

No 1. act to prosecute such heritable rights, within the which time also the other party representing the other contractor obtained execution against this pursuer for fulfilling of their part of the contract to him, which was done *anno* 1624, whereby he alleged that it was not equitable that the one party should have execution thereupon, and the other party to be prejudged thereof; yet this was repelled, and the prescription sustained, seeing this pursuer had not *debito tempore* sought execution, for his part, contracted in his favours; for when execution was sought against him for employing of that sum, appointed by the contract to be laid out, and it was competent to have been then alleged by him, that he could not employ that sum which they were obliged to pay to him before he had received payment thereof, and being then omitted, it was probable that the sum was paid, and he could not thereby seek implement thereof, not being then neither alleged, nor no pursuit made within the time of prescription to interrupt the same before this pursuit, which was not moved before the expiring of these 13 years granted by the last act, as said is.

Fol. Dic. v. 2. p. 97. Durie, v. 1. p. 542.

* * * Spottiswood reports this case :

By contract of marriage 1567, between the Laird Lawder of that Ilk, and the Goodman of Colmslie and his daughter, Colmslie was obliged to pay in tocher 600 merks, which Lawder was obliged to employ upon land or annual-rent for him and his wife, and the children of that marriage. Lawder's heir having registered this contract of marriage, charged Colmslie's heirs for payment of the 600 merks. He suspended, because the contract was prescribed by the act of Parliament. *Alleged*, Not prescribed, *1st*, Because it was registered within the years of prescription; *next*, The suspender had forced the charger within the time to fulfil his part of the contract, and so it could not prescribe on the one side, and not on the other. THE LORDS suspended the letters *simpliciter* upon that reason; and found, that registration could not interrupt the prescription, unless more had followed on it, as had been found before, between the Lord Borthwick and the Laird of Smeiton.

Spottiswood, (DE PRÆSCRIPTIONE ET USUCAPIONE.) p. 236.

1703, December 7.

NAPIER of Kilmahew *against* Sir HUGH CAMPBELL of Calder.

No 2.

A bond being prescribed, the pursuer alleged he might prove resting owing

NAPIER of Kilmahew, as executor to Sir George Maxwell of Newark, pursues Sir Hugh Campbell of Calder, for payment of a sum contained in his bond to the said Sir George in 1667. *Alleged*, *imo*, The bond is null, wanting the writer's name and designation. *Answered*, He can never quarrel the

bond on that defect, because they referred the verity of his subscription to his own oath; whereupon there is a commission directed to Cockston, to take his deposition at home, in respect of his indisposition and age; and when he comes to depone, he denied that he ever signed any bond to Newark in 1667; whereupon they finding it was only a mistake in the extractor, the bond being truly dated in 1661, and he had made the figure like to a 7, allowed him a new commission to depone, if he did not truly sign that bond in 1661; which commission was neglected to be extracted, and so the term is circumduced for not reporting it. Calder applies by a new bill, representing, *imo*, That they ought to have furnished him with the act. *2do*, They had disguised the date to preclude him of an obvious defence of prescription arising from the bond dated in 1661, and no pursuit for it till 1702, being 40 years thereafter. *Answered* to the *first*, The law does not oblige the pursuer to furnish the act in this case; and as to the *second*, it was a mere error in writing one figure for another. THE LORDS granted a new commission, on Sir Hugh's own charges, to be reported betwixt and a certain day, but declared they did not loose nor take off the circumduction; but if he should happen to die before the time of his deponing, the decret should go out against him; but allowed him to be heard on the separate defence of prescription; against which, it was *alleged* by Kilmahew, that *esto* it were prescribed, yet that did not so take away the debt, but I may still prove it to be resting owing by his oath. *Answered*, Prescription being founded on so long a taciturnity and silence, it is reputed equivalent to a discharge, and passing from the debt, and a total extinction thereof; so that the debtor's confession that it was never paid, can neither revive it, nor make it convalesce. THE LORDS found, after 40 years prescription, the party was not obliged to give his oath, whether it was yet resting owing; and though he should confess it, yet he was not *in foro humano* liable for the debt, whatever he might be *in foro poli et conscientiae*. Then Kilmahew *replied* on interruptions, by processes within the 40 years, and his own minority; which the LORDS found relevant, and admitted to his probation.

Fol. Dic. v. 2. p. 97. Fountainball, v. 2. p.

1710. June 7. The LADY CARDROSS *against* GRAHAM of Buchlivie.

THE heritor of the lands of Buchlivie obtained a valuation of his teinds in the year 1633, and a decret of sale in February 1634, against the proprietors of the Lordship of Cardross, titulars of these teinds, decerning and ordaining them to denude themselves thereof in his favours at Whitsunday thereafter, to the crop of which year he was to enter, and pay the price to them, upon their performance. But in case of their failing to deliver to him a valid right to his teinds, it was declared lawful for him to consign the money at the term.

No 2.

by the defender's oath. Found the defender was not obliged to give his oath; and if he should confess, he was not bound *in foro humano* to pay.

No 3.

An heritor obtained a decree of sale of his teinds, by which he was empowered to introduce with his own teinds, paying the annual rent of the price to