

1672. *January 11.* JAMES JOHNSTON *against* LORD BELHAVEN.

JAMES JOHNSTON, as assignee to a bond of 500 merks granted to a merchant, wherein the Lord Belhaven's father was cautioner, did pursue the Lord Belhaven for payment. It was *alleged* for the defender, That the bond was prescribed, being dated *in anno 1627*, and no pursuit intended thereupon until 40 years thereafter. It was *answered*, That the bond was registered *in anno 1656*, which was sufficient to interrupt prescription, as was found in a practise, *anno 1629*, Morris against Johnston, No 405. p. 11228. As likewise, by act of Parliament, King James III. where a creditor hath followed his debtor, and hath taken documents thereupon, it interrupts prescription, which is odious by all law. It was *duplicated*, That the practise does not meet this case; for the reason thereof was, that there were letters raised and executed upon the registered bond; and for the act of Parliament, it requires, that a party following the debtor should take documents against him upon the seeking of payment, otherwise his bond prescribes; and accordingly, the LORDS, by a practise, *anno 1631*, Earl of Loudon against the Laird of Caprington, No 267. p. 11070. did find, That the bond prescribed, unless that there had been either a charge or a citation executed within 40 years after the date thereof.

THE LORDS did find, That the registration of a bond, upon consent of parties, whereupon no execution followed, albeit it be a decret of the LORDS, yet it is not sufficient to interrupt prescription; but that either a charge, or a citation against the party, ought to be made, to make known the creditor's intention to seek payment, which only could be interpreted to be those documents meant by the act of Parliament foresaid, and not decret without citation of party; and, therefore, they assoilzied the Lord Belhaven, and found that the bond was prescribed.

Fol. Dic. v. 2. p. 127. Gosford, MS. No 439. p. 227.

* * Stair reports this case :

January 12.—JAMES JOHNSTON pursues the Lord Belhaven, as heir to his father, for payment of a bond, dated 28th June 1627, who *alleged*, Absolvitor, because the bond is prescribed. The pursuer *answered*, That prescription is interrupted, because the bond in question is registered within the 40 years, by virtue of the clause of registration, which is a decret of consent, and alleges the like was found the 21st of July 1629, Morris against Johnston, No 405. p. 11228.; and the 27th November 1630, Lauder *contra* Colmslie, No 1. p. 10655.; and that it is most just, prescriptions being odious, and founded upon the presumed dereliction or passing from the right prescribed, so that any act showing the contrary is sufficient; likeas, the old act of Parliament anent the prescription of bonds, bears, that if the creditor within 40 years take

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Registration
alone does
not interrupt
prescription.

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no document upon the writ, it prescribes; and here is a clear document, viz. a decret of registration. It was *answered*, That the ground of prescription is not presumed dereliction, but is, *ne dominia rerum sint incerta*; and, therefore, is introduced *in pœnam negligentium*, and in favour of those who have rights, which, if by any act that they did, or ought to know, they were quarrelled, they might remove that pretence; but a putting of a writ in the register, not being a register appointed for publication, as that of sasines and reversions, but a register for execution of sentences, no party was obliged to know the same; and if it were so letten lie over till all means of improbation should cease, it were of great detriment; neither do the practiques adduced at all quadrante; for, in the first case, there was not only decret of registration, but executed horning; and, in the second case, a registered contract, whereof both the date and registration were 40 years before any action was found prescribed.

THE LORDS found the registration of the bond without any action or charge before or after, was no interruption.

Stair, v. 2. p. 43.

1673. February 11. MUIR of Rowalland *against* LAWSON.

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The execution of a summons, altho' it did not particularly specify the action, found to interrupt prescription. See No 402. p. 11241.

ONE of Rowalland's predecessors being infest in a tenement of land in Tweeddale, which was possessed by the Earl of Morton, and by progress from him is now possessed by Lawson of Kairnmoor and others; this Rowalland's grandfather did, in the year 1630, infest himself as heir to that predecessor, and raised reduction against the Earl of Morton upon the priority of his right. Now, this Rowalland insists in the reduction, against whom the defenders alleged prescription; and the pursuer having replied upon interruption by his summons of reduction *anno* 1630 against the Earl of Morton; it was *alleged* against the executions of the summons, that they were in schedules apart from the summons; and that they did not express the pursuer, but only bore, that the messenger passed at command of the within written letters, raised at the instance of the pursuer within designed, so that the Earl of Morton being then a man of great estate and interest, being treasurer, and the year 1630 being the last of the 13 years granted by act of Parliament for interruption of old rights, there is no doubt but many interruptions have been used against him, so that the executions of any summons of reduction against the Earl of Morton *in anno* 1638 might be made use of, and unwarrantably applied to this summons, which were neither just nor favourable, the lands having passed for competent prices through many hands, and the pursuer having never insisted since the year 1630, till of late. It was *answered* for the pursuer, That he opposes the executions in the common and ordinary style, and the possibility of applying of these executions is of no moment; but that these were the executions of this summons is evident; 1st, Be

