the warrandice is mainly incurred through his own default and negligence; for if he had infeft himself upon the right he got in 1633, he would have been preferable to Winton and Kingston; but he suffering them to be infeft before him, *sibi imputet*, who did not perfect his right; and that he had a competent time appears, that the second disposition was not made till 1647; so he had thirteen years to have prevented them, but did it not; and the Duchess is farther prejudged, for

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Found conform to Crichton against Viscount of Air, No 362.
P. 11182.