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counsel, what may be for their honour, what for their interest, neither of which they seem for sometime to have understood. I give my opinion, therefore, my Lords, for continuing this injunction (interdict), not only on the plain and open principles of justice, but from regard to the public, and from regard to this misguided corporation itself.

"I therefore move to reverse the judgment of the Court of Session, and, in the technical terms of that country, to lay your order upon the Court to pass the bill of suspension, that it may be conjoined with the action of delarator, and the question of right decided."

It was therefore ordered and adjudged that the interlocutors complained of be *reversed;* and it is further ordered, that the Court of Session do pass the bill of suspension that the question of right may be decided, when the suspension shall be joined with the action of declarator.

For Appellants, *Al. Wedderburn, Ar. Macdonald.*
For Respondents, *Ja. Montgomery, Henry Dundas, Dav. Rae.*

(M. 11,276.)

His MAJESTY'S ADVOCATE, on behalf of His Majesty and the Public, - - } *Appellant;*

JEAN HAY, Widow of John Cuthbert of Castlehill, and her Children, - - } *Respondents.*

House of Lords, *24th April* 1758.*

WADSET—PRESCRIPTION—INTERRUPTION.—A bond was granted to a party, and had lain over until within a few months of 40 years, when decree *cognitionis causa*, followed by decree of adjudication, were obtained. A claim was made on this debt 40 years after the date of this adjudication: Held, that calling the creditor in an action of reduction, declarator, and extinction of the debt, raised by a co-creditor, to which the debtor was no party, within the 40 years, and appearance of the creditor made therein, with production of his bond and adjudication to support his debt, were not sufficient to interrupt the negative prescription, in terms of the statute thereanent.

The respondents were claimants on the forfeited estate of Simon Lord Lovat, who was attainted in 1747.

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* This and the following case omitted of their proper dates.

The debt upon which they claimed was founded on a wadset, dated so far back as 1683; and the debt itself had stood, previously to this date, on a bond granted on 11th October 1642, by Hugh, Master of Lovat, to William Paterson, for 4000 merks (or £222. 4s. 5d. sterling,) with penalty payable at the term of Whitsunday 1643. In 1647 this bond was assigned to George Cuthbert of Castlehill. From the term of Whitsunday 1643, the term of payment, till the beginning of the year 1683, no notice was taken of this bond, and nothing was done on it. It lay over until within a few months of 40 years without any demand for payment; Cuthbert then raised action against Lord Lovat and his guardians, and upon their renouncing, obtained decree *cognitionis causa* on 24th February 1683; and decret of adjudication on 30th March 1683, accumulating principal, penalty, and almost 40 years' interest.

In the meantime, the granter of the bond had died, after being infeft in the estate of Lovat, and was succeeded by Hugh, an infant, against whom and his guardians the action above referred to was brought.

The last Hugh Lord Lovat died in 1698, without issue male, leaving four daughters, the eldest of whom was married to Alexander Mackenzie, son of Roderick Mackenzie of Prestonhall, one of the Senators of the College of Justice.

Lord Prestonhall having purchased several encumbrances on the estate of Lovat, on which he passed four several infeftments, brought, as a creditor of the Lovat estate, an action of reduction, improbation, and declarator against the other creditors, who appeared from the records to have charges of debt against the estate, in order to ascertain the extent of the debts; and that it ought to be found that the said bonds, adjudications, &c. had been paid, or were destitute of the legal solemnities, or were false, or forged, and the estate disburdened of the same. 1708-9.

George Cuthbert was made a party to this suit, and appeared and produced the original bond and assignation above mentioned, and referred to the record for the two decrets of constitution and adjudication. Upon this action avizandum was made, and thereafter decree reducing all the writs specially called for, and of which production had not been made; but exempting therefrom the present claim, as to which sufficient production was made. Nothing further was done by George Cuthbert.

Alexander Mackenzie, husband to Lord Lovat's eldest daughter, possessed the estate of Lovat in his wife's

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right, and also as in right of his father, Lord Prestonhall, the incumbrancer, until his attainder in 1715.

In 1710, a submission had been proposed, and Alexander Mackenzie granted bond binding and obliging himself to procure Lord Prestonhall's consent agreeing to submit all law suits, claims, &c., due to George Cuthbert, including the action of reduction above referred to, and particularly a wadset right which George Cuthbert had over the lands of Achnagairn, part of the estate of Lovat, to the arbitration of Robert Frazer. The submission was written out, but before being signed, Lord Prestonhall died.

George Cuthbert died, and was succeeded by John Cuthbert, the respondent, Jean Hay's husband. Her husband died, after making a settlement, in 1732, in her favour, for behoof of her younger children. He took no notice of this debt in the settlement, which had now accumulated to a large amount (£4180), nor had he ever made any demand for payment during his life.

