SECT. II.

What evidence required of interruption.—Interruption by an apparent heir.

1637. *July* 26. Ld. Lawers *against* Dunbars.

No 453.

An only son who was nearest of kin to his father and to his mother, both now deceased, as executor to his mother, confirmed a decreet for a sum of money which had been recovered by her and her husband for his interest. The confirmation was null, the subject being *in bonis* of the husband, as falling to him *jure mariti*. Yet diligence done by the son upon this title against the debtor, was found sufficient to interrupt the negative prescription of the decree, he being at the same time, as mentioned, also nearest of kin to his father.

Fol. Dic. v. 2. *p.* 129. *Durie.*

*** This case is No 13. p. 10719.

1752. *December* 7. Lockhart of Birkhill *against* Elizabeth Merrie.

No 454.
Found, that to prove interruption of prescription, complete evidence is not necessary; but such as affords a presumption of interruption is sufficient.

Lockhart of Birkhill, insisting in a process of debt against Elizabeth Merrie, relict and representative of Captain Lockhart of Kirktoun, the defence was compensation upon counter-claims which the Captain had against Birkhill. It was *answered*, That these counter-claims were long ago extinguished by the negative prescription. The defender *replied* upon interruption; and, as the single question was, Whether the alleged interruption was sufficiently verified, the facts must be set forth with the evidence. It appeared by documents produced in process, that from the 1662 to the 1678, the Captain was in use to lend his credit to his friend Birkhill in several bonds to the extent of 2500 merks of principal. The Captain paid the whole of these sums as a distressed cautioner, betwixt the 1690 and 1697, and took assignations in common form, which, with the bonds, were all produced in process. The interruption condescended on was, that the Captain in the year 1712, brought a process against the present Birkhill, as representing his father the principal debtor, for payment of the above mentioned debts. The interruption was undoubtedly relevant; the difficulty lay in the evidence; for though the principal execution of the summons was produced, the summons itself was not; and it did not with certainty appear from the execution that it related to a summons for payment of the debts under consideration. But to supply this want, the following production was made,

1*mo*, A holograph missive-letter from Birkhill to Captain Lockhart, dated the 28th November 1712, soon after the summons was executed. In this letter, after declaring that he always was for an amicable settlement, he entreats Captain Lockhart to delay the calling of his summons for a few days till he should come to town. 2*do*, This letter produced a submission betwixt the parties, of all claggs, claims, processes, &c. dated the 18th January 1717; which was also produced. 3*tio*, There was produced a very material writing, which is, answers for Birkhill to Captain Lockhart's claim to the arbiters, where every one of the grounds of debt above mentioned are set forth, and objected to, principally on this account, that the Captain had not produced the conveyances of these debts, and that the claim must be suspicious, since it had been allowed to lie over near 30 years, without a constitution. These answers were urged as legal evidence, that the submission concerned the very claim now insisted on by way of compensation; and consequently, this very claim was contained in the summons to which the above mentioned execution relates; because there can be no doubt that it was this summons which produced the submission; especially when it is considered that the summons is dated and signeted of the dates the execution bears, as appears from the signet-book regularly kept. And *lastly*, A full copy of the summons was produced, which, from the ink and form of the hand, appeared to be no recent paper; and in this copy the whole grounds of debt in dispute were distinctly libelled. The defender founded upon this production as legal evidence of a document taken by the Captain of his debt, to make an interruption in terms of the act of Parliament: That at least it afforded a sufficient presumptive evidence, that the copy produced was a copy of the summons to which the execution related, unless the pursuer would undertake to prove, that there was a different summons to which the execution might relate; or, at least that there was some ground or foundation for a process, *anno* 1712, at the Captain's instance against Birkhill, other than that under consideration. No 454.

"THE LORDS unanimously found that there is sufficient presumptive evidence of the interruption of the prescription; and therefore repelled the objection of prescription."

Though this case is much involved in fact, yet it rests upon a general point of law, which is, that to prove interruption of prescription, complete legal evidence is not necessary; or, in other words, not the best evidence that the nature of the subject-matter can admit of; but that evidence, such as affords a presumption of interruption, is sufficient.

Fol. Dic. v. 4. *p.* 115. *Sel. Dec. No* 28. *p.* 31.