

1753. November 26.

EXECUTORS of Mr DAVID COUPER *against* Mr JOHN OGILVY of Airly.

OGILVY being pursued by the Executors of Couper, for payment of an account of money advanced, and expenses incurred by Couper, as doer for the family of Airly, *objected* the triennial prescription.

*Answered* for the Executors of Couper ; The prescription has been interrupted ; for that, in the year 1722, Ogilvy, the defender, pursued Couper for exhibition of certain writings belonging to the family of Airly. Couper pleaded retention, until payment should be made to him of his account ; he was ordained to produce it ; he neglected so to do ; and he was then ordained to restore the writings.

It was, therefore, *pleaded* for the Executors ; That, whatever interrupts the long prescription, interrupts the shorter prescriptions : Now, the long prescription is interrupted, whenever the creditor takes document upon his debt ; and there can be no more solemn method of taking document upon a debt, than by demanding it in judgment : And this was done in the procedure above narrated, and the triennial prescription thereby interrupted : The account, indeed, through the negligence of Couper, was not lodged in Court ; nevertheless, the pleading on it is as valid an interruption, as if he had brought a process for payment of it, without either ingrossing it in the summons, or producing it in judgment. Such process would have interrupted the prescription ; and the same ought to be the effect of the judicial procedure in the year 1722.

*Replied* for Ogilvy ; Although Couper pretended in the 1722, that an account was due to him ; yet neither at that time, nor for 20 years after, did he produce it, or even specify its extent. The prescription cannot be interrupted by the vague allegation of an account owing ; for that it would not be interrupted by a direct action brought for payment, unless the extent of the sum acclaimed were therein specified : It can in no ways be interrupted, unless the creditor bring an action within the three years ; or the debtor acknowledge the debt to be due ; and neither of these is, in this case, pretended.

“ THE LORDS sustained the defence of prescription of the account libelled, unless the pursuer offer to prove the account resting owing by the oath of the defender.”

Reporter, *Murkle.*

Act. D. *Grams.*

Alt. *J. Ferguson.*

Clerk, *Justice.*

D.

*Fol. Dic. v. 4. p. 107. Fac. Col. No 92. p. 140.*

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A writer's judicially claiming retention of his constituent's writings, until payment of his account, without producing it, does not interrupt the prescription of that account.