1681. *June* 23. DUNLAP *against* PORTERFIELD.

No 419.
Prescription interrupted by an informal citation.

DUNLAP pursues Porterfield for payment of a debt. The defender excepted upon prescription. The pursuer replied upon interruption, and produced a process for the same debt, the execution whereof was within prescription. The defender *duplied*, That the executions were simply null, neither bearing to be personally, nor at the party's dwelling-place; and albeit citations may serve for interruption, though the process might be excluded through irrelevancy, or some informality of the order, yet it would never be sustained with no citation, or a citation absolutely null. The pursuer *triplied*, That by the process produced, it is evident, that the same was several times called, and compearance made therein, marked by the hand of Alexander Lockhart, sub-clerk, who died before this process; so that the pursuer hath not only followed his right, but taken document thereon, according to the old act of Parliament anent prescriptions.

THE LORDS sustained the reply and triply, and found the interruption by this citation, and the compearance marked as said is sufficient.

Fol. Dic. v. 2. *p.* 128. *Stair, v.* 2. *p.* 882.

*** Similar decisions were pronounced, 25th November 1665, White against Horn, No 44. p. 10646. *voce* POSSESSORY JUDGMENT; and 6th July 1671, M'Rae against Lord M'Donald, No 13. p. 8338. *voce* LITIGIOUS.

1683. *November* 29. SIR PATRICK HOME *against* HOME of Linthill.

No 420.
A summons found not to interrupt prescription as to grounds not particularly libelled on. See No 417. p. 11238.

IN the action pursued by Sir Patrick Home against Home of Linthill, craving, that it might be found and declared, that Sir Patrick, as being infeft in a mill, had right to affix his dam upon the end of a commonty, wherein Linthill had an interest, upon this ground, that he and his predecessors had prescribed a servitude, having been forty years in possession; and Linthill having *alleged* interruption, for proving thereof, he produced a summons of molestation and declarator, raised at the instance of Linthill's author, in a mill superior to Sir Patrick's, for demolishing Sir Patrick's mill, that it might not make the water restagnate upon the superior mill; it was *objected* by Sir Patrick, That this interruption could not be sustained, it being only raised at the instance of the heritor of the superior mill, as being infeft therein, and in the multures of certain lands condescended upon in the summons; and which interruption could only import a regulation of Sir Patrick's dam, that it might not restagnate the water upon the other mill, but could not import an interruption of Sir Patrick's servitude, of affixing the end of his dam upon the commonty, there being no mention in that summons of interruption, that the pursuer thereof was infeft in the com-

No 420. monty; and, therefore, that he craved the land-stone of the dam to be demolished, the infeftment of the commonty being absolutely disparate titles; so that the interruption upon the one title could not be ascribed to the other. It was *objected* by Sir Patrick, 2*do*, That the interruption was null, seeing that all interruptions, by the act of Parliament 1669, that should be made use of in relation to heritable rights, should be renewed every seven years, and that this was not. It was *duplied* for Linthill, That the interruption was sufficient, being the pursuer therein had right both to the commonty and superior mill, and had concluded a casting down of the said mill-dam, and not a simple rectification, and that there was no necessity that all these titles should be libelled, to the effect that the summons might be sustained as an interruption, seeing his presumed acquiescence was taken off by executing of the summons; 2*do*, That there was no necessity to renew this interruption within seven years, seeing the act of Parliament could be only extended *ad futura*, and that this interruption was raised long before the act of Parliament, whereby there was *jus acquisitum* to the raisers thereof. The Lords found the old summons did only import an interruption, in order to the regulation of Sir Patrick's dam, that it might not cause the water restagnate upon Linthill's dam, but that it did not import an absolute interruption, in relation to the affixing of the dam-stone upon the commonty; and also, the Lords found, that the act of Parliament anent interruptions did only extend *ad futura*, and not to this interruption that was raised before the act.

Fol. Dic. v. 2. *p.* 127. *P. Falconer, No* 69. *p.* 46.

