

No 468.

once summoned, he might have compelled the pursuer to have insisted by his ordinary course of process, in seeking protestation, and charging him to insist, with certification.

The like done 11th February 1637, betwixt M'Kie and L. Lag; where a spuilzie once intended *debito tempore*, albeit lying over after the citation upon the second summons, ten years together, without calling or wakening, yet the LORDS found the action did not prescribe, but sustained it as a spuilzie, to give *juramentem in litem*; for they found, once an interruption made, was sufficient to interrupt for ever; but the LORDS declared, that after probation, when the party's oath should be taken, they would tax the same as they found requisite, and reserved the modification of the quantities to themselves.

Act. ———.

Alt. *Oliphant*.Clerk, *Gibson*.*Fol. Dic. v. 2. p. 131. Durie, p. 11.*

1630. March 4.

LORD LESLIE against ———.

No 469.

Found again
in conformity
with Wood
against Pow-
rie, No 467.
P. 11319.

A SPUILZIE being intended, and the summons executed *debito tempore* within the prescription, viz. within three years after the committing, which was committed *in anno* 1601; and, after citation, having lain over, without continuation, calling, or wakening, until the year 1622, at which time it was transferred; and after the transferring, being wakening and called this day; and the defender *alleging*, That it was prescribed, in so far as albeit it was intended *debito tempore*, yet seeing it lay over 22 years after the intending, during which space nothing was done therein, both the parties being dead, by that long intermission it was prescribed, sicklike as if it had not been intended in due time. This allegiance was repelled, for the LORDS found, that the lying over of the cause, being once intended lawfully, made it not fall under prescription.

Clerk, *Scot*.*Fol. Dic. v. 2. p. 131. Durie, p. 499.*

1666. June 28.

LORD PHILORTH against LORD FRASER.

No 470.

A PROCESS once commenced does not fall in less than 40 years, unless where the time is shortened by particular statute; and therefore, after a process of declarator was raised, which lay over, and then was taken up again, the defender's answer was not found sufficient, that he a churchman had *decennalis et triennalis possessio*, since the commencement of the process.

Fol. Dic. v. 2. p. 130. Stair.

* * This case is No 4. p. 5620, *voce* HOMOLOGATION.

* * A similar decision was pronounced in the case of a process of compt and reckoning against tutors and curators, though it had lien over more than ten years, December 1731, Creditors of Libberton against his Tutors and Curators. See APPENDIX.

No 470.

1680. February 5. BROWN against HEBURN.

THE act 10th, Parl. 1669, about the interruption of prescription, respects only the future time, and has no retrospect. This remedied by act 15th, Parl. 1685.

No 471.

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

* * This case is No 382. p. 11208.

1684. December. COUNTESS of WEMYSS against M'KENZIE of Applecross.

No 472.

IN an action to make furthcoming at the instance of the Countess of Wemyss against M'Kenzie of Applecross, the LORDS found, That actions founded upon arrestment were not to prescribe, if they were wakened at any time within five years after the ten years mentioned in the act of Parliament in the year 1669 concerning prescription.

Fol. Dic. v. 2. p. 131. Sir P. Home, MS. v. 2. No 639.

* * Fountainhall reports this case :

1684. December 3.—THE Countess of Wemyss for payment of a debt of 11,000 merks due to her, arrested the like sum, and it being debated, that the arrestment was null by the 9th act of Parl. 1669, because not wakened within five years; and this being advised, the LORDS found the sense of the said act of Parliament 1669, anent prescriptions, does not extend to actions for making furthcoming, if they be interrupted within the space of ten years posterior to the date of the said act; and find, that, by the said act, the course of ten years is necessary to the prescription of actions of furthcoming, and that the wakening every five years is to be understood posterior to the elapsing of the said ten years; and therefore the deceased Earl of Wemyss having interrupted by the wakening and declarator within the ten years, find that the pursuer's action is not prescribed; and adhere to their former interlocutor, finding that Sinclair of Maye's bond is not in implement of the contract of marriage. Some of the extraordinary Lords were for referring the explaining the ambiguity of the act to the approaching Session of Parliament. But others opposed this; because,