

in Lauder and Balgone's case, Title Mills, p. 18. (see APPENDIX.) See also Stair, 22d June 1667, Hay of Stroway, No 9. p. 1818.

No 420.

Against this Sir Patrick gave in a bill, which procured a new hearing on the 12th December; but the LORDS adhered to their former interlocutor, with this addition, that they allowed an incident diligence to Sir Patrick Home, to recover that contract betwixt Ayton and Wedderburn, whereby Ayton is obliged to do no deed against this mill but by course of law; after sight whereof, they will consider what the interruptions which Linthill shall prove were used *via facti* shall operate against the foresaid clause, and if they be receivable. Sir George Lockhart contended for Linthill, That an interruption *via facti*, by throwing down a dyke or dam, &c. might be a riot or crime in itself, and yet such was the favour of interruptions in law, that lawyers allowed it the effect of a legal interruption. The King's Advocate *alleged*, This was to invite men to commit insolences, and to break the public peace; and that *nemo debet lucrum reportare ex suo delicto*; and that it were worthy the care of a Parliament to discharge these tumultuary interruptions *via facti*, which have been the rise among hot-spirited Scotsmen of many dissensions, and sometimes of bloodshed, as in Carmuck's and Waterton's case, and many others; and throwing off one feal is as good an interruption as to throw down the whole dyke; and because the King's Advocate valued himself as the author and persuader of that act of Parliament made in 1669, about interruptions, Sir George Lockhart took the freedom to show all the defects of it, and the many cases it did not obviate nor provide for.—Interruptions *via facti per dejectionem* have effect, *per. l. 4. § 20. et l. 5. D. De usucap.* See No 422.

Fountainhall, v. 1 p. 193, 213, 245.

1684. *January.*

BROWN against HEPBURN.

THE Laird of Coalstoun having pursued a reduction against the Laird of Bearford, of a disposition of the lands of Easter-Monkton, *ex capite inhibitionis*; *alleged* for the defender, That his right was prescribed, there being no diligence done against him nor his predecessors for the space of 40 years. *Answered*; That the prescription was interrupted by a reduction raised at Coalstoun's instance, in the year 1635, against Bearford and his curators; and albeit the execution against Bearford personally, or at his dwelling-house, is miscarried, yet the execution at the market cross of Edinburgh against his curators being still extant, is sufficient to interrupt the prescription, especially seeing the tutors and curators are expressly named in the execution; and albeit process would not have been sustained upon such an execution against Bearford, yet it is sufficient to interrupt prescription, it being clear by several decisions, that citations otherwise null for want of some formalities, yet would be sustained to interrupt prescription; as was decided 25th November 1665,

No 421.

Possessing, or pursuing upon the debt upon which inhibition is grounded, does not stop prescription of the inhibition, which can only be done by action upon the inhibition itself.

Similar decisions were pronounced, 22d June 1681, Kennoway against Craw.

No 421.
ford, No 9.
p. 5170. and
22d Novem-
ber 1682,
Moultray a-
gainst Port-
ous, No 367.
p. 11187.

Found also,
that a citation
at the market-
cross against
tutors and cu-
rators could
not be sustain-
ed as an inter-
ruption of pre-
scription of in-
hibition, the
execution a-
gainst the
principal
party being
amissing.

See No 382.
p. 11403.

