

the citation, though only for the first diet, was sufficient for an interruption; but found the said citation and summons fallen and extinct, because not renewed within seven years after the date of act 15th, Parl. 1685, which they found was not to be accounted from the date of its publication, and proclamation over the cross of Edinburgh, as the act 128th, Parl. 1581, appoints; because this new act derogates from it, by declaring, that with respect to interruptions, the seven years shall commence from the date of the act.

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Fol. Dic. v. 2. p. 131. -Fountainball. Forbes.

* * This case is No 464. p. 11295.

1726. *January 14.* GRAY *against* MURRAY.

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THE price being arrested in a purchaser's hand, he deponed in the forthcoming, that he was debtor in a certain sum as the price of the lands, payable the first term after purging of incumbrances. When the incumbrances were purged, which was many years thereafter, the arrester raised a summons of wakening of his forthcoming, and insisted to have decreet. The condition in the defender's oath being now purified, the defence was, that the action upon the arrestment was prescribed. *Answered*, That till incumbrances were purged the arrester was not *valens agere*. *Replied*, The law has said, 'That all actions on arrestments shall prescribe, unless wakened every five years;' therefore, how fruitless soever the wakening might otherwise be, it was by the disposition of law requisite, in order to keep the arrestment alive. THE LORDS sustained the defence of prescription. *See APPENDIX.*

Fol. Dic. v. 2. p. 131.

1761. *July 30.*

JAMES and ALLAN CAMERONS *against* ALLAN MACDONALD of MOROR.

ALLAN MACDONALD of MOROR, predecessor of the defender, became debtor by bond, dated 28th March 1702, in the sum of 409 merks, to John Cameron, payable at the term of Martinmas thereafter, with annual rent from the term of payment.

John Cameron, in order to, obtain payment, and interrupt prescription, raised a summons upon the passive titles against the defender, which was executed against him personally upon the 11th March 1742, about eight months before the 40 years were expired. This summons having been allowed to run out, without being judicially called, the pursuers, as assignees by John Cameron, raised and executed a new summons against the defender upon the 6th July

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A citation for the purpose of interrupting prescription expires in seven years; but even an informal execution of a summons within the seven years, was held a suffi-

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 cient renewal
 of citation.
 The inform-
 ality was that
 a copy of the
 summons be-
 ing put into
 the key-hole,
 the execution
 did not bear
 that six
 knocks had
 been given.

The acts re-
 quiring re-
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 sonal as well
 as to real
 rights.

1745, the execution whereof was of the following tenor: ' This I did after the
 ' form and tenor of the said summons in all points, whereof I left an just and
 ' authentic double to the will, with an short copy thereto subjoined, subscrib-
 ' ed by me, in the lock-hole of the most patent door of his dwelling-house at
 ' cross in Moror, seeing I could not apprehend him personally ;' and this sum-
 mons having been called in Court, decret in absence was pronounced in terms
 of the libel.

M'Donald having suspended this decret, *insisted*, That the summons exe-
 cuted in the 1742 was no interruption of the long prescription; because, as
 this summons was never brought into Court, it was necessary to renew it in
 seven years in terms of the act 1669, cap. 10.; and that in fact it never had
 been renewed; for though a second summons was taken out in 1745; yet the
 execution of the same was void and null, in respect it bore the copy to have
 been left in the lock-hole of the defender's dwelling-house, without mention-
 ing that six knocks were given, in terms of the act 75. Parl. 1540; and there-
 fore this second summons, with the decret following upon it, being null, and
 there having been no proper renewal of the summons 1742 within seven years,
 the debt was now entirely cut off by prescription.

Answered for the pursuers; *imo*, By acts 1669, cap. 10., 1685, cap. 15.,
 and 1696, cap. 19. certain regulations were introduced with regard to interrup-
 tion by citation; but the enactment of these statutes seems to be limited en-
 tirely to the case where rights of land are concerned. There is no doubt that
 at common law the execution of a summons is as good a document of inter-
 ruption as any whatever; and though nothing should follow upon it, ought to
 preserve the right from prescribing for 40 years longer: But this was found to
 be attended with some inconvenience in the case of land-rights, as purchasers
 could not see from any record, whether summonses had been executed at any
 time within 40 years back, which might have the effect of interrupting the
 prescription of latent claims upon the lands. It was therefore very necessary
 for the security of purchasers, that some method should be devised of putting
 interruptions with regard to land-rights upon a less precarious footing. This
 seems to have been the design of the legislature in passing the three acts above
 mentioned, whereby citations for interruption, either in real or personal rights,
i. e. personal rights of lands, are required to be renewed within seven years,
 and a particular register is appointed for interruptions of the prescriptions of
 real rights; Stair, B. 2. T. 3. § 22.; Sir George M'Kenzie's Observes on the act
 1669. Further, it would appear that, at the time of these statutes, a particu-
 lar species of citations was in use, intended merely for interruption; and there-
 fore the requisites of these acts do not apply to common summonses, which
 are intended to be judicially called; 24th November 1692, Robertson *contra*
 Duncan Campbell, *voce* Process; Bankton, v. 2. p. 176.

