

No 314.

of his body, and there is an apparent probable manner by which it might come into Breadalbane's hand: He confessed before the Parliament he had got the writs from the Earl of Caithness at the date of the disposition, and partly from Sir Robert Sinclair; the backbond was never in Sir Robert's hand, and is of a posterior date to the disposition. It is said that the reversion expired in 1678; and though after that the party should be found entitled to redeem, the *pactum legis commissoriæ* being reprobate, yet this equity of redemption is prescribed: But it is apprehended the reversion could not expire, when Glenorchy, during the currency thereof, had got the bond into his custody; as neither could the equity prescribe, so long as he secreted it from the persons having interest therein: Also there is no prescription run, as the application to Parliament in 1681 was an interruption, within forty years of which this process was commenced.

Answered, The disposition to Glenorchy was no trust, but an onerous deed under reversion, which expired by the lapse of the time, and that competent to the heirs of the Earl's body, by his dying without any. If it were necessary the defender could plead prescription, having possessed forty years on the disposition and infestment that followed upon it, and having a negative prescription against any claim the pursuer might have, to be reponed against the lapse of the time for redeeming, there being a prescription run since the lapse, as was found Pollock against Story, No 51. p. 7216.; of which the petition to Parliament can be no interruption, both as the petitioner had no title to the reversion in his person, which is required by the 28th Act. P. 1469, and as that was not a method of bringing a declarator of redemption of a real estate: These answers would be good, if the reversion were in the hand of the pursuer; but, on the contrary, there is no evidence Glenorchy came unwarrantably by it: The presumption is, that Caithness having no hopes of being able to redeem, nor of male issue, as he died soon after, delivered it up.

THE LORDS adhered.

Act. R. Craigie.

Alt. W. Grant.

D. Falconer, v. 2. No 232. p. 281.

1759. February 9. ALEXANDER DUNBAR of Boath *against* Sir HARRY INNES.

No 315.
Implement of
a contract
presumed af-
ter a long in-
terval.

DUNBAR's predecessor being creditor to the predecessor of Sir Harry Innes in L. 1103:13s. Scots, the debtor, in 1682, became bound, in payment of this debt, to deliver 200 bolls of bear of that crop before the last of March 1683, under the penalty of L. 8 Scots for every boll undelivered. This obligation was in the form of a mutual contract, and the testing clause is in these terms: ' In witness whereof, these are written by John Brodie, servitor to the Laird of

' Brodie, and subscribed with my hand, at Edinburgh, the 18th of November 1682, before these witnesses,' &c. This deed is signed by both parties. No 315.

On this obligation Dunbar of Boath pursued Sir Harry Innes for payment of the L. 1103 : 13s. Scots.

Objected by the defender, The testing clause does apply particularly to neither of the parties' subscription, therefore the obligation is improbative, void and null; and supposing it might be applied to the subscription of one of the parties, if it cannot apply to the other party's subscription, it can have no effect; for, as the deed is a mutual contract, if both parties are not bound, neither is bound.

Answered, It was usual, in mutual contracts, to execute two deeds of the same tenor, each whereof was completed by the subscription of one of the parties. The deed produced was the one completed by the subscription of Innes, and was properly found in the custody of Dunbar the creditor. *2do*, The testing clause does apply to each of the parties subscriptions taken separately.

THE LORD ORDINARY repelled the objection.

Pleaded, That the obligation was prescribed; and that, from the nature of the obligation, it being for the delivery of a quantity of victual within a certain time, under a high penalty of L. 8 for every boll undelivered, the presumption was, that it was performed within the time, as it did not appear that any demand was made on this obligation, either for the victual or the penalty, for thirty-nine years after the parties contractors were dead.

THE LORD ORDINARY, on account of an obligation granted to Dunbar's successor in the 1722, passing from the defence of prescription, but reserving the defence of payment, repelled that plea likewise; but found it presumed, that the victual was paid in terms of the obligation.

" On advising a reclaiming petition and answers, the LORDS found it presumed, That the obligation in the contract, in the year 1682, was implemented, and therefor they adhered to the Lord Ordinary's interlocutor. See WITNESS.

Act. *Hamilton Gordon*.

Alt. *Lockhart*.

J. C.

Fol. Dic. v. 4. p. 129. Fac. Col. No 165. p. 294.

1760. July 15. STEWART *against* TRUSTEES OF HOUSTON.

IN an action for payment of a bill, which had lain over for twenty-seven years, without diligence done on it, or interest paid, it appearing that the debtor, who had frequently borrowed small sums from the charger, was in use to pay him by furnishing lime to his farm, and that after the date of the bill