

1764. February 15.

ROBERT M'PHERSON *against* PATRICK and THOMAS GRAHAM.

By contract of marriage, dated 2d September 1698, between Duncan Graham of Ledhart and Anne Colquhoun, the said Duncan Graham as principal, and Thomas Graham of Deuchry as cautioner, became bound to provide 5000 merks to the said Duncan Graham himself, and Anne Colquhoun his wife, in conjunct fee and liferent, and to the heirs of the marriage in fee.

Duncan Graham, the husband, died about Martinmas 1705; and, in 1714, his widow, Anne Colquhoun, married Alexander M'Pherson of Crigie, and lived till Whitsunday 1739.

The liferent-provision settled upon Anne Colquhoun in her first contract not being regularly paid, Alexander M'Pherson, her second husband, did, after her death, enter into a submission with Patrick Graham, the son of Duncan of Ledhart, and Thomas Graham, the son of Graham of Deuchry, the cautioner. In consequence of this submission, a decret-arbitral was pronounced, finding Patrick and Thomas Graham liable to Alexander M'Pherson in a certain sum, as the balance of the jointure remaining due to his wife at the time of her death; but as, in the proceedings during the course of the submission, the said Patrick and Thomas Graham had pleaded upon arrestments used in their hands by George M'Farlane of Fasland, who had brought an action against Alexander M'Pherson, for payment of two bonds granted by his wife, upon the 6th February 1714, the arbiters found, that, before demanding payment, Alexander M'Pherson should be obliged to loose these arrestments in common form.

Alexander M'Pherson purified this condition of the decret-arbitral, by loosening the arrestments; and having charged Patrick and Thomas Grahams for payment of the sums thereby awarded, they suspended the charge upon this ground, that, having acquired right from George M'Farlane to the two bonds granted by Anne Colquhoun, upon the 6th February 1714, they were entitled to plead compensation upon these bonds.

Alexander M'Pherson assigned his ground of action to Robert M'Pherson, clerk to the trustees for improving fisheries and manufactures, who, in answer to the above plea of compensation, insisted, *1mo*, That the said debts not being constituted even against Alexander M'Pherson, they were illiquid *quoad* Robert his assignee; and therefore could not compensate a clear and liquid claim at his instance. *2do*, That the bonds bearing annualrent by their conception, they were, in their nature, heritable, *quoad* the husband, who, on that account, could not be made liable after the dissolution of the marriage. And, *3tio*, That, at any rate, both bonds were cut off by the negative prescription.

Answered for the suspenders; *1mo*, The statute whereby it is provided that compensation is not pleadable in the second instance, does not apply to suspension of charges founded upon decreets-arbitral, which are of the nature of con-

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A person pursuing for provisions due to his deceased wife, by the heirs of her former husband, the defenders pleaded compensation, as in right of bonds granted by the wife. The pursuer assigned his claim, and the assignee pleaded against the defence of compensation, that the debts not having been constituted against the cedent, were illiquid *quoad* the assignee; and that the bonds, bearing annualrent, were heritable *quoad* the husband; who, consequently could not be made liable after the dissolution of the marriage. Found that compensation did not take place.

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tracts, rather than of judicial proceedings. Besides, the compensation in this case was not pleadable when the submission depended, the bonds having only come into the person of the suspender, Patrick Graham, after the decret-arbitral was pronounced: and, even considering the decret-arbitral as the decret of a judge, the compensation pleaded would fall to be admitted; because, if it were to be repelled, the debts whereon it was founded would be totally lost by the death of Alexander M'Pherson and Anne Colquhoun, neither of whom left any funds behind them. *2do*, The bygone annualrents, which are now more than double the principal sum in the two bonds, are moveable to every effect; and, as the principal sums themselves must have affected the husband while the marriage subsisted, at least, to the extent of the wife's funds, so, the dissolution of the marriage could make no difference, as the sum charged for, against which the compensation is pleaded, consists of effects originally due to her, and only belonging to the husband *jure mariti*, agreeable to a decision observed by Lord Stair, 1st February 1662, Cunningham *contra* Dalmahoy, *voce* HUSBAND and WIFE.

