gence being, by the statute, an interruption of the prescription, it behoved to have that effect.

But the Lords found,—That the diligence was no interruption of prescription in this case, because there was no prescription by this statute, but a limitation of the cautionary obligation to a certain term; so that the effect of the diligence was not to continue the obligation beyond that term, which could not be by the nature of it, but only to secure what falls due within that term. See *Forbes, December* 10, 1712, *Stuart* against *Douglas.*

1741. *December 5.* COCKBURN *against* GRANT.

[C. Home, No. 110.]

IN this case the Lords found,—That the seller of smuggled goods was not obliged to deliver, nor, *vice versa*, the buyer to receive them. The *ratio decidendi* is the smuggling Act, 11 G. II, by which the buyer of such goods may, when they are offered to him, seize them for his own behoof without paying the price; and, on the other hand, the seller may, after delivery, seize and take them from the buyer; so that the law never can oblige the seller to deliver his goods to have them seized, nor the buyer to receive, to have them immediately retaken.

The Lords, notwithstanding, would find the buyer liable in the price if he received the goods; and did find him liable,—July 1745.

1741. *December 5.* ——— *against* ———.

[Elch., No. 2, *Promissory Note.*]

THE Lords found,—That an indorsation not holograph, in Scotland, of a promissory note, was not a habile conveyance, notwithstanding there was here no competition of creditors; but the single question was betwixt the debtor in the note and the indorsee.

1741. *December* 9. SINCLAIR of FRESWICK *against* MURRAY of CLARDEN.

[Kilk., No. 1, *Wadset.*]

THIS was a question about the redemption of a wadset. The wadsetter had disponed a considerable part of the wadset lands, and of the remainder that continued in his hands the reverser assigned the reversion to a third party, who premonished the wadsetter, and consigned a certain sum as his proportion of the re-

demption-money, together with a bond for whatever more should be found due. Upon this order of redemption, he pursues a declarator.

It was OBJECTED,—That a wadset could not be redeemed in part without the consent of the wadsetter, no more than a debt could be paid in part *invito creditore*. ANSWERED,—That all the wadset lands he had a title to were offered to be redeemed; so that, with respect to him, it was no partial payment, but a payment of all he could ask or crave.

REPLIED,—That, though the wadsetter had divided the wadset, yet he had not divided, nor consented to the division of the reversion; therefore, as, by the contract, the reverser was obliged to consign the whole sum before he could redeem, and as this benefit was not renounced by this wadsetter, or any of the purchasers from him,—the reverser must still follow the same method, and cannot pretend to redeem by parcels. And as he cannot redeem by consignation of the part, so neither can he redeem by consignation of the whole; because, having only title to a part of the reversion, he cannot redeem the whole. The consequence of which is, that, in the present circumstances, he cannot redeem at all, till he acquire the rest of the reversion, which gives him a title to redeem the whole; upon which he should premonish all the partial wadsetters to receive their respective sums, and then consign the whole. Which the Lords sustained.

1742. *February* 6. HUNTER, &c. *against* BINNIE, &c.

THIS was an action upon the Act 7 Geo. II., for recovery of the penalty imposed by that statute, upon the separatists in elections of magistrates and councillors in burghs. The first defence was a dilatory, *viz.* that, the defenders being in possession, the pursuers had no title to insist in this action till they had first declared their own election. Till then, they could not say, in terms of the statute, that the defenders had made a separate election; therefore, before they could proceed, they must wait the fate of a declarator of reduction which they have just now depending,—which the Lords sustained; so that it was not necessary to enter into the merits of the cause. However, as the other defences were pleaded upon at the bar, and reasoned on by the bench, I shall take notice of them. *2do*, A second defence was, that one of the councillors upon the side of the pursuers was not, at the time of election, qualified in terms of law: and he being set aside, the pursuers have no majority, but only nine to nine. To this it was ANSWERED,—That that councillor had afterwards qualified within the time allowed by the indemnifying Act, the effect of which, by that Act, is declared to be, the liberating him from all the penalties and incapacities, and validating all his acts done or to be done.

REPLIED,—That the Act indemnifies only for not qualifying within the time prescribed by law, and validates the deeds done during that period; but if, after that, a person goes on, in contempt of the indulgence shown by this Act, to act without taking the benefit of it, it is impossible that his after qualifying will validate these Acts. For that purpose another Act of indemnity would be requisite. This was the opinion of Arniston, and I believe of the majority.