

* * A similar decision was pronounced in the case of a process of compt and reckoning against tutors and curators, though it had lien over more than ten years, December 1731, Creditors of Libberton against his Tutors and Curators. See APPENDIX.

No 470.

1680. February 5. BROWN against HEBURN.

THE act 10th, Parl. 1669, about the interruption of prescription, respects only the future time, and has no retrospect. This remedied by act 15th, Parl. 1685.

No 471.

Fol. Dic. v. 2. p. 131. Stair.

* * This case is No 382. p. 11208.

1684. December. COUNTESS of WEMYSS against M'KENZIE of Applecross.

No 472.

IN an action to make furthcoming at the instance of the Countess of Wemyss against M'Kenzie of Applecross, the LORDS found, That actions founded upon arrestment were not to prescribe, if they were wakened at any time within five years after the ten years mentioned in the act of Parliament in the year 1669 concerning prescription.

Fol. Dic. v. 2. p. 131. Sir P. Home, MS. v. 2. No 639.

* * Fountainhall reports this case :

1684. December 3.—THE Countess of Wemyss for payment of a debt of 11,000 merks due to her, arrested the like sum, and it being debated, that the arrestment was null by the 9th act of Parl. 1669, because not wakened within five years; and this being advised, the LORDS found the sense of the said act of Parliament 1669, anent prescriptions, does not extend to actions for making furthcoming, if they be interrupted within the space of ten years posterior to the date of the said act; and find, that, by the said act, the course of ten years is necessary to the prescription of actions of furthcoming, and that the wakening every five years is to be understood posterior to the elapsing of the said ten years; and therefore the deceased Earl of Wemyss having interrupted by the wakening and declarator within the ten years, find that the pursuer's action is not prescribed; and adhere to their former interlocutor, finding that Sinclair of Maye's bond is not in implement of the contract of marriage. Some of the extraordinary Lords were for referring the explaining the ambiguity of the act to the approaching Session of Parliament. But others opposed this; because,

No 472. in Sir Richard Maitland of Lethingston's case, in the 94th act, Parliament 1579, we see the Parliament there ordains the cases preceding their act to be decided by the Lords conform to the law then. And this being of new heard again on the 10th December, the LORDS adhered to their former interlocutor, and found the five years mentioned in the act were not included within the ten, but were over and above, which indeed made 15. The lawyers subtilized much on a parallel case *in l. 18. C. De transact. Ubi transigere non licet de criminibus non capitibus citra falsi accusationem*; whether *citra* be an exception of the crime of falsehood from the rule, or if it be not rather a certification or penalty on the transactors, as falsaries; which they drew to these unclear words of our act, "except they be renewed in five."

December 23.—Another point of the debate between Lady Wemyss and Applecross, mentioned 3d current, anent the innovation, was decided. "THE LORDS found she was not obliged to assign the debt, because she had right thereto by a diligence, and not by a voluntary right."

Fountainhall, v. 1. p. 317. & 323.

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

1684. December 16.—IN the competition betwixt the Countess of Wemyss and M'Kenzie of Applecross, anent a sum of money lent to the Laird of Maye, by the Tutor of Lovat and his Lady, it was *alleged*, That the action for making arrested goods forthcoming at the Lady Wemyss's instance was prescribed, in regard, by the late act of Parliament, actions for making arrested goods forthcoming prescribed within ten years, except they be wakened every five years; and that the Countess of Wemyss's arrestment was not wakened within five years after the act of Parliament. It was *answered* for the Countess, That her action for making arrested goods forthcoming, was depending before the act of Parliament; and the act could not be extended *quoad præterita*, except it had borne an express clause for that effect. *2do*, That by the act of Parliament, actions prescribed in ten years, and that this arrestment was wakened within the ten years; and the meaning of the act of Parliament was, that the wakening behoved to be within the ten years, and after the wakening there behoved to be every five years a new wakening. It was *replied* for Applecross, That the act of Parliament having declared and ordained, that arrestments, even before the act, should prescribe within five years after the act, actions for making arrested goods forthcoming being but a consequence of the arrestment, the act of Parliament must be extended to such actions as were depending before the act. THE LORDS did not decide the first point, whether the act of Parliament did extend to actions for making arrested goods forthcoming, depending before the act. But they found, that this action being interrupted by a wakening within the ten

years, did not prescribe ; and as to the provision of the act of Parliament, that it should be wakened every five years, the LORDS were of opinion, that the meaning of the act of Parliament was, that actions for making arrested goods forthcoming should be wakened within ten years after the raising of the action, if the action was raised since the act of Parliament, and within ten years after the act of Parliament, if the action was depending before the act, as was in this case, and that the action behoved to be wakened every five years, commencing from the date of the wakening, and not from the date of the raising of the process.

