

1764. *August 4.* STEELE *against* Earl of HOME.

No 448.

THE debtor in a bond defending himself upon the negative prescription of 40 years, the pursuer *urged*, That a process had been brought formerly for payment, which interrupted the prescription; and, in proof of this, an extracted act was produced, dated in 1682. *Answered*, This is not sufficient; the pursuer has not produced the summons, nor any other step of process in that pretended action. *Replied*, As soon as an act is extracted, the warrants of it are sent to the record; so that they could not be produced; but, at any rate, there is no necessity to produce warrants after so long a time. THE LORDS found the prescription validly interrupted.

Fol. Dic. v. 4. p. 114. Fac. Col. Kames.

* * * This case is No 113. p. 5555. *voce* HERITABLE and MOVEABLE.

1776. *July 5.* ROBERTSON *against* ROBERTSON.

No 449.

JOHN ROBERTSON pursued his niece Janet Robertson, as representing her father, the eldest son of Paul Robertson of Pittagown, for payment of 1000 merks, provided in Paul's marriage-contract, to the heirs of the marriage. And, in 1763, the COURT found the pursuer entitled only to one third of the sum, as there were three children of the marriage. The pursuer having obtained right from his sister Grizel to her third, brought action, in 1773, for that share. *Urged* on the part of the defenders, That much more than 40 years had elapsed between 1725, when this sum became payable to Grizel, and 1773, the date of the conveyance to the pursuers. *Answered*, The process in 1763, though only for the part, must interrupt the prescription as to the whole. THE LORDS sustained the defence of prescription. (See APPENDIX.)

Fol. Dic. v. 4. p. 113.

1784. *July 21.*

Sir JAMES GRANT *against* The CREDITORS of the YORK-BUILDINGS COMPANY.

No 450.

THE York-Buildings Company was debtor by bond to the predecessor of Sir James Grant, who brought an action in the year 1735, calling by name the then Governor and six Assistants of the Company, for themselves, and as representing the Company. And upon the decret which followed, a horning was executed in the month of July 1740.

Whether prescription of a debt due by a corporation, was interrupted by a horning used against some of the members, who

No 450.
had been the
representa-
tives of the
corporation
when the de-
cree on
which the
horning pro-
ceeded was
pronounced?

In the ranking of the creditors of the Company, Sir James Grant, in the month of March 1780, entered a claim, in virtue of the above-mentioned debt and diligence. The other creditors objected the negative prescription, and

Pleaded; Corporations which are established by law, can sue or be sued only by the particular name or designation given to them by the legislature. The action, therefore, instituted in the year 1735, not being directed against the Company, but its managers for the time, was altogether irregular and inept; and the horning issued in 1740, was still more exceptionable, the persons against whom it was executed being no longer the representatives of the Company. They were not even liable, as partners, for its debts, it being only the stock belonging to corporations of this sort, and not the wealth or security of particular members, on which creditors can rely for their payment.

Answered; The authority given by Parliament to sue a chartered Company by its corporate firm, cannot detract from the validity of judicial proceedings, in which, without using that privilege, its representatives have been regularly cited. The decret obtained by the claimant was therefore completely effectual; as was also the subsequent horning, which, without a total nullity, could not have been framed in any other terms. The irregularity, however, of the diligence here used as an immediate document against the Company, will not support the present objection. The defenders in the action 1735 were called, not only as representing the Company, but as individuals, in which last character they were liable, after the expiry of their office, in the same manner as Magistrates, for the debts of a burgh contracted during their administration; 10th July 1752, Cleland *contra* the Magistrates of Pittenweem, No 17. p. 2511. In virtue of the horning which followed, their persons might have been seized by caption, or an escheat of their moveables might have taken place. As therefore diligence used against one of many co-obligants will preserve the debt against the whole, the statutory exception is here altogether precluded.

The Lords considered the decret of constitution as sufficiently formal. Their only difficulty respected the effect to be given to the horning which could not be received as an immediate document against the Company. A considerable majority, however, were of opinion, that the intimation thereby afforded to one or more of the partners was effectual to save the debt from prescription.

THE LORDS found, " that the decret of constitution, with the horning and execution following thereon, sufficiently interrupt the negative prescription."

Reporter, *Lord Monboddo*. For Sir James Grant, Lord Advocate *Campbell*, *James Grant*.
For the other Creditors, *Elphinston*, *Blair*, *Abercrombie*. Clerk, *Colquhoun*.

G.

Fol. Dic. v. 4. p. 115. Fac. Col. No 171. p. 268.

* * * This case having been appealed,

THE House of Lords, 15th April 1785, " ORDERED and ADJUDGED, That the interlocutors complained of be reversed, without prejudice to the points therein decided; and farther ORDERED, That the cause be remitted back to the Court of Session, with a direction to proceed thereupon according to justice.' It is believed the suit was afterwards compromised.

No 450.

1784. July 21.

THE EARL of HOPETON *against* The CREDITORS of the YORK-BUILDINGS COMPANY.

IN the ranking of the Creditors of the York-Buildings Company, a claim was entered, in the year 1779, by the Earl of Hopeton, in virtue of a contract which had been executed, in the year 1731, between his father, the late Earl, on the one part, and Colonel Horsey, as commissioner for the York-Buildings Company, on the other.

No 451.
Prescription
not interrupt-
ed by inform-
al diligence.

To this claim the Creditors of the Company objected the negative prescription of 40 years, the only document taken on it having been a horning executed in the year 1743, not against Colonel Horsey, but against the managers of the Company.

Pleaded for the Earl; Though Colonel Horsey was the nominal party, the contract bound the York-Buildings Company, and them only. The omission, therefore, to take a decret of constitution against them, as the warrant of the horning which followed, being merely an inaccuracy in point of form, will, in a question of this sort, be altogether disregarded.

Answered; There is a solid distinction between the informal execution of regular diligence, which has been admitted as a sufficient intimation of the claimant's intention to prosecute, and the using of diligence intrinsically inept and void, to which no effect can be given; Erskine, b. 3. tit. 7. § 40.; Reid against Ker, No 440. p. 11273. Of the latter sort was the horning in question. To Colonel Horsey, the proper and only debtor in the obligation, it could afford no notice, because it was not executed against him; and it was equally ineffectual against the Company, who were no parties to the contract, on which alone it could proceed.

THE LORDS admitted the distinction, and found, " That the horning executed in the year 1743 against the Governor and Assistants to the Court of Direc-