*** Sir P. Home reports this case:

1683. *November.*—In the action at the instance of Sir Patrick Home, advocate, against Home of Linthill, for laying in the damhead to Brownsbank mill, Sir Patrick being appointed to prove forty years possession of the damhead, and Linthill to prove interruption, and Sir Patrick having proved immemorial possession, Linthill for proving interruption produced summons of declarator at his author's instance against the Laird of Wedderburn, who was former possessor of the mill. *Alleged* for Sir Patrick, That no respect ought to be had to the interruption, because it was prescribed, it being provided by the act of Parliament concerning interruptions in the year 1669, that all citations that should be made use of, for interruptions either in real or personal rights, be renewed every seven years, otherwise to prescribe; and the said summons being executed in the year 1652, and not renewed since the act of Parliament 1669, is prescribed. *Answered*, That act of Parliament can only take effect *ad futura*, and not *ad præterita*; and so this act of Parliament can only be understood of citations to be made, and not of citations already made, seeing acts of Parliament are not drawn back to the past deeds, unless expressed especially, being a correctory

law, and prescription in itself is odious, and there being *jus acquisitum* to Lint- No 420.
hill by the citation, it ought to stop prescription for the space of forty years thereafter, and cannot be taken from him but by an express law; and if this were sustained, the greatest part of all the interruptions in Scotland would be prescribed, many persons having neglected to renew their citations within seven years after the act of Parliament; and whatever may be pretended in the case of laws relating to order of process and *forma judiciorum*, that these may be extended *ad præterita*, but no laws that are made in relation to men's rights; which is farther cleared from the beginning of the preceding act, concerning the prescription of arrestments, by which the prescription of arrestments used and to be used is expressed; so that if it had been designed that the act should be understood of preceding citations, it would have mentioned citations used and to be used, as well as in the case of prescription of arrestments in the preceding act; and this is clear by the decision, betwixt the Laird of Colstoun and Hepburn of Bearford, *infra*, where the Lords found, that an action intented before the act of Parliament 1669 did not prescribe, albeit not renewed within seven years after the act; and if the said act should be extended to preceding citations, it would prejudge the King of the benefit of the act of interruption in the year 1633, and the King's revocation in the year 1662, there being no interruption used since the said act of Parliament *anno* 1669. *Replied*, That the act of Parliament is express, that all citations that shall be made use of for interruptions not being renewed within the seven years, shall prescribe; which clearly comprehends all citations as well before as after the act of Parliament, *namque omne dicit nihil excipit*; and it bears "citations to be made use of," which doth clearly relate to citations before the act; for if it had been to be understood only of citations after the act, then it would have run in these terms, All citations that were thereafter to be given should not be sustained as interruption, unless renewed every seven years: But the words "that shall be made use of," doth properly relate to the prior citations that had been formerly given, and existing the time of the act; and this is clear from the express words of the law. So it is evident from the reason of making the law, which is, that parties having been forty years in possession, by virtue of their rights, may be secured, and not be always at an uncertainty by private latent citations, which many times parties themselves do not know, far less singular successors; for the inconveniency and abuse that gave a rise to that law was, albeit a party had been 80 or 100 years in possession of lands, and thereafter having sold them to another person, and albeit the singular successor had paid an equivalent price for the lands, not knowing that there were any incumbrances upon the lands, seeing there did nothing appear in the public register, yet if there were a private latent citation given by any person that pretended to have interest in the lands, he might reduce the rights, albeit the citation may be never was made known to the party himself, which might have been left at his dwelling house; nor was it possible it could be known to a singular succes-

No 420. sessor; so that in effect no man was secure of any purchase he made; and therefore, for obviating these inconveniencies, and that men may be at some certainties as to their rights, this excellent law was introduced concerning interruptions, That all interruptions, as to rights of lands by citations, shall in all times hereafter be executed against the party at their dwelling place, and at the parish church in time of divine service; and that interruptions already used, as well as those to be used, should be made public, it is provided, that all citations that shall be made use of for interruptions be renewed every seven years, otherwise to prescribe; so that seeing one reason and design of the law militates as much that prior citations should be renewed, as those that are posterior to the act of Parliament, *ubi eadem ratio, idem jus est statuendum, cum ratio est amma legis*; and if it were otherwise, that the act of Parliament should not be extended to prior citations, then parties should still be at an uncertainty as to the rights of forty years to come; and it is not to be imagined, that the Parliament would make a law to take effect forty years thereafter, and provide for the security of the succeeding generation, and not to have the benefit of it themselves: And as this is clear from the express words, reason, and design of the law, so it is likewise clear from the analogy of this law with other acts of Parliament concerning prescriptions, such as the prescription of three years, in the case of spuilzies, ejections, warnings, actions for deeds, servants' fees, merchants' accounts, &c.; which laws are not only understood of those actions that are after, but even of those that are before these acts of Parliament, unless they be pursued within three years; and by the act immediately preceding concerning prescriptions, it is provided, that all actions proceeding upon warnings, spuilzies, ejections, arrestments, ministers' stipends and others therein mentioned, shall prescribe within ten years, except the said actions be wakened every five years; and it was never controverted, but that these clauses in the act do take effect, not only as to those actions that are since that act, but even as to those that are preceding the act, which do prescribe within ten years, if not wakened every five years; and was so decided in the case of a minister's stipend Baird against the Parishioners of Fythie, No 254. p. 11061.; and by the same act concerning prescriptions it is provided, that holograph missive letters, holograph bonds, and subscribed account-books, without witnesses, not being pursued within 20 years, do prescribe, which is not only extended to holograph writs, which are after the said act, but even to those that are of a date prior to the said act, which do prescribe, not being pursued within 20 years, as well as those that are granted thereafter; and if the act of Parliament be extended *ad præterita*, in those cases, albeit not mentioned, so that by that same reason this act, concerning the prescription of interruptions, should be extended to preceding citations, and which is agreeable to the common law, as is clear from the lawyers upon that title of the law, *De legibus*, and particularly Perezius, No 8. *quod leges in præteritum tempus vim suam extendunt, si jus vetus declarent confirmentive, vel ejus abusum tol-*

lent, as in this case ; and albeit there had been *jus acquisitum* to Linthill by the citation, that it should serve for interruption of the prescription for the space of 40 years by the law then standing, yet *nihil imputet*, but that might be taken away by a posterior law for the public weal and good of the kingdom, that men may have some certainty as to their rights; and the law doth not simply and absolutely take away the effect of such citations, but only qualifies them that they should not be made use of as interruptions, unless they be renewed within seven years after the date of the act; and many persons have neglected to renew their citations within seven years after the date of the act, and so would be prejudged; *incommodum solvit argumentum*; and if any person has been negligent in renewing their citations, *sibi imputent*, *nam ignorantia juris neminem excusat*; and it is a far greater advantage to the lieges to be at some certainty as to their rights, than any prejudice that will arise by deciding conform to this law, that citations preceding the act should not be made use of as interruptions, unless the same had been renewed within the seven years after the date of the act; and if it be granted that laws relating to order of processss, and *forma judiciorum*, may be extended *ad præterita*, then the law must be extended in this, seeing a citation that shall be made use of for interruption *est modus procedendi*, *et forma*, *et ordo judicii*; so that, *ex concessis*, this act of Parliament concerning interruption must be extended *ad præterita*, as well as the former act concerning prescriptions; as also by the preceding law, not only the actions prescribe, but even the point of right prescribes; seeing it is provided that mails and duties, ministers stipends, holograph bonds, &c. prescribe *quoad modum probandi*, not being pursued within a certain time; and many times it may happen that the defender is dead, and then not only the *modum probandi*, but the point of right prescribes; and that in the beginning of the preceding act concerning prescriptions of arrestments, it mentions arrestments used, and to be used, the argument is retorted; for that clause, in relation to arrestments, being mentioned in the act immediately preceding, it must be understood to be repeated in this act concerning interruptions; seeing there is the same reason for both; as also the reason why arrestments used, and to be used, is mentioned in the preceding act, is because there is one provision as to arrestments used upon bonds and others before the act, and another provision as to arrestments after the act, and one and the same provision as to arrestments used upon dependence, so that it was impossible to clear the meaning of the act, unless that both arrestments used, and to be used, had been expressed; and as to the practice betwixt the Laird of Coalston and Hepburn of Bearford, it doth not meet this case, in respect the contract of wadset upon which the summons was raised, whereupon citation proceeded, was not prescribed, Bearford's wife's liferent being reserved, she having lived till the year 1645; and therefore the LORDS found the prescription did not run during the lifetime of the liferentrix; as also the summons was founded upon the inhibition, which of its own nature does not prescribe, but from the date of the deed contravening the same; and albeit it did meet, as

No 420.

No 420. it does not yet *una hirundo non facit ver*, and the interlocutor proceeding only upon a debate at the side bar, and the grounds of law now represented were not then alleged, and there is no decreet yet extracted; and albeit the act of Parliament should be extended to preceding citations, yet it would not prejudice the King of the benefit of the act of interruption or revocation, because the prescription of 40 years will not run against the King in such a case, seeing the negligence of his Officers of State will not prejudge him; and albeit it should run, yet there would be no prescription in this case, since the act of interruption 1633, for deducting the years of his Majesty's minority, and the years of his exile, during which time his Majesty was not *valens agere*, there will not be yet 40 years; as also this act of Parliament concerning interruptions can never be extended to the interruptions at the King's instance, by the act of Parliament 1633, or his Majesty's revocation in the year 1662, because those are edictal interruptions by a public law, which cannot be comprehended under this act of Parliament, which relates only to citations at the instance of private parties, as is clear from the act of Parliament; for that clause in the act, that all citations that shall be made use of for interruptions, be renewed every seven years, otherwise to prescribe, can only relate to interruptions mentioned in the preceding part of the act, whereof the form and method is there set down, which is, that the same shall be executed by messengers at arms, and against the defenders personally, or at their dwelling-houses, and at the parish church door in time of divine service, or immediately thereafter; which being only as to citations upon summonses raised at the instance of private parties, can never be extended to edictal interruptions, which are done by a public law. The Lords being equal in their votes, it was cast by the Chancellor's vote, and found, That the act of Parliament concerning interruptions did only extend *ad futura*, and not to citations before the act.

It was further *alleged* for Sir Patrick, That the summons of declarator, upon which that citation made use of for interruption proceeded, was only against Sir Patrick's predecessors of the mill, for casting down of the dam-head, that it might not make the water re-stagnate, and cause Linthill's mill, which was the superior mill, stand in back-water; so that this citation could not be sustained as a simple and absolute interruption, but only in the terms of the conclusion of the summons, which was qualified that Sir Patrick should not erect his dam-head so high as to make Linthill's mill re-stagnate; but so it is, that the erecting of the dam-head so high as to make Sir Patrick's mill a going mill, will not make the water re-stagnate, nor prejudge the superior mill, which is evident from this, that both mills have been going mills upwards of these 60 years. *Answered*, That the conclusion of the summons being for casting down of the dam-head, it must import a total interruption; and the quality adjected to the conclusion of the summons, that the dam-head should not be erected so high as to make the water re-stagnate, will not prejudge the pursuer, seeing he might have declared his summons, and past from that part of the conclusion, and

might have insisted for a total demolishing the dam-head. THE LORDS found, That the citation upon the foresaid summons, did only import an interruption, in order to the regulation of the dam-head, that it might not cause the water restagnate upon the superior mill; but that it did not import a total interruption as to the laying in of the dam-head. No 420.

See No 422.

Sir P. Home, MS. v. 1. No 483.

*** Fountainhall reports this case:

1682. *November* 9.—AT Privy Council, Sir Patrick Home advocate, pursues Home of Linthill for riot, in demolishing a mill-dam. *Alleged*, The mill was Linthill's, and he might do with his own what he pleased; 2*do*, It was not a going mill. *Answered*, It was built on Sir Patrick's ground of Brown's Bank, *et inædificatum cedit solo*; and to the 2*d*, *non refert*, it had not gone for three or four years, because he was in a process evicting it from Sir Laurence Scot. THE LORDS found no deeds of violence libelled, and no actual possession in Sir Patrick's person, it not having been a going mill for three years past; and therefore assoilzied from the riot; and referred them to the Judge Ordinary for discussing the civil point of right as accords.

1683. *January* 13.—'THE LORDS ordained Sir Patrick to debate the point of right to this servitude of the mill-dam, and found his seven years possession not sufficient here, unless he would offer to prove prescription by 40 years possession; and found he might make use of Sir Laurence Scot's possession to conjoin with his own though he was but an intruder, and he had reduced his right.' For what if a robber possess my lands some years, that should not interrupt nor stop my prescription.

1683. *November* 24.—SIR PATRICK HOME, advocate, pursuing against Home of Linthill, a declarator of his right of the mill of Brownsbank, and having proved 40 years possession, Linthill, for taking it off, produced an interruption by a citation on a summons in 1652. *Alleged* againt it, This interruption was prescribed, because it was not renewed in seven years after 1669, conform to the 10th act made that year anent interruptions. *Answered*, That act being only correctory *respicit tantum futura*, and the interruptions to be used after it, but can never regulate interruptions used before it. *Replied*, Though prescriptions *jure Romano* were *inter odiosa*, and interruptions favourable, yet not so with us; as appears by the narrative of our act of prescriptions in 1617, and it will render our properties exceedingly unsecure, to restrict this act in 1669 to interruptions of prescription since the act, and not to extend it before it. "The LORDS, after a long debate in presence, and some days deliberation on this important point, did find citations used for interruptions before that act of Parliament 1669, ran and had effect for 40 years, without the septennial renovation requisite by this act, which they found only concerned interruptions

No 420. since that act; and this because in 1681, they found the same *in terminis* so decided between Hepburn of Bearford and Brown of Coalstoun," No . p.

.—Then Sir Patrick Home *alleged*, This citation produced for an interruption could go no farther than the libelled summons of declarator on which it was used and executed, which only craved Brownsbank-mill to be demolished, in so far as it was prejudicial to Linthill's mill, in making it regorge and stand a back-water, which he is content be yet declared, and so restricted. *Answered*, Though that be adjected as a cause, yet the conclusion of the declarator is simple; and libels before debate, are oft formed at random. *Replied*, That it is limited by the premisses, et limitata causa limitatum producit effectum; et actus agentium non operantur ultra eorum intentionem. " The Lords found the summons only qualified; and so the interruption could extend no further, but only to secure Linthill's mill against all prejudice of restagnating."—Then Linthill *alleged*, The 40 years possession for making up the prescription was not proved, in so far as he conjoined with his own Home of Wedderburn and Sir Laurence Scot's possessions, whose rights he had reduced, and evicted the mill from them, as having no right; et quod semel reprobas approbare amplus nequis. *Answered*, The act of litiscontestation is opponed, where this is proponed, and repelled on this ground; that *esto* a robber possess my land some years, yet, when I debar him, his possession will go unto the account of my prescription, as if I had possessed myself: And in my Lord Lauderdale's case about the estate of Swinton, the Lords found Swinton's possession behoved to be conjoined with his, though he was only donatar to his forfeiture, and Swinton's possession of Brunstone was violent and unjust. See 13th July 1664, Lauderdale *contra* Wolmet, No 5. p. 26.; *Item*, Stair, B. 4. Tit. 24.

This cause being again heard on the 4th of December, " The Lords found the former violent possessor's right of possession might be joined with Sir Patrick's, and that he had so proved 40 years possession of this *servitus prædialis* of laying in his dam-head on Linthill's ground, and decerned; providing his dam-head do not with its height make Linthill's mill to restagnate;"—which Linthill offered to prove it did, and craved a visitation for that effect.

It being again called on the 6th of December, Linthill founded on a new interruption, viz. a reduction against Margaret Brown, relict of Brownsbank, of her right to the mill; likeas they offered to prove sundry other interruptions *via facti*. The Lords directed a commission and visitation of the mill, to consider how Sir Patrick's mill-dam occasioned a restagnation or regorging of Linthill's; and allowed each party to name a commissioner in that country to be judge; and admitted to Linthill to prove, that Margaret Brown was then possessor of the said mill, (though she was neither Sir Patrick's author as to right nor possession,) and to prove his other interruptions *via facti*; though it was after an act of litiscontestation, and in a concluded case; and that mill once going, cannot in law be stopped or interrupted *via facti*; as Hope tells

in Lauder and Balgone's case, Title Mills, p. 18. (see APPENDIX.) See also Stair, 22d June 1667, Hay of Stroway, No 9. p. 1818. No 420.

Against this Sir Patrick gave in a bill, which procured a new hearing on the 12th December; but the LORDS adhered to their former interlocutor, with this addition, that they allowed an incident diligence to Sir Patrick Home, to recover that contract betwixt Ayton and Wedderburn, whereby Ayton is obliged to do no deed against this mill but by course of law; after sight whereof, they will consider what the interruptions which Linthill shall prove were used *via facti* shall operate against the foresaid clause, and if they be receivable. Sir George Lockhart *contended* for Linthill, That an interruption *via facti*, by throwing down a dyke or dam, &c. might be a riot or crime in itself, and yet such was the favour of interruptions in law, that lawyers allowed it the effect of a legal interruption. The King's Advocate *alleged*, This was to invite men to commit insolences, and to break the public peace; and that *nemo debet lucrum reportare ex suo delicto*; and that it were worthy the care of a Parliament to discharge these tumultuary interruptions *via facti*, which have been the rise among hot-spirited Scotsmen of many dissentions, and sometimes of bloodshed, as in Carmuck's and Waterton's case, and many others; and throwing off one feal is as good an interruption as to throw down the whole dyke; and because the King's Advocate valued himself as the author and persuader of that act of Parliament made in 1669, about interruptions, Sir George Lockhart took the freedom to show all the defects of it, and the many cases it did not obviated nor provide for.—Interruptions *via facti per dejectionem* have effect, *per. l.* 4. § 20. *et l.* 5. *D. De usucap.* See No 422.

Fountainhall, v. 1 *p.* 193, 213, 245.

1684. *January.* BROWN *against* HEPBURN.

No 421.
Possessing, or pursuing upon, the debt upon which inhibition is grounded, does not stop prescription of the inhibition, which can only be done by action upon the inhibition itself.

THE Laird of Coalstoun having pursued a reduction against the Laird of Bearford, of a disposition of the lands of Easter-Monkton, *ex capite inhibitionis; alleged* for the defender, That his right was prescribed, there being no diligence done against him nor his predecessors for the space of 40 years. *Answered*, That the prescription was interrupted by a reduction raised at Coalstoun's instance, in the year 1635, against Bearford and his curators; and albeit the execution against Bearford personally, or at his dwelling-house, is miscarried, yet the execution at the market cross of Edinburgh against his curators being still extant, is sufficient to interrupt the prescription, especially seeing the tutors and curators are expressly named in the execution; and albeit process would not have been sustained upon such an execution against Bearford, yet it is sufficient to interrupt prescription, it being clear by several decisions, that citations otherwise null for want of some formalities, yet would be sustained to interrupt prescription; as was decided 25th November 1665,

Similar decisions were pronounced, 22d June 1681, Kennoway against Craw.