

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.

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*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

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Wedderburn, who built the built, by which the Laird of Aiton was obliged that he should not stop the going of the said mill, otherways than by order of law; and granted commission to visit the ground, and to consider the building of dam-head, if it would prejudge Linthill's mill, by causing the same to stand in back water: And the commission being reported, it did appear by the report, that the water at the dam-head, when there was no flood, or when it is low water, will be six feet of measure lower than the water below Linthill's mill. *Alleged* for Linthill; That the commissioners were mistaken as to the way and manner of trying and measuring the fall of the water from Linthill's mill to the dam-head below; seeing it appears by the report, that they did begin their measure from Linthill mill downward; whereas, they should have taken the level from the dam-head upwards, to the end of Linthill's tail-dam, which is far below the mill-wheel; and if the level had been so considered, the dam-head would not be two feet of measure below the level of the fail-dam; so that if the dam-head were built up, the water would restagnate; and that Sir Patrick could not found upon prescription, because Linthill had proved his interruption *via facti*, by cutting the dam-head, and stopping the laying thereof, by Alexander Home of Blackhill his author, in the year 1652; as also, the ground on the other side of the water belongs to Linthill, at least is commonty to the town Eyemouth, wherein he has interest, and that he will not suffer Sir Patrick to affix the end of his dam-head to any part of the ground on the other side. *Answered*; That the commissioners did justly take the measure of the level from Linthill's mill-head to the dam-head below, and not from the end of the tail-dam; because, there is a great descent from the mill-wheel to the end of the tail-dam; and where there is a descent, the water must run; and so long as the water runs, there can be no restagnation; so that, unless the superficie of the water, at the dam-head below, were as big as Linthill's mill-wheel, the water cannot restagnate; and the level was taken by a mathematician that was employed by the commissioners appointed for visiting the dam-head; and, as a further demonstration that the report was just, and that the building of Sir Patrick's dam-head cannot make Linthill's mill restagnate, they have been both going mills together upwards of these 60 years; and no respect ought to be had to the probation adduced by Linthill, for proving the interruption *via facti*; because, there was liti-contestation formerly made in this action, by which Linthill offered to prove interruption *scripto* and *via juris*; and there is probation adduced and advised, and is found not to prove; so that he having elided the manner of probation to prove interruption *via juris*, he cannot have recourse to prove the same *via facti*; and albeit it had been entire to him to prove his interruption *via facti*, yet the act alleged to be proved, being the cutting and casting down of the dam-head, which is a riot and crime, could not be sustained as an interruption, seeing unjust and unwarrantable acts cannot have the benefit of a legal diligence; it being a principle in law, that *nemo debet lucrari ex suo dolo vel culpa*; and the foresaid deed of interruption,

alleged to be proved, was so unwarrantable an act, that Blackhill, who did cut and throw down the dam-head, being convened before the English Judges, it was found to be a riot, and he was severely fined; and, by an express decision, the 22d June 1667, Hay of Stroway, No 9. p. 1818. the LORDS found, that, albeit a party might use a civil interruption *via juris* of a mill, or laying in of a dam-head, yet he could not stop a going mill, or demolish the dam-head *via facti*, if the mill was a going mill before, without the authority of a Judge; and as this is clear in the general, much more in this particular case, seeing, by the agreement betwixt the Laird of Wedderburn and the Laird of Aiton, in the year 1625, Aiton, Linthill's author, is obliged not to stop the going of the mill, otherways than by order of law, which excludes all interruption *via facti*; and albeit the ground on the other side of the water doth not belong to Sir Patrick in property, yet he having interest in the commonty, as well as Linthill, it is a certain rule in law, that any party having an interest in the commonty, may make any use thereof that does not prejudice the common interest; but so it is, that the affixing of the end of Sir Patrick's dam-head to the water brae on the other side, doth not prejudice the ground; and it is clear by Craig, Lib. 2. Dieges. 8. § 5. that, in flumine privato pro reparando aquæductu, sive clusam molendini sua posunt imponere ligna et lapides in fundo vicinorum, invito etiam domino, quamvis non potest pro novi molendini constructione; and it is evident, that Linthill's stopping the laying in of the dam-head was only *emulationem vicini*; and by the report, the building of this dam-head cannot make Linthill's mill restagnate; so that it is a principle in law, that what is done *in emulationem, invidiam, et injuriam*, altering ought not to be allowed, *nam maliciis hominum non est indulgendum*.—THE LORDS sustained the report; and found, that there was no restagnation; but, in respect of Linthill's interruption *via facti*, assoilzied him as to that point, anent the pursuer's affixing the lintal of his dam-head upon the other side of the water, wherein Linthill has interest either of property or commonty.

*Sir Pat. Home, v. 2. No 631.*

1685. *January 1.* COUNTESS of ROTHES *against* MARQUIS of DOUGLAS.

No 423.

IN a pursuit at the instance of the Countess of Rothes against the Marquis of Douglas, for four bolls of barley out of the lands of Abernethy parish;

The defender *alleged* prescription, in regard no such annuity had been exacted for the space of 40 years.

*Answered* for the defender; That the prescription was interrupted by process against the tenants of the lands.