

1682. *November.**HOME against The Earl of HOME.*

THE Earl of Home having granted bond to the Lady Home, his mother, for the sum of 40,000 merks, which being assigned to Mr Charles her son, and he having pursued an adjudication against the Earl his brother; *alleged* for the defender, That he offered to prove, by the pursuer's oath, that this action was to the Lady his mother's behoof; and by the Lady's oath, that this bond was granted to the defender's own behoof; which action having lain over year and day, and thereafter the pursuer having craved a commission to take the Lady's oath; the defender did rectify his allegiance and offer to prove that by a late agreement betwixt the Lady and him, she had discharged the said sum, and renounced all her right for the payment of 2500 presently, and 5000 merks yearly in time coming; upon which there being a commission extracted for taking the Lady's oath, the defender did reclaim against the commission, as being unwarrantably extracted, and the process first behoved to have been wakened. *Answered,* That there was no necessity of a wakening, the action being several times called within year and day, albeit nothing marked; and, albeit it had been sleeping, yet the Lady being sickly and valetudinary, her deposition ought to be taken upon the commission to lie *in retentis* before the conclusion of the cause. THE LORDS repelled the dilator, and found no necessity of a wakening.

Hol. Dic. v. 2. p. 202. Sir Pat. Home, MS. v. 1. No 267.

1707. *July 22.**MR ALEXANDER MAITLAND against ALEXANDER BRAND of Reidhall.*

IN the declarator of non-entry at the instance of Mr Alexander Maitland against Alexander Brand of Reidhall, it was *alleged* for the defender, That the cause is sleeping; in so far as nothing was done from the 14th of February 1706 to the 30th of June 1707; whereby it lay over more than year and day, even after deduction of the whole space of the adjournment of the winter-session, viz. from the 1st of November 1706 to the 4th of February last bypast; and therefore no process could be sustained till the cause were wakened.

Replied for the pursuer; The time of the adjournment of the session by the Parliament, is to be considered as *tempus utile*, and so before the process could sleep, he should be allowed three months of session, without reckoning the intervening vacation.

Duplied for the defender; The year within which a process must be called to hinder sleeping, was never imagined to be a year of session-months, but *tempus continuum*, including session and vacation. This is farther cleared from the tenor of the acts adjourning the session, whereby it is declared, That the

No 308.

The Lords found no necessity of a wakening, where the action had been several times called within the year, tho' nothing had been marked on it.

No 309.

A cause found not to be sleeping tho' nothing was done therein from 14th February 1706 to 30th June 1707, in respect the session was under adjournment from the 1st of November 1706 to the 4th of February 1707, and in order to the sleeping of a cause the time of adjournment was to be con-

No 309.
sidered as
tempus inutile,
and to be
made up by
so long of ses-
sion, without
reckoning the
vacation.

space of adjournment should not be reckoned in annual prescriptions, which argues plainly, that the said individual space of time should only be deducted, without any alteration of the nature of these annual prescriptions from a *tempus continuum* to a *tempus utile*.

THE LORDS repelled the defender's allegiance, and found that the cause is not sleeping.

Fol. Dic. v. 2. p. 202. Forbes, p. 188.

1709. January 7.

Mr ROBERT WHITE of Bennoch, Advocate, *against* Captain JAMES OSWALD of Dunnykeir.

No 310.

MR ROBERT WHITE of Bennoch, advocate, pursues Captain James Oswald of Dunnykeir for the price of a house and some acres. *Alleged*, He could not pay till he received a full progress of writs. THE LORDS decerned him in the balance of the price, a sufficient progress being given. This is suffered to lie over twenty months, and then Bennoch craves his oath, that if he produce the writs given him, it will appear to be a forty years progress. *Answered*, The process must be wakened, having slept more than year and day. *Replied*, There is a decret in the cause, and that can never fall asleep. *Duplied*, The meaning of that brocard is, that a decret once pronounced may be extracted *quovis tempore*, even after year and day, without either wakening or transferring; but if it be not a final decret ending the whole cause, but something yet remaining to be done, as here a progress was to be made up, that slept like any other process, it being upon the matter only an interlocutor. And the LORDS found so, and that Bennoch behaved in form to waken it.

Fol. Dic. v. 2. p. 202. Fountainhall, v. 1. p. 478.

1710. February 2.

Earl of LAUDERDALE *against* My Lord YESTER and GEORGE SETON of Barns.

No 311.

Instance
where a pro-
cess was found
to be sleep-
ing as to one
defender,
while going
on as to ano-
ther.

THE Earl of Lauderdale having raised a summons against the Lord Yester and Seton of Barns, concluding against my Lord Yester as heir of line to the Duke of Lauderdale, that the pursuer, as heir-male to the Duke his uncle, has good and undoubted right to an apprising led against the estate of Dumfermline, and also that the apprising is affectable for his relief of the Duke's debts; and concluding against Barns, as representing Charles Earl of Dumfermline, that he ought to be personally liable for the sums contained in the apprising: