

## DIVISION XVI.

## Interruption of the Positive Prescription.

1630. *March 29.* The KING and the E. MONTEITH *against* —.

No 455.  
Interrup-  
tion by the  
Crown.

AFTER mature deliberation and reasoning amongst the LORDS, upon a letter exhibited by the Earl of Monteith to them from the King's Majesty diverse days of before ; it was at length found, That the publication and proclamation of that letter at the market-crosses of any sheriffdom, within the which any party having interest dwells, whose right may be quarrelled by the King, without intending of any action against any person, or any particular citation of any person, should serve to the King, being so published to the lieges generally before the 13 years expired, appointed by that act of prescription, to interrupt the prescription, which might run against the King's right, appointed by the act of prescription *anno 1617*, as effectually as if action had been intended and executed against particular persons, within the space foresaid, notwithstanding that by that act, intending of action within that space was appointed and required specially to be executed ; which the LORDS by their ordinance found was supplied by this publication of the King's letter and will, whereof the LORDS allowed, and interponed their authority thereto *nemine opponente*.

*Fol. Dic. v. 2. p. 130. Durie, p. 515.*

1630. *July 14.* His MAJESTY'S ADVOCATE *against* LAIRD OF PINCAITLAND.

No 456.

CONFORM to the statute (anent prescription) in an action pursued by his Majesty's Advocate, Sir Thomas Hope, and Treasurer, 14th July 1630, against the Laird of Pincaitland, for the duty of viccarage lands of Pincaitland, set in tack to the Laird of Pincaitland, unconfirmed *in anno 1558*, the Laird of Pincaitland *alleged* by Mr Roger Mowat, his procurator, That he and his predecessors had bruiked the said lands, conform to his right, more than 40 years without interruption ; and by virtue of the act anent prescription of heritable rights, James VI. Parl. 22d, cap. 12th, the King's Advocate could not be heard to quarrel his right, which was prescribed. To which it was *answered* by Sir Thomas Hope, That the King's Majesty, conform to the Lords' statute, had made lawful interruption by the publication of the said statute at the market-cross of Haddington, where the lands lie, and the cross of Edinburgh, where the defender dwells, before the outrunning of 13 years, granted by the estates in the said Parliament. To which it was *replied*, That the statute of the Lords could not derogate to the

express words of the act of Parliament, which ordained interruptions to be made by lawful citation of parties. To which is was *triplied* by his Majesty's Advocate, That the statute did not derogate to the act of Parliament, but explained the same anent the manner and form of citation in causes concerning the King. THE LORDS found the King should be answered and obeyed of the duties, notwithstanding of the alleged prescription, in respect of the foresaid interruption.

No 456.

*Auchinleck, MS. p. 163.*

1662. November 14.

MR THOMAS NICOLSON *against* LAIRDS of BIGHTIE and BABIRNIE.

THERE having been mutual molestations betwixt Mr Thomas Nicolson advocate, and the Lairds of Bightie and Babirnie, anent a common pasturage in the muir of Bighty, lying contiguous to all their lands; it was *alleged* for Babirny, That he ought to be preferred to Mr Thomas Nicolson, and the said Mr Thomas excluded from all commonty, because Babirny stands infest in the lands of Babirny, which infestment bears, with common pasturage in the muir of Bighty, and Mr Thomas had no express infestment therein. It was *answered* for Mr Thomas, That the allegiance is not relevant to exclude him, because he, his predecessors and authors are, and have been infest in his lands *cum communi pastura*, and by virtue of the said infestments, in peaceable possession immemorial, or by the space of 40 years, which was sufficient to establish the right of community with Babirnie, notwithstanding his infestment bears express. It was *answered* for Babirnie, That not only was his infestment more express, but Mr Thomas's lands and his were holden of diverse superiors, viz. Babirnie's of the King, and Mr Thomas's were kirk-lands; and albeit the muir lies contiguous to Mr Thomas's lands, yet it is not of the same parish. THE LORDS repelled the reasons of preference for Babirnie in respect of the answer. It was further *alleged* for Babirnie, That the allegiance and answers for Mr Thomas Nicolson ought to be repelled; because he offers him to prove, that Nicolson was interrupted since the year 1610, and condescended, by yearly turning his cattle off the ground, and stoping him from casting peats; and therefore he must say 40 years possession, by virtue of an infestment preceding that interruption. It was *answered* for Nicolson, *non relevat*, unless either a legal interruption by law-burrows or summons, or at least a complete and full *interruptio facti*, by debarring him one whole year from any deed of community; but for turning off his goods, which were presently put on again, and he enjoying all his profit, such were attempts, and incomplete interruptions, whereof he needed take no notice, seeing he continued in possession; otherways there would be great inconveniences by such interruptions, which would be noticed by the lieges, and yet would cut off the probation of the old possession before the same.

No 457.  
What sufficient interruption of the servitude of common pasturage.