2do, The execution of the summons 1745 was sufficiently formal, at least to
 the effect of interrupting prescription. In the execution of summonses much

less strictness is required than in legal diligence, such as executions of hornings, inhibitions, &c. By these last, the preference of creditors is regulated; and it is reasonable that creditors, when competing with one another, should be allowed to take advantage of every informality: But there can be no reason for any such precision in the execution of summonses, and accordingly the Court is every day in use to over-rule no-processes founded upon objections to executions; much more ought such objections to be repelled when the only question is, whether the summons shall be sustained as an interruption of prescription. In the present case, the long prescription of 40 years was unquestionably interrupted by the summons 1742; but by a statute correctory of the common law, a septennial prescription has been introduced of citations not renewed within seven years; and the question is, whether this septennial prescription has been interrupted by the summons and execution 1745, and the decret in absence following upon this summons; it is plain that nothing can be more favourable than the pursuer's plea, which is, that these steps were a sufficient interruption of the septennial prescription.

There is nothing better established than that citations, though labouring under very material informalities, and even null as to some effects, are held sufficient for interrupting prescription. The rule is, *Quævis insinuatio sufficit*; Bankton, v. 1. p. 178; Stair, B. 2. T. 12. § 26. And a great variety of decisions have been pronounced upon the same principles; November 25. 1665, White *contra* Horn, No 44. p. 10649.; June 15. 1666, Sir Robert Sinclair, No 15. p. 1289.; July 6. 1671, M'Rae, No 13. p. 8338.; February 11. 1673, Muir *contra* Lawson, No 417. p. 11238.; November 23. 1694, Rattray *contra* Earl of Airly, *voce* PROCESS; November 9. 1694, Spens *contra* Martin, No 119. p. 1017.; January 14. 1698, Hopekirk *contra* Mary Deas, *voce* PROOF.

Replied upon the first point; The acts 1669 and 1685, in so far as they require the renewal within seven years, are plainly general, and respect all citations whatever, whether in the case of land-rights or personal obligations, which have no connection with land-rights; and so it was determined in the case of the Earl of Sutherland *contra* the Earls of Crawford, Errol, &c. 23d Jan. 1706, No 464. p. 11295. Neither is there any distinction to be found in the law-books between summonses raised merely for interruption, and summonses in prosecution of a right. The word *citation* implies the prosecution of a right before a judge; and in the decisions above quoted, the septennial renewal of interruptions was understood to be requisite uncommon judicial citations.

2do, The execution in question is directly contrary to the act of Parliament 1540; and consequently void and null. It ought to have borne, that the messenger left it in the key-hole, because he could not get entrance; and it ought likewise to have borne, that he gave six knocks before he so left it. That the six knocks should be given, is essentially requisite to prevent frauds; for, without this solemnity, the copy may never be known to one in the family, and may either be accidentally lost or wilfully abstracted, without a possibility of the

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person concerned ever hearing any thing of it. See EXECUTION. The presumption of law is, that the summons in question never came to the defender's knowledge; and therefore, in common sense, it cannot be held as a legal demand or proper interruption. There are indeed instances where executions not entirely agreeable to form have been sustained as a sufficient interruption: But none of them apply to the present case; because, in these instances, the want of notice was not the objection. This observation will apply to all or most of the decisions which have been cited for the pursuer.

'THE LORDS were clearly of opinion, that this case fell under the act of Parliament 1661, and subsequent acts, requiring the renewal of citations within seven years to interrupt prescription; and therefore unanimously found, That the citation 1742 was not sufficient to interrupt the long prescription without such renewal.' But upon the other point they were more doubtful, and pronounced different judgments. The last was in these words:

'Find, That the execution of the summons 1745, and the proceedings thereon, was a sufficient renewal of the citation 1742; and therefore repelled the defence of prescription.'

Act. *Ilay Campbell, Burnet.* Alt. *Jobaston, Wal. Stewart.* Clerk, *Home.*

J. C.

Fol. Dic. v. 4. p. 116. Fac. Col. No 55. p. 134.

* * * Lord Kames reports this case :

PAYMENT being demanded of the sum of 409 merks, with interest from the term of payment at Martinmas 1702, being 58 years, and prescription being *objected*, the following interruption was specified: That in March 1742, during the running of the last year of the long prescription, a summons of constitution and letters of general charge were executed by the creditor against the heir of the debtor. *Answered*, That this summons never having been called in Court, it could not be held a good interruption of prescription, unless it had been renewed within seven years, in terms of the 10th act, Parl. 1669.

'Found, That the citation not being followed by a process, and falling by the lapse of year and day, ought to have been renewed within seven years; and therefore, the defence of prescription was sustained.'

By this decision a rational and salutary point is established, viz. that a citation upon a summons for payment, without proceeding further, comes under the act 1669, so as to lose its effect of an interruption unless it be renewed in seven years. This is giving an useful meaning to the statute, and the only useful meaning I ever could discover.

Sel. Dec. No 181. p. 247.

Prescription of bills. See BILL.

If compensation can be proponed upon a prescribed debt? See COMPENSATION.

See No 126. p. 6702. and No. 35. p. 905.

See APPENDIX.