

1758. July 7.

JAMES ROBERTSON, Writer in Edinburgh, *against* His Majesty's ADVOCATE.

No 447.
Prescription
interrupted
by the debt-
or's estate
being annexed
to the Crown.

ALEXANDER ROBERTSON of Strowan, in 1683, granted bond for 600 merks to Sir William Paterson. This debt Sir William assigned to his son John, from whom the right to it came into the person of James Robertson.

Alexander Robertson of Strowan, the son and representative of the debtor, was convicted of high treason, and forfeited by decree of the Parliament of Scotland, dated 22d July 1690.

In 1703, Strowan obtained from Queen Anne a pardon, and gift of his estate, which was issued from the Secretary's Office, but not expedite through the Seals. He however entered to possession of the estate, and sued and defended in actions before all courts during the Queen's reign.

John Paterson, then in the right of the aforesaid debt, charged him to enter heir in general to his father, and thereupon raised a summons against Strowan on the passive titles; which was given out to see on the 27th December 1711, and returned 3d January, and inrolled 5th January 1712; but no further step taken in the action.

Strowan, having engaged in the Rebellion 1715, was again attainted by act of Parliament. In 1723, King George I. was pleased to grant a revocable gift of the estate to Strowan's sister; and, in 1725, a pardon was granted to him, so far only as concerned his life.

Strowan once more appeared in rebellion in 1745; and thereupon his Majesty revoked the gift that had been made to Strowan's sister, and resumed the estate upon the forfeiture 1690.

In the 27th year of his Majesty's reign, an act passed for annexing to the Crown certain forfeited estates, which had been vested in his Majesty by a former act of the 20th of his reign. These estates were by the statute declared to be unalienably annexed to the Crown, 'from and after the 25th day of December 1752.' The act proceeds to provide for satisfaction to be made to the creditors on these estates; and then follows this clause: 'And whereas the barony of Strowan, and other lands, which formerly belonged to Alexander Robertson of Strowan, now deceased, became forfeited to the Crown, by decree or sentence of the Parliament of Scotland, in the year 1690, and now belong to and remain the property of his Majesty, be it further enacted, by the authority aforesaid, That the said barony and lands be, and are hereby annexed to the Imperial Crown of this realm, and shall be and remain for ever unalienable from the same; and the lawful debts thereon shall be paid in the same manner as is provided concerning the lands and premises before mentioned.'

In the 26th of his Majesty, another statute passed, directing the lawful creditors on the said estate of Strowan, before the 1st of December 1753, to enter

their claims in the Court of Session, there to be tried in the manner prescribed as to claims on other forfeited estates, by the vesting act of the 20th of his Majesty.

James Robertson accordingly entered his claim for the aforesaid debt before the 1st December 1753.

Objected for the Crown; The debt is cut off by the negative prescription, no legal document having been taken upon it from the date of the bond in 1683. The summons 1711 could not interrupt the prescription; because it was raised against Strowan only, who had not *persona standi*, but was dead in law, his pardon never having been expedited, and the estate was still in the Crown.

Answered for the claimant; The negative prescription is founded in the presumed dereliction of the creditor. An interruption of it is only necessary to show the *animus* of the creditor to prosecute his claim. Here the law does not so much consider the real situation of the parties, as the apparent state they are understood to be in at the time. Strowan was then universally believed to have been effectually restored against the forfeiture 1690; and it was so understood by the Legislature itself, when the second attainder was passed against him in 1715; and many other actions were in the Queen's time prosecuted by him, or carried on against him, in the House of Peers. Supposing the defect of completing the pardon had been known or attended to at the time, and that it was liable to revocation, or might fall by the death of the granter; yet, while Strowan enjoyed the benefit of it, and continued in possession of his estate, it was not competent for him to object against being made liable in payment of the debt; and it has been found, that an attainted man is liable to perform his contracts, and that diligence may issue against him for that purpose, 24th December 1725, Jacob Gomez Serra *contra* Robert late Earl of Carnwath, No 26. p. 10449. Now, a process against a party who might have been found liable in payment, is surely a sufficient interruption of the negative prescription.

Replied, The debt pursued on is not contracted by the attainted person, but by his father; so the decision quoted does not apply.

The Lords were of opinion, that the process 1712 was sufficient to interrupt prescription.

But it was further *objected* for the Crown, That the years of prescription were run from the 5th January 1712, when the last step of that process was taken, to the 5th January 1752, which was before Mr Robertson's claim was entered.

Pleaded for the claimant, The only method competent for the creditors of Strowan to recover payment of their debts before the statute of the 26th of the King, was to attach the estate by real action or adjudication, in pursuance of the act 1690. But as, by the act of the 25th of the King, this estate was annexed unalienably to the Crown, while the term of 40 years from the interruption 1712

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was yet current, the claimant was thereby *non valens agere*, as the estate could not be thereafter adjudged, and he could do nothing for recovery of his debt till the statute of the 26th appointed the method of entering claims in this Court, which he followed in due time.

Answered for the Crown, *1mo*, The act of 25th of the King annexed this estate 'in the same manner' with the other forfeited estates therein mentioned; that is, only from the 25th December 1752, which was after the 40 years were expired. *2do*, Supposing the statute to have immediately annexed this estate, yet, on the 5th of January 1752, when the 40 years expired, the statute did not exist; it was only first moved upon the 17th February 1752, and got the royal assent on the last day of that Session, which was 26th March 1752. *And, 3tio*, Although the annexation had been made within the years of prescription, yet the claimant was *valens agere* during the whole 40 years; as he might still have brought a declarator for having it found that his debt was lawful, and subsisting to such an extent, and that, in terms of the annexing act, he was entitled to recover payment of it.

Replied for the claimant, *1mo*, The clause of the annexing act relative to this estate, annexes it to the Crown *de presenti*, without mention of any future day; and the reference to the case of the other estates only concerns the payment of debts. *2do*, The British statutes do not bear dates, like the Scots acts; but it is an established rule of the law of England, that every statute is held to be passed on the first day of the Session in which it is made; and if no time is expressed in the statute from which it should take effect, it must operate *retro* from the first day of the Session; *Lo. Coke*, 4. *Inst.* p. 25.; *Brook's Abridg.* tit. *Relation*, § 34. Now, this Session began on the 14th November 1751, which was near two months before the 40 years expired. *And* although, in fact, the act was not passed till some time after, yet no man can lose his right, through prescription, by neglecting to do what, by a supervenient statute, would have been rendered useless. *And, 3tio*, The only effectual method for recovering payment prescribed by the act 1690, was an adjudication, which confessedly could not be led after annexation. It is also, at best, doubtful if a declarator would have been competent after it; but, at any rate, as neither payment nor security could have been got by it, the creditor was not bound to bring so unprofitable an action.

"THE LORDS found, That the prescription objected to the debt claimed on was sufficiently interrupted; and therefore sustained the claim." (See PRESUMPTION.)

Act. Dav. Rat. J. Ferguson. *Alt. The Crown Lawyers.* *Reporter, Kames.*
D. R. *Fol. Dic. v. 4. p. 114.* *Fac. Col. No 117. p. 213.*