After the estate of Lovat, however, was forfeited, the respondent, for the first time, and under certain general words in the trust-deed, raised and obtained decret of adjudication in implement against the heir of her husband of the adjudication of 1683, whereupon the present claim was made in 1749. Thus the whole claim is founded on a bond 115 years old—this bond having been neglected almost for 40 years before any step was taken, and then only the adjudication of 1683 was obtained; and thereafter the debt was again neglected for 66 years, until the present claim was made. In these circumstances, the appellants contended, 1st, That the claim was totally barred, that, if it was ever due, there was a legal presumption either that it was totally paid and discharged, or that it was unjust; and, 2d, That the debt was cut off by the negative prescription,—no document having been taken thereon from the adjudication in 1683 to the date of the present claim in 1749. He founded on the negative prescription of obligations established by the act 1469, c. 29, and repeated by the act 1474, c. 55, declaring that the person having interest in an obligation, shall follow forth the same within the space of 40 years, and take document thereon. As well as the act 1617, which declares, "And "sicklike his Majesty, with advice foresaid, statutes and or- "dains that all actions competent by the law upon heritable "bonds, reversions, contracts, or others whatsoever, either "already made, or to be made, after the date hereof, *shall*

" *be pursued* within the space of 40 years after the date of " the same."

It was answered by the respondents, that there was no reason to suspect that the debt now claimed was satisfied, because it appeared from the public records that the family of Lovat, from the time of granting the bond in question till the year 1734, had been in continued distress; their estate overwhelmed with debts, and the heir in possession constantly in poor circumstances, which sufficiently accounted for the lapse of time, and also presumed that the debt was not paid. That in answer to the plea of prescription, it could not be pleaded, as the legal interruptions, by the decree of adjudication taken on the debt in 1683, and the appearance made in the action of reduction brought by Lord Prestonhall, and production therein of the grounds of debt in 1709, by the respondents' ancestor, sufficiently elided the plea. To this it was replied, that the adjudication was of no avail, as it was prescribed itself; and that the production of the bond and assignment in Lord Prestonhall's action in 1709 was no legal interruption of prescription, the act requiring " the party to whom the obligation is made, that has " interest therein, shall follow the said obligation, and take " document thereupon;" and that even decret of registration upon an obligation, with letters of horning thereon, was decided to be no interruption of prescription.

At first the Court, on report of the Lord Ordinary, sustained the objections made to the claim, holding that the plea of prescription was good, and that the " documents " produced did not interrupt prescription." Mar. 9, 1756.

On further advising, with a further production of the bond of submission, they altered the above judgment, and sustained " the interruptions of the prescription founded on, " and remit to the Lord Ordinary to proceed accordingly." and July 13, 1756. July 27, 1757.

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—1*st*, The circumstances of the present case amount to a legal presumption, that the debt now claimed was either originally unjust, or had been long ago paid: and of themselves are sufficient, without any collateral aid, to determine the question, and to establish that the adjudication 1683 ought to be considered as a satisfied incumbrance, and as such, to attend the inheritance. The bond, the original voucher of debt, was granted 116 years ago, and interest is now claimed for all that time. For

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almost 40 years this bond lay totally neglected, without any demand of payment; at length, in 1683, when the heir of the family had renounced the succession, and consequently *in hoc statu* it was not competent to him or any other person to dispute the debt, this bond was again revived by George Cuthbert, as assignee of the original creditor, and an adjudication *cognitionis causa* obtained for the purpose of charging the estate of the granter. From that date, till the time when the present claim was made—a period of 66 years,—was the debt again deserted. And although this debt was greater in amount than all the funds which John Cuthbert had, put together, yet, on making his settlement before his death, he makes no allusion to it whatever. All this is allowed, although in the interval other creditors adjudge, and attempts were made to carry off the estate by expired apprizings. If this bond existed, it cannot be supposed that George Cuthbert, or his son, who lived in Lord Lovat's neighbourhood, would have quietly looked on, and seen all this without attending to ther own interests, and securing themselves for their own debts. 2*d*, The debt now claimed is, besides, barred by the negative prescription, no legal document having been taken thereon from 1683, the date of the adjudication, till the present claim. The appearance made in 1709, in Lord Prestonhall's action, is no legal interruption of prescription, the act requiring expressly, that document must be taken by the creditor against the debtor, as the only *following forth of the debt*, according to the natural meaning of the act, and to the construction established by practice. Here no document of *following forth the debt* was taken by the creditor; he only appeared as a defender, to an action brought by another creditor of the common debtor, who was neither owner of the estate, nor liable to payment of the debt; no other proceedings were had on the part of George Cuthbert, than the appearance and production of his vouchers of debt; there the matter rested. And, with respect to Alexander Mackenzie's obligation as to the submission, it does not alter the case; he was neither owner of, nor had any power over the estate: The engagement was for another person, and by his disapprobation became ineffectual; and even though it had been completed, yet as *none* of the *parties* were either *owners* of the *estate*, or *liable in the debt*, it cannot be an interruption of prescription, within the words and sense, or established construction of the act 1469.

Pleaded for the Respondents.—It is sufficient to save against prescription, that the person claiming under the obligation should do some act and deed, by which an intention is manifested, or denoted, not to desert or depart from it; but, on the contrary, to insist on his right or claim. Such being the evident import of the statutory words of *taking document on, and following and pursuing the obligation*, it is to be presumed, that where the justice of the debt is clear, courts of justice will hold such proceedings as were here taken, to be sufficient to bar the plea of prescription. In this case, no prescription attached, or could apply until forty years after the day of payment on the bond. But, before the forty years had expired, it clearly appears, that action was raised on the bond, which is sufficient of itself to elide prescription, and this action was followed by a decree of adjudication, which is likewise a sufficient taking of document upon the debt in 1683. But, further, prescription was further interrupted by exhibiting and producing the said adjudication and bond now claimed, in the action of reduction improbation and declarator brought by Lord Prestonhall in 1709; which was entering the lists in competition, and taking one of the strongest documents that can be conceived, upon the debt in question, because thereby the party claimed and insisted upon his debt and adjudication, as a just and real subsisting incumbrance upon the estate of Lovat, out of which he was entitled to receive payment and satisfaction, preferably to any right or title, debt, or incumbrance, standing in Lord Prestonhall's person upon the same estate. So many of the judges in the Court below viewed the question when the interlocutors appealed against were pronounced, disallowing that these *per se* were sufficient to interrupt prescription. Thus then, there are not only acts and *deeds of the creditor* in the way of *taking document* upon, and following and pursuing his right and claim, but there are also the strongest *acts* of *the debtor* and party then liable for the debt, owning and acknowledging the same, all which, it is maintained, are a sufficient bar to prescription. Such is the obligation for a submission, granted by Frazerdale, heir-apparent of Lord Prestonhall, which expressly acknowledged the debt, and referred to the foresaid reduction and proceedings therein, wherein that debt was insisted in and claimed. And the whole other circumstances of the family —the writs and writings referred to, demonstrate that the debt is due, and not prescribed. 1710.

After hearing counsel, it was

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Ordered and adjudged that the said two interlocutors of 13th July 1756, and 27th July 1757 be reversed, and that the respondent's claim be dismissed..

For Appellant *C. Pratt, Rob. Dundas, C. Yorke.*
For Respondents, *Edward Starkie, Ro. Mackintosh.*

His Majesty's Advocate, - - *Appellant;*
Jean Hay, Widow of John Cuthbert, *Respondent.*

House of Lords, 26*th April* 1758.

Adjudication and Infeftment—Prescription—Interruption.—A bond was granted by a party to his creditor, upon which adjudication, charter, and infeftment followed, this adjudication comprising several other separate debts; the bond debt lay over for 66 years, when the present claim was made, and the negative prescription pleaded against the adjudication: Held that a claim made before the Government Commissioners of Enquiry on forfeited estates and registration thereof, together with a submission, followed by decree-arbitral, entered into by the debtor with one of the creditors in the separate debts comprised in this adjudication, and assignation of that debt by him to the debtor within the 40 years, were sufficient to interrupt the negative prescription in regard to the debt, it being one of those comprised in the adjudication thus acknowledged by the debtor.

Nov. 6, 1690. Hugh, Lord Lovat, granted bond, of this date, for the sum of 1600 merks Scots, payable at the term of Martinmas then following, in the year 1691, to the Bishop of Murray, his heirs, executors, or assignees.

1703. In 1703, this bond was assigned to Robert Frazer, advocate, which appears to have been done in trust, and for the

Feb. 9, 1703. Bishop's behoof; as appears by letter, of this date, under Frazer's hand, declaring that this bond was "assigned in trust "to me for your behoof."

Nov. —— On 18th November 1703, the said Robert Frazer, upon the above bond, as well as upon other bond debts assigned to him in trust, and a bond debt due to himself by Lovat, obtained decree *cognitionis causa* against Lady Frazer of Lovat, eldest lawful daughter of Hugh Lord Lovat, the debtor then deceased. In this decree there was comprised a bond, granted by Hugh Lord Lovat, to James Frazer of Phopachy, dated 16th April 1694, for the sum of 1800 merks, which was afterwards assigned to Robert Frazer, in trust for Alex-