3tio, The bonds are not liable to the negative prescription, in respect that a summons for payment thereof had been brought against Alexander M'Pherson, upon the 10th of January 1754, upon which letters of arrestment had been raised and executed against Patrick Graham, one of the suspenders. Nor is it of any consequence, that this summons was neither called nor renewed within seven years. By the 28th act of the 5th Parliament of King James III. introducing prescription into the law of this country, no more was required, than that the party to whom an obligation was granted should follow that obligation within the space of 40 years, and take document thereupon: And, although act 10th, 1669, declares, 'That all citations that shall be made use of for interruptions, whether in real or personal rights, be renewed every seven years, otherways to prescribe;' yet this act does not apply to citations upon a summons for payment, which, however they may have the effect of interrupting prescription, cannot be said to be made use of for that purpose. Besides, supposing some judicial procedure necessary, in order to the full interruption of a prescription, without the necessity of renewing the summons every seven years, such judicial procedure was had in this case as must necessarily have that effect; because, not only an arrestment was obtained upon the depending action created by the execution of the summons, but likewise this arrestment was founded upon in the procedure before the arbiter, and was by him ordered to be loosed before payment of the sums decerned for could be demanded.

Replied for the charger; Whatever construction the statute of James III. may have received, prior to the act 1669, the question, with regard to the prescription, must now be judged agreeably to that act, and the subsequent act in 1685. The distinction between a common summons for payment, and a summons raised for no other end than to interrupt the prescription, is not easily comprehended; and, at any rate, when a party does not carry his summons the length of a depending process, it must be understood to have been raised only for the pur-

pose of an interruption ; and, of consequence, every such action must fall under the septennial prescription ; nor can the arrestment raised in consequence of the executed summons be of any avail. An arrestment is not a document taken against the debtor ; and it is absurd to pretend, that the production of an executed summons to the clerk of the bills, at raising an arrestment, can make that summons a judicial depending process in Court : Neither is it of any consequence, that the arrestments used upon the bonds in question were founded upon by the suspenders before the arbiter. These bonds stood in the person of George M'Farlane during the whole dependence of the submission, and even some months after the decret-arbitral was pronounced ; and it was only at the close of the proceedings under the submission, that the arrestments were founded on. Even then the suspender did not claim retention of these bonds as a creditor, but simply insisted that he should be warranted against double distress, by means of these arrestments ; and accordingly the arbiter went no further than to find, that he ought to be freed of the arrestment, by its being regularly loosed before he should be obliged to pay the sums awarded. It is inconceivable, therefore, how this submission, or the proceedings upon it, to which neither M'Farlane, nor any other person in the right of these debts, was a party, can be founded on as interrupting the prescription. This was not a document taken upon the debt by the creditor, either judicial or extrajudicial. It was no demand made by him for payment ; and consequently cannot be held an interruption.

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' THE LORDS found the letters orderly proceeded.' See PRESCRIPTION.

For the Charger, *David Rat.* For the Suspenders, *David Grane.* Clerk, *Ross.*
A. W. *Fol. Dic. v. 3. p. 148.* *Fac. Col. No 134. p. 313.*

1795. November 17.

Mrs JANE ANN DOUGAL, Executrix of Dr Dougal, against JOHN GORDON.

No 57.

A CREDITOR holding a bond in consequence of an assignation from his debtor, *ex facie* absolute, is not obliged to re-convey it to the cedent, till he be repaid advances made by him to the latter, subsequent to the date of the assignation, although by a missive granted by him to the cedent of the same date with the assignation, he declared it to have been granted only in security of certain debts then due to him. See The particulars, No 53. p. 851.

Fac. Col. No 184. p. 439.

* * See Crockat against Ramsay, *infra*, *b. t.*