P. Falconer, No 95. p. 65.

* * This case is also reported by Harcarse :

It being controverted, if actions of forthcoming intended before the act of Parliament 1669, concerning prescriptions, could be regulated thereby ; or if they did only prescribe in 40 years ;

It was *alleged* for my Lady Wemyss an arrester ; That the said act being correctory, was not to have a retrospect, except where it is expressly appointed ; because regularly laws not declaratory *futuris tantum dant formam negotiis*.

Answered for Applecross ; The act doth expressly regulate preceding arrestments, and consequently actions thereupon, which are but an accessory. And herein it differs from the act concerning interruptions, which hath no retrospect. Now, the reason is equally strong, if not stronger, for the short prescription of actions of forthcoming raised before the act ; for seeing this short prescription was found convenient for ascertaining the property of moveables, as the actions before the act have been older than those after ; so it was more necessary the former should be abridged.

THE LORDS demurred to give interlocutor upon this debate, seeing the cause might be determined without it, the pursuer having raised a wakening within eight years after the act, and alleged, That the prescription run not for ten years.

It was *alleged* for the defender ; That the clause in the act, "That action shall prescribe in ten years, if not wakened every five years," imports, that if they be not wakened every five years, they prescribe, which is congruous to the time appointed for prescription of arrestment, which either before or after the act prescribes in five years, unless action be raised thereon within the said space of five years.

Answered for the pursuer ; The act expressly mentions ten years, and the exception cannot be understood to abridge that time, but must be so understood, that if a wakening be used any time within the ten years, that being an interruption, the ten years must run again from the wakening ; and the words every five years, are but added *exempli gratia*, if wakening be used within the

No 472. ten years. *2do*, The clause of exception doth rather concern the quality of interruption by wakening, than the time of prescription.

THE LORDS found the action prescribed in ten years, though there was no wakening till the eighth year; and that another ten years must run from that wakening.

Harcarse, (PRESCRIPTION.) No 769. p. 218.

1687. *February.* Colonel GRAHAM *against* LIN of Larg.

No 473.
A man's creditor becoming rebel, and the forfeiture being gifted, interruption by citation at the rebel's instance before forfeiture altho' not renewed every seven years by the donatar, was sustained.

COLONEL GRAHAM of Claverhouse having obtained a gift of Patrick M'Dougal's forfeiture, and having pursued Fergus Lin of Larg for the sum of 4000 merks, contained in a bond granted by him to M'Dougall of French, and assigned to Patrick M'Dougall, his brother; *alleged* for the defender, That the bond was prescribed, being dated in the year 1642, and the sum payable at Whitsunday 1683. *Answered*, That the prescription was interrupted by a citation at the rebel's instance against the defender long within the years of prescription. *Answered*, That the citation cannot be sustained as an interruption, because it has not been renewed every seven years, conform to the act of Parliament concerning interruptions. *Replied*, That the act of Parliament takes no place in the case of a donatar of a forfeiture; because it is not to be supposed, that a donatar can be master of the papers or the writs and evidents belonging to the rebel, or know his rights; and as prescription cannot take place in such cases in the general, much less in that particualar case, seeing the summons of interruption at the rebel's instance against the defender was seen, and returned, and called, and a decret marked by the clerk upon the back of the summons, which, as it kept the process from sleeping, so that there would be no necessity of a wakening, albeit the decret should lie over unextracted the space of seven years, so by that same reason, it should hinder prescription, and was so found lately in the case of Innes of Lithuel against the Lord Duffus. THE LORDS repelled the allegiance proponed against the interruption produced, in regard of the answer, and sustained the interruption.

Fol. Dic. v. 2. p. 132. Sir P. Home, MS. v. 2. No 874.

No 474.
The act 10th, Parl. 1669, extends to all interruptions, as well of short as of long prescriptions.

1699. *July 21.* EARL of FORFAR *against* The MARQUIS of DOUGLAS.

By contract of marriage betwixt the Earl of Angus and Lady Jean Weemys, his second Lady, the baronies of Bothwell and Wandle are provided to the heirs of that marriage, which the Earl obliges himself to be worth 10,000 merks yearly.