Whyte against Horne, No 44. p. 10646. ; and the 15th June 1666, Sinclair against the Laird of Houstoun, No 15. p. 1289. where a decret of pouding the ground was found sufficient to interrupt prescription, albeit the heritors were not called, but only the tenants ; and a pursuit at the instance of an heir has been sustained for an interruption, for a moveable debt, and at the instance of an executor for an heritable debt, because prescription in itself being odious, *quilibet insinuatio*, doth interrupt prescription, especially *in re antiqua* ; as also the prescription was interrupted by a summons of exhibition raised upon the debt, which is the ground of the inhibition against Bearford in the year 1637, which being sufficient to interrupt the prescription, as to the debt which is the principal, it must likewise interrupt prescription as to the inhibition, which is accessory ; for an assignation to the debt would carry the right to the inhibition, albeit it was not particularly assigned, so an action for the debt might interrupt the prescription as to the inhibition ; albeit it be not mentioned in the summons and citation against a principal, will interrupt prescription against a cautioner, and a charge to enter heir for a debt will interrupt prescription as to the inhibition served upon that debt ; and as a summons raised and executed upon an inhibition would interrupt prescription as to the debt, so likewise the citation upon the debt interrupts as to the inhibition ; and this point was expressly decided the day December 1682, in the cause Mr John Phillip against Watson and Walker, (see APPENDIX.) where the LORDS found an interruption used upon an infetment did preserve the inhibition that was founded upon the same right, albeit the inhibition was not mentioned in the summons, which is according to that principle of law, that *accessorium sequitur naturam principalis* ; as also there were warnjngs used against Bearford and his tenants, which is offered to be proved by witnesses, which ought to be allowed to supply any defects or informalities of the foresaid interruptions. *Answered*, That the reduction intended in the year 1635 cannot be sustained as an interruption, seeing there are no citations against Bearford, who is the principal party called ; and albeit the LORDS have sometimes sustained a citation that was truly given, to have the effect of an interruption, albeit it labour of some defects and informalities, but where there is no execution at all against the principal party, the execution against tutors and curators cannot be sustained as an interruption ; and as an intimation of an assignation at the market cross would not be sustained as a legal intimation of an assignation, far less a citation at the market cross can have the effect of an interruption, but that which might make Bearford *titulare de jure suo* ; but so it is, that any such citations against his curators at the market cross, was not any ground to make him to be doubtful of his right, and the citation upon the exhibition of the right, upon which the inhibition was used, cannot interrupt the prescription as to the inhibition, seeing there is no mention of the inhibition in the summons, it being expressly provided by the act of Parliament that all rights whereupon there is no diligence or document used within 40 years, prescribe ; and the case of a

principal and accessory doth not meet this case, because an inhibition so as to be a ground of any action of reduction is *quod principale*, and therefore it must prescribe as to that effect, unless there be some diligence done upon it within 40 years, and it was so decided in the case of Crawford against Kennoway, No 9. p. 5170. where the LORDS found that a reduction could only be sustained as an interruption from the libelling the reasons *ex capite inhibitionis*; and a citation used at the instance of an heir for a moveable debt, and at the instance of an executor for an heritable debt, will be sustained as an interruption, because they have a putative and presumptive title, which is sufficient to interrupt prescription, and being interrupted, the benefit doth accrese to the party that is found to have truly the right; and a citation upon a summons, founded upon an inhibition, will interrupt prescription as to the debt, because the inhibition is founded upon the debt, and could not subsist if the debt were prescribed; for a debt may subsist, albeit the inhibition be discharged, and a charge to enter heir being the foundation of legal diligence, which equally and in its own nature relates to all debts and actions that the pursuer has against the parties charged, it does interrupt not only as to the debt, but as to the inhibition; whereas a summons of exhibition is only expressly libelled upon the debt, without relation or respect to any action to be founded on the inhibition, and the executions of the warning not being produced *quæ ex sua natura requirunt scripturam*, they are not provable by witnesses. The LORDS found that the citation at the market cross against the tutors and curators could not be sustained as an interruption, seeing there was no execution against the principal party; and found that the exhibition of the right whereupon the inhibition was founded did not interrupt the prescription of the inhibition; and refused to sustain the warnings as grounds of interruption to be proved by witnesses.

Fol. Dic. v. 2. p. 127. Sir P. Home, MS. v. 1. No 552.

* * * Harcarse reports this case :

HAMILTON of Bearford having granted a wadset of some lands to Coalstoun, who served an inhibition against him; and thereafter having dispoed the lands to Hepburn, of whose right Coalstoun raised reduction after 40 or 50 years possession, upon the head of minority and *ex capite exhibitionis*;

Alleged for the defender; That he was secure by prescription upon 40 years possession.

Answered; Prescription was interrupted by a reduction *ex capite inhibitionis* within the 40 years, and by an exhibition.

Replied; The citation in the reduction was null, not being executed either personally or at the dwelling-house, against the defender's author, but only against tutors and curators at the market-cross; so the defender's author not being put to any doubt about his right by citation, it can be no interruption, nor can it hinder inhibition to prescribe, (the raising of a summons without

No 421. citing the party being no using of the inhibition to hinder it from prescribing) and the exhibition can make no interruption *quoad* the diligence of inhibition, the inhibition neither being libelled as to the title, nor called for to be produced; although the wadset, which was the ground of the inhibition, and title of the exhibition, might be thereby preserved; and the preserving of the debt and ground of diligence, doth not preserve the diligence from prescribing, unless there be some document taken upon the diligence itself. And the receiving annualrent upon a bond, and granting discharges not relative generally or specially to diligences of inhibition, apprising, or infestment following thereon, would not hinder these diligences and real rights to prescribe, if no document be taken upon them for 40 years; although, *e contra*, taking documents upon diligences will preserve the ground thereof, seeing accidents cannot be *sine subjecto*.

