

No 427.

scription, and that *talis qualis insinuatio* is sufficient to interrupt. The second defence was, That Sir Patrick Nisbet having paid this debt *in anno* 1664, he took an assignation thereto from Cockburnspath, the creditor, in Yeaman of Dryburgh his brother-in-law's name, and caused him in 1670 give a blank translation, wherein now Mr John Guthrie's name is filled up; and that it could not be originally there, is evident from this, that he is designed "Writer to the Signet," to which office he was not admitted for more than ten years after; and, therefore, they offered to prove by his oath, that he got this translation from Sir Patrick Nisbet; and if he acknowledged that, then they offered to prove, that Sir Patrick was factor for Craigtinny in 1664, when the debt was paid; and so it must be presumed it was out of the minor's own estate.—*Answered*; This was no way relevant to take away Mr John Guthrie's right, who had it for an onerous cause; and *esto* his name had been lately filled up, yet he was not obliged to know that Sir Patrick had been the debtor's factor; and though a tutor, *ante redditas rationes*, cannot validly assign, yet his factor is not so incapacitated nor bound up; and, therefore, he would not suffer Sir Patrick to depone, but it could only be loosed *scripto vel juramento* of the pursuer. Some of the Lords inclined to cause examine Mr John Guthrie before answer, from whom he received the said translation, for what cause, and at what time his name was filled up therein; and on his condescending, then to see how far Sir Patrick's intromission, as factor, would extinguish this bond, as presumed to be with the pupil's means. See Stair, B. 1. T. 6.; and Durie, 18th July 1635, Edmiston, *voce* TUTOR and PUPIL. But the plurality considered, that though, in some cases, where trust or fraud appear, they used such expiations *ad rimandam veritatem*, yet there being no relevant allegiance made which would meet Sir Patrick, *esto* the right of debt were in his person; therefore, they repelled the defence *in terminis*, as it was proponed; and only found it relevant to be proved by the pursuer's oath, that he either had it in trust for Sir Patrick's behoof, or without an onerous cause; which being, then to try if they would prove *scripto vel juramento* of Sir Patrick, that he paid this out of the minor's estate, and by his intromission therewith when he was his factor.

*Fol. Dic. v. 2. p. 128. Fountainball, v. 1. p. 718.*

1699. February 16. MENZIES of Pitfoddels *against* FORBES of Tolquhon.

No 428.

A process of forthcoming on a sum libelled, in general does not interrupt prescription, *quoad* a particular bond.

MENZIES of Pitfoddels pursues Sir Alexander Forbes of Tolquhon, on this ground, Sir Alexander's father owèd one Mitchel in Aberdeen, 1000 merks by bond, dated in 1638. Pitfoddels being creditor to this Mitchel, arrests in Tolquhon's hands, and obtains a decret of forthcoming against him, wherein a term was taken to produce him, and he holden as confessed; and for that sum Sir Alexander is made liable as representing his father on the passive titles.

During all this time, Tolquhon's bond to Mitchel was never produced; but now being found, Pitfoddels discovers, though it bore not annualrent, yet he was denounced upon it in 1652; and so, by the act of Parliament 1617, it must bear annualrent from the denunciation, for which he raises a new pursuit, as executor-creditor confirmed to Mitchel. *Alleged* for Tolquhon, No annualrent can be due; because the bond, horning, and denunciation are all prescribed, and nothing done thereon within the 40 years. *Answered*, The prescription was interrupted by Pitfoddels arresting 1000 merks due by Tolquhon to Mitchel, and obtaining a decret of forthcoming; which being suspended, the same was discussed within the 40 years. *Replied*, In all these decreets of forthcoming, there is neither mention nor production of this bond of 1200 merks by old Tolquhon to Mitchel, but only the sum of 1000 merks arrested in his hands, which might be another sum; and he suffering himself to be holden as confessed thereon, it can never be applied to this bond, unless it had expressly mentioned the same; and that there must be a specific application of the title necessary for interrupting, was found, 11th February 1681, Kennoway *contra* Crawford, No 9. p. 5170.; and the act 28th, 1469, introducing personal prescriptions, requires that a document be taken on the writ within the 40 years, which cannot be alleged in this case; and lawyers are very positive that sums are presumed to be different in such cases; and Menochius de arbitrariis judicium quæstionibus, lib. 2. cas. 213., states many cases, quando summæ eadem vel duplicatæ præsumuntur, and particularly that *due sententiæ* presume *summarum deversitatem*, &c. *Duplied*, Prescription is odious; and therefore, where one raises a pursuit, intelligitur omnes causas et actiones cum eorum mediis in judicium deduxisse quoad interruptionem temporis, l. 3. C. De annali except. THE LORDS found the bond prescribed, seeing no document had been taken on it within the 40 years; and that the decreets of forthcoming on a sum libelled in general did not interrupt *quoad* this bond, though this seems to contradict Justinian's decision in the foresaid l. 3. But it agrees with the tenor of our old act of Parliament, and the LORDS would not take upon them in this case to extend it.

*Fol. Dic. v. 2. p. 127. Fountainhall, v. 2. p. 44.*

1704. February 15. JOHNSTON *against* KENNEDY.

LORD TILlicouLTRY reported Johnston *contra* Kennedy. Robert Johnston of Straiton pursues Sir Archibald Kennedy of Colzean, for payment of 10,000 merks, contained in a bond granted by his grandfather and others, *in anno* 1651, to Fergus Macubine, and whereto James Johnston writer to the signet, the pursuer's father, was constituted assignee. *Alleged*, *imo*, The bond was prescribed, not being pursued for within the 40 years. *Answered*, There is an inhibition

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Serving and executing an inhibition against a debtor, is a sufficient interruption of the prescription of a