real diligence, seeing, so long as the disposition remained in the naked terms of a personal right, the pursuer was not obliged to know if there was any such right made; and so was *in bona fide* not to pursue a reduction thereof. THE LORDS found, That the leading of a comprising upon a bond which was the ground of the inhibition did not interrupt the prescription of the inhibition, seeing that diligence could not be ascribed to the inhibition; but found that the prescription did not run against the inhibition, but from the date of the comprising used upon the bond or disposition craved to be reduced; in respect the party at whose instance the inhibition was served could not know of the bond, until real diligence was done thereupon to affect the lands. No 367.

Sir P. Home, MS. v. 1. No 259.

1687. *July* —. Earl of LAUDERDALE *against* VASSALS of Dundee.

No 368.

IN a question of recognition, *alleged* for the Vassals, That one of the base infeftments being granted 40 years before the other, the process of recognition was prescribed, *quoad* that subject, and so it could not concur to infer recognition; *answered*, The first base infeftment did not comprehend the major part of the ward tenement; and the action of recognition could not begin to prescribe until recognition was incurred. THE LORDS repelled the defence, in respect of the answer.

Fol. Dic. v. 2. p. 124. Harcarse.

*** This case is No 63. p. 6485. *voce* IMPLIED DISCHARGE AND RENUNCIATION.

1688. *June* 28. WILKIE *against* SCOT.

No 369.

ONE having disponed a tenement, with a servitude *altius non tollendi*, and the heritor of the said tenement having offered to build it higher, he was interrupted. *Alleged* for the builder, That the servitude was prescribed *non utendo* for the space of 40 years. *Answered*, Negative servitudes do not prescribe, but after the contrary positive acts are done, just as warrandice; till then, the parties being *non valentes agere*. 2*do*, Predial servitudes are constituted by personal rights, and need not be included in infeftments. *Replied*, It would be an invincible inconvenience, if predial servitudes should not be notified, especially negative servitudes; for positive servitudes, with possession, is a sufficient notification, whether they be included in the infeftment or not.

THE LORDS found, The servitude did not prescribe from the date of the writ, but from the time the party acted contrary to the servitude, by building, or obtaining a declarator of immunity from the servitude.

Harcarse, (PRESCRIPTION) *No* 780. *p.* 220.

*** Fountainhall reports this case:

No 369.

John Wilkie, Taylor in Edinburgh, and George Scot, pursue mutual declarators. The first pursued *actione confessoria*, That Scot's tenement owed him and his tenement the servitude *altius non tollendi*, conform to an obligement contained in the disposition made 1607 by Mr William Adamson, then heritor of both dominant and servient tenements, to James Heriot. Scot, *actione negatoria*, contended his tenement was free; 1*mo*, Because the said clause was not in the charter and sasine; 2*do*, That he derived no right from Adamson; 3*tio*, That he and his authors had possessed it 40 years, without any acclaiming that servitude, or its being mentioned in their writs. *Answered* to the 1*st*, Servitudes were real without infeftments; for which see 26th Jan. 1622, Turnbull, *voce* Servitude. 2*do*, The bounding of his own lands demonstrates that it came from Adamson and James Heriot. 3*tio*, In negative servitudes (such as this of *altius non tollendi*) there is no prescription, being *actus meræ facultatis*, until there can be an attempt or contravention. The Lords *in præsentia* assoilzied from Scot's declarator of immunity, and found his tenement liable in a servitude *altius non tolendi* to John Wilkie's land; and therefore decerned in his favours.

Fountainhall, v. 1. *p.* 508.

1707. *December* 17. Captain Gordon *against* Mr John Cuming.

No 370.
The seven years prescription of bonds begins to run from the date of the bond, and not from the term of payment, though before that the creditor is not *valent agere*; for such are the express words of the act.

Captain Gordon, brother to Earlston, being cautioner in a bond for Sir George Campbell of Cesnock, his father-in-law, to Mr John Cuming, a creditor in a certain sum by bond, and being charged with horning for payment, he suspends, for this reason, that being *per expressum* only cautioner, he is free by the 5th act of Parl. 1695, declaring, if they be not insisted against in seven years, they shall be *ipso facto* free of their cautionry; and *ita est* this bond was in 1700; and he is at a small loss, for he has an heritable bond and infeftment in the principal debtor's lands, which has made him the more slack and negligent against Mr Gordon. The Lords doubted on two points: 1*mo*, Whether the seven years ran from the date of the bond, or the term of payment, before which the creditor is not *valens agere*; but having read the act, it commenced from the bond, which seemed very mysterious; for some bonds bear a very long term of payment, which will render these bonds with cautioners very insignificant. The *second* was, if the minority of the principal debtor's heir will not stop this septennial prescription; but there being nothing of this alleged on, it was laid aside; all the difficulty and strait was, that the suspension was craved without caution or consignation; but there being no answer for the