

No 309.
sidered as
tempus inutile,
and to be
made up by
so long of ses-
sion, without
reckoning the
vacation.

space of adjournment should not be reckoned in annual prescriptions, which argues plainly, that the said individual space of time should only be deducted, without any alteration of the nature of these annual prescriptions from a *tempus continuum* to a *tempus utile*.

THE LORDS repelled the defender's allegiance, and found that the cause is not sleeping.

Fol. Dic. v. 2. p. 202. Forbes, p. 188.

1709. January 7.

Mr ROBERT WHITE of Bennoch, Advocate, *against* Captain JAMES OSWALD of Dunnykeir.

No 310.

MR ROBERT WHITE of Bennoch, advocate, pursues Captain James Oswald of Dunnykeir for the price of a house and some acres. *Alleged*, He could not pay till he received a full progress of writs. THE LORDS decerned him in the balance of the price, a sufficient progress being given. This is suffered to lie over twenty months, and then Bennoch craves his oath, that if he produce the writs given him, it will appear to be a forty years progress. *Answered*, The process must be wakened, having slept more than year and day. *Replied*, There is a decret in the cause, and that can never fall asleep. *Duplied*, The meaning of that brocard is, that a decret once pronounced may be extracted *quovis tempore*, even after year and day, without either wakening or transferring; but if it be not a final decret ending the whole cause, but something yet remaining to be done, as here a progress was to be made up, that slept like any other process, it being upon the matter only an interlocutor. And the LORDS found so, and that Bennoch behaved in form to waken it.

Fol. Dic. v. 2. p. 202. Fountainhall, v. 1. p. 478.

1710. February 2.

Earl of LAUDERDALE *against* My Lord YESTER and GEORGE SETON of Barns.

No 311.

Instance
where a pro-
cess was found
to be sleep-
ing as to one
defender,
while going
on as to ano-
ther.

THE Earl of Lauderdale having raised a summons against the Lord Yester and Seton of Barns, concluding against my Lord Yester as heir of line to the Duke of Lauderdale, that the pursuer, as heir-male to the Duke his uncle, has good and undoubted right to an apprising led against the estate of Dumfermline, and also that the apprising is affectable for his relief of the Duke's debts; and concluding against Barns, as representing Charles Earl of Dumfermline, that he ought to be personally liable for the sums contained in the apprising:

Alleged for my Lord Yester; The pursuer may constitute his relief as accords against the heir of line, and adjudge in common form; but to declare the apprising affectable for his relief, is to go out of the common road of diligence; *2do*, Such a conclusion cannot be indulged, unless the grounds of debt had been libelled and produced; seeing a right cannot be declared affectable with a *nonens*; and the pursuer might as well carry on an adjudication, or pursue a forthcoming, without producing his debt.

No 311.

Alleged for Barns; The process as to him is sleeping, not having been insisted in for a whole year after it was called by course of the roll; and therefore must be wakened.

Replied for the pursuer; *imo*, There is no necessity to libel or produce the debts in this process, which concludes not payment, but only that the apprising belonging to the Duke should be declared affectable by his debts; *2do*, The process was kept waking against Barns by the continued prosecution against the Lord Yester upon the same active title, libel, and grounds of debt; against whom it was necessary for the pursuer to insist *primo loco*, to remove all prejudicial exceptions against his title; as in an action against heirs of line and tailzie, the latter could not pretend that the process *quoad* him could sleep during the time of insisting against the heir of line who must be first discussed.

Duplied for Barns; *Perinde est* whether different parties be called in one, or in separate summonses, where the conclusions are different. The reason why a process doth not sleep against an heir of provision, while the creditor is discussing the lineal heir, is, because the action resolves in a competition betwixt these, which of them should be liable to the debt; whereas there is no such thing in this case, and therefore the parallel doth not hold.

THE LORDS declared the apprising affectable for the pursuer's relief of the Duke of Lauderdale's debts; and found that the process is sleeping as to Barns.

Fol. Dic. v. 2. p. 202. Forbes, p. 393.

1775. July 21.

LOGAN against HOWATSON.

An action in an inferior court found not to sleep while lying at *avisandum* before the Judge, though for a longer space than a year.

No 312.

Fac. Col.

* * This case is No 15. p. 10492. *voce* PLANTING and INCLOSING.