

1631. December 17. Lo. LOUDON against L. CAPRINTON.

No 267.

A person who had a tack of coal for a single year, being violently ejected, the act of ejection, being pursued more than five years thereafter, was found prescribed as to violent profits and re-possession, but sustained for damage and interest.

Lo. LOUDON, as assignee to John Baird, to whom the L. Caprinton had set a tack of his coal-heugh of _____ for the space of a year, for payment of L. 1200 yearly, and payment of some yearly loads of coals to his house, pursuing action of ejection of the said John Baird, before the expiring of the year of his tack; and Caprinton *alleging*, That this cause was prescribed, this action not being intended within three years after the committing of the alleged deed; and the pursuer *replying*, That the cedent had *debito tempore* intended action of ejection, before the bailie of Kilestuart, wherein the defender had compeared by his procurator, and produced horning, to debar the pursuer *ab agendo*, which he referred to the defender's oath, now present; and the defender *duplicing*, That the reply was not relevantly qualified this way, to be proved by the defender's oath; for nothing can interrupt prescription, but a summons and lawful citation; for his compearance, to debar the pursuer by horning, could be no impediment, if the party had been or should be relaxed, to quarrel the citation, as not lawfully made, or to improve the same, or to allege that he was not subject to that jurisdiction to which he was summoned; so that to prove by his oath that his procurator produced horning against the pursuer in that cause, without production of the process, could be no interruption; and the pursuer *tripling*, That he referred to his oath that the cedent had intended action *debito tempore*, and that he knew the citation, and thereupon gave direction to his procurator to compear in the court, and produce horning against him; which, if he confess, was sufficient to interrupt the prescription, howsoever now that process was miscarried, and not extant; and in respect thereof he *answered*, That he could never improve that citation so acknowledged by himself: notwithstanding of the which answer and reply, the LORDS found the exception relevant, and that the action was prescribed, and that the interruption was not relevantly qualified by the party's compearance, as said is, albeit it were granted; seeing, nevertheless thereof, he might quarrel the lawfulness or truth of the execution; and therefore the pursuer passing from the violent action of the ejection, he retrenched the same, to crave repossession of the coal, and of the common and ordinary profits thereof, and sought no violent profits. And the defender *alleging*, that seeing the ejection was prescribed, as is found, therefore he could not seek to be repossessed now, specially there being five years expired since the alleged time of the tack of the coal set to the pursuer was run out, so that where there was no ejection, there could be no repossession, neither could there be any profits sought, where the deed of violent ejection was prescribed; but the most the tacksman could seek in law, was the damage sustained by the pursuer for not bruiking during the time of

his tack; and the pursuer *replying*, That albeit the action for ejection was prescribed, yet this action to be restored against the deed unorderly done, and for the ordinary profits, is not prescribed, albeit the violent profits cannot be sought: the LORDS found, where the ejection was prescribed, specially after so long a time after the yearly tack was outrun, That there could be no action for restoring of the pursuer, or his cedent, to the possession of the coal again, neither had he action for the profits; but the LORDS found, That he had good action to pursue for damage and interest sustained by the cedent, since the time of his dispossession to the time that the tack was outrun; for the which damage, they sustained this same pursuit, seeing the pursuer acclaimed the profits as the damage foresaid, and which the LORDS found he might do.

Act. Nicolson & Stuart.

Alt. *Advocatus* & Cunningham.

Clerk, Gibson.

Fol. Dic. v. 2. p. 119. Durie, p. 609.

* * * Spottiswood reports this case :

IN an action of ejection pursued by the Lord Loudon against the Laird of Caprinton; *alleged*, It was prescribed, because not pursued within three years; *replied*, Lawfully interrupted, because he offered to prove that he having intended action of ejection against the defender before the Sheriff of Ayr, the defender gave command to a procurator to compear there, and defend, who accordingly did compear and defend; *duplied*, Not relevant, except he would allege that he was lawfully cited to compear, because he might improve the executions: the LORDS would not sustain the reply as it was conceived.

The ejection having been thus made void, it was next *alleged*; The conclusion of the summons, to enter and repossess the pursuer to the coal from which he was ejected, could not be sustained, because the pursuer, having only the coal set to him for a year, which year was expired long since by the space of four or five years; he could not now re-enter him to it, *quia frustra petis, quod mox es restitutus*; otherwise, there might ensue a greater inconveniency. Put the case, that the defender had set a new tack to another, whom he behoved to remove first, to make him enter, that could not maintain his possession, when he was in it. THE LORDS would not sustain the libel nor repossess, but only for damage and interest.

Spottiswood, (DE PRESCRIPTIONE & USUCAPIONE) p. 237.