

forthcoming after the arrestee had brought the present process, yet it was nevertheless competent for him to produce his grounds of debt there, as it always had been for the five previous years proper to insist in an action of forthcoming upon the arrestments. By bringing a process himself, the arrester shews, that he does not mean to abandon his diligence; but by being merely cited, which is the act of another, he does nothing indicative of intention; and till he appear, it is uncertain whether he intends to obey the citation or not, that being entirely optional. Upon the arrester's plea, if the multiplepinding were detained in Court for several years, he might still appear at the end of that period, and maintain, that he was preferable to all rights acquired since the intimation of the arrestment, although he had not till then insisted in it, because the prescription on his diligence was interrupted by the raising of the action, and citing him as a defender.

The Court 13th February 1802) altered the interlocutor of the LORD ORDINARY; and again, on advising a petition, with answers, they "adhered," by the narrowest majority.

It was remarked by one of the Judges in the minority, that if it was not necessary that the creditor should do something to defeat the presumption of dereliction of his claim, and if it was sufficient merely to be called in a multiplepinding, (which, no doubt, was a common process, and to the parties appearing, served the purpose of a mutual reduction,) the Legislature never would have enacted § 41. of the bankrupt statute, declaring the production of the grounds of debt in the sequestration to have the same effect as a legal interruption of prescription; but, on the other hand, it was observed, that this was necessary, as a sequestration was not a process; as it was not in Court, but under the direction of a trustee, on which account that clause was introduced.

Lord Ordinary, *Bannatyne.*

Act. *Fletcher.*

Agent *R. Graham, W. S.*

Alt. *A Campbell, jun.*

Agent. *Ar. Ferrier, W. S.*

Clerk, *Sinclair.*

*Fac. Col. No 56. p. 117.*

## SECT. II.

### Mails and Duties.

1688. *February.* ROBERTSON of Inches *against* M'INTOSH of Daviot.

No 247.

FOUND, That violent intrusion into possession, by virtue of a pretended right, was probable by witnesses, even five years after the intruder's removing.

No 247. Mails and duties, not pursued within five years after the tenant's removing, do thereafter prescribe *quoad modum probandi*.

*Harcarse, (PRESCRIPTION.) No 779. p. 220.*

1709. December 9.

JOHN MURRAY of Philliphaugh *against* JOHN TROTTER of Mortonhall.

No 248.

A fiar having a tack of life-rent lands, and after the death of the liferenter commencing to possess as proprietor; in a suit for arrears more than five years after the tack had expired, it was found, that the act 1669 did not apply to the case.

HARRY TROTTER of Mortonhall having taken from Margaret Scot, Lady Chesterhall, a tack of some lands liferented by her, whereof he was fiar, for the yearly tack-duty of 2500 merks; and the Lady having afterwards married John Murray of Philliphaugh, who got the tack-duty assigned to him in their contract of marriage; John Murray, now of Philiphaugh, as representing the said John Murray his grandfather, pursued John Trotter of Mortonhall, as representing the said Harry Trotter, his father, for payment of tack-duties resting before the year 1675, when old Philiphaugh died.

*Alleged* for the defender; By the 11th act of the Parliament 1669, mails and duties of tenants not pursued within five years after the tenant's removing from the lands prescribe, unless proved to be resting by the defender's oath or writ. And it is more than five years since Mortonhall's tack was expired by the liferenter's death, and he commenced to possess as proprietor.

*Replied* for the pursuer; This being a correctory law, strictly to be interpreted, and neither extended *de casu in casum*, nor *de persona in personam*, March 20. 1683, Hamilton *contra* Herries, No 255. p. 11061, it will not comprehend the present case; for, *imo*, It was made in favours only of *nudi coloni*, poor tenants who labour the ground by themselves or their sub-tenants, because of their presumed rusticity; whereas here the debate is with an heritor and fiar, who attained possession of liferented lands, while the liferentrix lived, by a tack from her of the whole rent, and cannot in propriety of words be designed a tenant in the terms of the act of Parliament. *2do*, Prescription by the act 1669, takes place only from the tenant's removal, to prevent the hazard they were in of losing their discharges; but here the heritor continues to this day to possess his own lands, without removing at all. *3tio*, The act constitutes only a prescription of mails and duties and rents of lands not proved *scripto*; whereas the pursuer proves his claim by a written tack; and it is reasonable that rents due by verbal agreement only should prescribe sooner than such as are constituted by writ.

*Duplied* for the defender; *imo*, He pleads no extension of the act, but that his case is in the precise terms of it; for that law is general, making no distinction of tenants, whether they possess by tack, or verbal set; or whether they be rich, or poor; or whether they be tenants of the whole rent, or but of a part; and so long as the liferenter lasted, Mortonhall possessed *tanquam qui-*