

duction within the *quadriennium utile* for reducing deeds in minority, did not interrupt the prescription of that privilege of revoking and reducing, unless it was renewed every seven years, in the Earl of Forfar's process against the Marquis of Douglas, in 1700.

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Fol. Dic. v. 2. p. 127. Fountainball, v. 2. p. 223.

1705. July 4.

The LORD and LADY PITMEDDEN *against* GEORGE MONRO of Lymlair.

THE Lady Pitmedden as executrix to Mr William Lauder her father, and her husband for his interest, having pursued George Monro of Lymlair, for his father's debt by bond upon the passive titles; it was *alleged* for the defender, That the bond was prescribed, no diligence being done thereon, for the space of more than 40 years.

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Communing
by missive
letter not sus-
tained as an
interruption
of prescrip-
tion.

Replied for the pursuers; That they had interrupted prescription by intimating their claim upon the bond, by a missive to the defender, as the defender's letter of answer bears, wherein he craved some time to search out matters, and advise with his friends; and that being indulged him, he ought not to obtrude prescription upon the 40 years expiring *medio tempore*; especially seeing he promised by that letter to do just things, and by another letter written to the pursuer after elapsing of the 40 years, desired a communing upon the matter, without mentioning the defence of prescription; now, communing by letters, is more than if they had stated accounts about the debt; and counting was sustained to interrupt prescription, July 2d 1630, Herries *contra* Scott, No 280. p. 11084.

Duplied for the defender; According to the 29th act, 5th Parliament, James III.; the negative prescription of exoneration from personal obligation, should be interrupted by legal diligence, or a bond of corroboration, 27th November 1630, L. Lauder *contra* L. Colmslie, No 1. p. 10655. As to the decision betwixt Herries and Scott, it hath no contingency with the interruption of prescription of 40 years, but relates only to the triennial prescription of the *modus probandi* of merchant accounts by witnesses. *2do*, Interruption of prescription by a letter is a novelty, except in the sovereign's case, which is allowed by an act of sederunt; Stair's Instit. lib. 2. tit. 12. § 27., and even then the letter requires publication at the market cross of the proper jurisdiction, where the interested party lives, 30th March 1630. The King and Earl of Monteith, Div. 16. *h. t. 3tio, Non relevat*, That the defender upon the alarm given him by my Lord's letter, craved time, unless he had acknowledged this debt, and craved time to take course with it, which would have been an interruption by way of corroboration, or renewed obligation. But on the contrary, the answer bears, that the pursuer's claim was altogether a mystery to him, and

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consequently his demanding time to be cleared therein, was rather a persisting in the denial of it, than any thing like to homologation; and the defender's using a point of legal defence, cannot pass under the construction of a step of unjust dealing; so, that if the pursuer through his own remissness hath suffered prescription to run out, *sibi imputet*, he hath himself only to blame for it. *4to*, *Esto*, the defender had known of the defence of prescription competent to him at the time of his writing the last letter, as he did not, his craving a new opportunity to commune, can never be esteemed a renunciation of that defence; seeing the first word of the communing upon sight of the pursuer's claim, might have justly been, that the same was prescribed.

THE LORDS found the bond prescribed, and repelled the ground of interruption as not legal.

Fol. Dic. v. 2. p. 128. Forbes, p. 23.

. Fountainhall reports this case:

THE LORD Tillicoultry reported Dame Margaret Lauder, and Lord Pitmedden her husband, against George Monro of Lymlair. The lady, as executor to Mr William Lauder, her father, pursues Lymlair, as representing his uncle, for payment of 1000 merks, contained in his bond. *Alleged*, The bond being dated in December 1659, the same was prescribed in December 1699. *Answered*, The act of Parliament anent prescription of personal rights bears an exception, unless a document has been taken on the debt within the 40 years, which was done here, in so far as my Lord Pitmedden, in May 1696, wrote a letter to the defender, acquainting him of the bond, and desiring him to take course with it; and he, in July thereafter, by his answer produced, tells, that my Lord's claim was unknown to him, but desired time to search among his papers, and advise with his friends what was to be done for his satisfaction; and by a second letter he craved a delay, which makes a sufficient interruption of the prescription; and it were hard to punish a man with the loss of his debt for his civility and discretion in forbearing his debtor, and counting has been sustained as an interruption, as is observed by Balmanno, *Tit. Prescription*, 2d July 1630, *Herries contra Scott*, No 284. p. 11084., in the case of a coal-grieve; and communing by letters is more than stating of counts. *Replied*, All interruptions must be either by some judicial execution, or a legal pursuit and citation in a process, or by a bond of corroboration, or some other acknowledgment of the debt, as was found, 27th November 1630, *Lauder contra Colmesly*, No 1. p. 10655.; but the letters bear no such thing, and he calls it a mystery, and craves time to inform himself against it. And the counting was sustained against the triennial prescription, which is unfavourable and odious, but the grand prescription of 40 years is not so, but rather to be enlarged, as the great security of our possessions and properties; and every deed is not to be construed an interruption, unless it be on a legal diligence, otherwise it may

leave that foundation-stone too arbitrary and uncertain. *Duplied*, The ground whereon prescription, both by the common and our law, stands, is, that by parties' so long silence, they are presumed to derelinqish their rights. Now, Pitmedden, by his several letters within the years of prescription, gave evidence enough, *rem pro derelicto habere* was none of his intention; and if the other party, by craving time to search his papers, induced my forbearance, *non debet lucrari ex suo facto*, so as now to obtrude prescription occasioned by himself. THE LORDS, by plurality, of seven against six, thought the limits of interruption should be fixed, and therefore repelled this, as not a legal and sufficient interruption, and found the bond was prescribed.

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Fountainhall, v. 2. p. 281.

1706. July 2.

ISOBEL SCOTT, Relict of Andrew Angus, Town-Clerk, in Selkirk, *against*
ADAM BRYDEN, Tenant in Henderland.

JAMES MENZIES writer to the signet, being debtor by bond to Isobel Scott in the sum of L. 370 Scots, she raised horning thereon, in the year 1690, and arrested in the hands of Adam Bryden, as debtor to Mr Menzies, and obtained decret of furthcoming in the same year, before the commissary of Peebles; which decret being suspended, and at discussing of the suspension turned into a libel; it was then *alleged* for the defender, That the pursuer's arrestment was prescribed by the act 9th Parl. 2d Cha. II. and so no decret of furthcoming could proceed upon it.

THE LORDS found, that prescription was interrupted by the commissaries decret; albeit it was *alleged* for the defender, That the commissaries decret was found null; and a null decret could no more interrupt prescription, than a null execution.

Fol. Dic. v. 2. p. 128. Forbes, p. 116.

* * * Fountainhall reports this case :

1706. July 4.—Isobel Scott, relict of Andrew Angus, town-clerk of Selkirk, being creditor by bond to James Menzies, writer to the signet, in L. 300 Scots, arrests, *in anno* 1690, with Adam Bryden tenant in Henderland, the like sum owing by him to Menzies; and, in the 1692, recovers a decret of forthcoming in absence before the commissary of Peebles: This lying over till 1699, is then suspended, and the decret turned to a libel; and then it was *alleged* for Bryden, The decret being now out of doors, the arrestment laid on in 1690, was prescribed by the 9th act of Parliament 1669, not being pursued for, nor insisted on for the space of five years after its date. *Answered*, This ought to be repelled, for the decret was within two years after the date of the

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Prescription
of arrestment,
interrupted
by a decret
in absence
pronounced
by a commis-
sary beyond
his instruc-
tions, and
afterwards
turned into
a libel.