Duplied; Interruption is favourable for preserving of rights, and *quævis insinuatio sufficit*; and the LORDS have found, That illegal citation will make interruption, viz. where all parties having interest are not called, or where an executor pursues for an heritable sum.

Triplied; Although diligences having some informalities, as the not citing of the party upon the full number of days, or the like, or when a party is cited upon an inhibition not duly registrate, especially before the late act of Parliament concerning interruptions, might *perimere instantiam*; yet in all these instances the party is acquainted, and so had reason to doubt *de jure suo*.

THE LORDS found, That neither the reduction nor exhibition did interrupt the prescription of inhibition; and found, that a warning being interruption *via juris* for preserving rights, was not probable by witnesses.

Harcarse, (PRESCRIPTION.) No 767. p. 217.

* * * This case is also reported by P. Falconer:

BROWN of Coalstoun being a creditor to Archibald Hamilton, and having served inhibition, he intented, against Hepburn of Bearford, a reduction, *ex capite inhibitionis*, of a disposition of the lands of Monkkrig, granted by his debtor to Bearford's grandfather. It was *alleged* for Bearford, That the inhibition was prescribed, there being no document taken thereupon for 40 years. It was *replied*, That the prescription was interrupted by a reduction raised at Coalstoun's instance against Bearford *in anno* 1635, and also by an exhibition raised and executed against Bearford *in anno* 1637; and *3tio*, By several warnings to remove used at his instance, which he offered to prove by witnesses. It was *duplied* for Bearford, That the reduction raised *in anno* 1635, could not be sustained as an interruption of the prescription of the inhibition, because there was no execution against the party personally, or at his dwelling-house, but the execution was against him, and his tutors and curators, allendarly at the market-cross

of Edinburgh. It was *alleged* for Coalstoun, That *quævis insinuatio* was sufficient to interrupt the prescription, and that this citation being at the market-cross of Edinburgh, where the curators dwelt, was a sufficient certioration: And interruptions were sustained in many cases, where a decret could not follow, as in a process of poinding the ground against tenants, albeit the master was not called. The LORDS found, That the reduction foresaid, was not a sufficient ground of interruption of the prescription of the inhibition. To the *second*, it was *answered* for Bearford, That the exhibition could not be sustained as an interruption, because the same was at the instance of Coalstoun against Bearford and several others, wherein he libels, that there was a contract betwixt Bearford and his debtor Hamilton, anent the alienation of the lands of Monkrig, wherein Bearford was obliged to pay L. 1000, due by Hamilton to Coalstoun, and therein concludes exhibition of the contract, wherein there is not the least mention of the inhibition; so that Bearford being secured, in relation to the ground libelled, he was not anywise certiorated in relation to the inhibition: And albeit this process of exhibition may be sustained, as an interruption for the debt, yet it cannot be sustained as an interruption for the inhibition, it being very consistent, that the inhibition may prescribe, be discharged and renounced, and yet the ground thereof may subsist. It was *answered* for Coalstoun, That *accessorium sequitur principale*, and whatever did interrupt the prescription of the ground of the inhibition, did interrupt the inhibition itself. The LORDS found, That the exhibition foresaid did not interrupt the prescription of the inhibition; as also, they refused to sustain the warnings to be proved by witnesses as grounds of interruption.

No 421.

P. Falconer, No 78. p. 52.

1684. *November.*

Sir PATRICK HOME *against* LINTHILL.

No 422.

FOUND, That an interruption *via facti* in demolishing a mill-dam, made with that excess that it was a riot, might yet serve as an interruption of prescription. See No 420. p. 11241.

Harcarse, (PRESCRIPTION.) No 768. p. 218.

* * * Sir P. Home reports this case :

1684. *December.*—IN the action at the instance of Sir Patrick Home, Advocate, against Home of Linthill, in November 1684, for laying in the dam-head of Brown's Banks mill, Linthill having offered to prove interruption *via facti*, the LORDS allowed him to prove the same; reserving to the Lords to consider, at the advising of the probation, the import of an agreement in the year 1625, betwixt the Laird of Aiton, Linthill's author, and the Laird of