

1756. *March 9.*Mrs JEAN HAY and her Children *against* His Majesty's ADVOCATE.

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Found, that the production of a deed in a reduction and improbation, and *avisandum* made, interrupted not the negative prescription. An obligation granted to submit the claim upon the deed, found to be an interruption. The judgement of the Court on the first point was affirmed in the House of Lords, and on the last reversed.

IN the year 1683, Cuthbert of Castlehill obtained decret, adjudging to him the estate of Lovat, for the accumulated sum of 15,840 merks.

Mrs Jean Hay and her children, in right of the adjudger, entered their claim upon the forfeited estate of Lovat, to the extent of the adjudication aforesaid.

To this claim, his Majesty's Advocate *objected* the negative prescription.

Pleaded for the claimants; The course of the negative prescription has been interrupted; for that, in the year 1706, M'Kenzie of Prestonhall entered into possession of the whole estate of Lovat, in virtue of a charter of adjudication and infestment on it; and, in the year 1708, he brought a process of reduction and improbation against the other creditors on the estate of Lovat; and particularly against Castlehill; that in this process Castlehill produced his grounds of debt; great *avisandum* was made with them; and they were specially excepted in a decret of certification pronounced *contra non producta*. From this state of the fact, the claimants *contended*, That the negative prescription could not be objected to their claim; that he cannot be said to lose his right *non utendo*, who, before the years of prescription have run, produces it in judgment. Castlehill, by this production, took document upon his obligation, in terms of the act 1469, and followed it in terms of the act 1474. Neither can the term 'pursue,' which is used in the act 1617, afford any argument against this claim; that term must be explained by the terms used in the former acts; and thus the negative prescription has been found interrupted by a charge of horning, which is yet no pursuit, 21st July 1629, Morris against Barclay, No 405. p. 11228; by an informal execution of citation, 6th July 1671, M'Crae against Lord M'Donald, No 13. p. 8338.; and by citation upon the first summons, although no judicial act followed, 17th February 1665, Butler against Gray, No 363. p. 11183.

Pleaded for his Majesty's Advocate; The words used in the three statutes denote that, in order to prevent the negative prescription, the creditor must use some judicial procedure, testifying to the debtor that he means to insist in his right. To such judicial proceedings all the decisions produced for the claimants relate; but extraneous deeds of the creditor infer not any interruption of prescription. Thus, an action of debt in general will not prevent the prescription of a particular debt, 16th February 1699, Menzies against Forbes, No 428. p. 11258.; nor letters of horning, although suspended by the debtor; such suspension being no document taken by the creditor, 11th December 1717, Wright against Wright, No 436. p. 11268.

And thus the production made by Castlehill cannot be understood to interrupt the negative prescription; for that he made it, not in order to obtain pay-

ment of his debt, but to prevent his titles being held as forged by a decret of certification; and as this production was made, not against the debtor, but against an incumbrancer, it cannot operate against the debtor, nor against the Crown in right of the debtor.

“THE LORDS sustained the objection made on the part of his Majesty’s Advocate.”

1757. *July 27.*—HUGH Master of Lovat, in the year 1642, granted bond to William Paterson for 4000 merks of principal, payable at Whitsunday 1643.

William Paterson assigned this bond, in 1647, for a valuable consideration, to George Cuthbert of Castlehill; who, in 1683, raised letters of general charge upon the bond against Hugh Lord Lovat, grandson of the granter, and thereupon obtained decret *cognitionis causa*; and decret of adjudication was thereupon led against the estate of Lovat for the accumulate sum of 15,840 merks.

The Lord Prestonhall, having acquired right to sundry adjudications for very considerable sums affecting the estate of Lovat, had expedite charters under the Great Seal, and was thereupon infeft; and, in 1706, executed a settlement of the estate in favour of his only son, Alexander Mackenzie of Fraserdale, (who had intermarried with *Æmilia* Lady Fraser, and heiress of Lovat), in liferent, and in favour of Hugh, therein designed Master of Lovat, his grandson, in fee, with ample reserved powers to himself over that estate.

In 1708, Lord Prestonhall brought a process of reduction and improbation, and declarator of right, against the said John Cuthbert of Castlehill, and several other creditors who were possessed of incumbrances upon that estate; in which, comparence being made for Castlehill, he produced the original ground of debt, and other deeds relative thereto, before mentioned; with which, and the production for the other creditors, great *avisandum* was made; and, on the 9th February 1709, certification granted *contra non producta*; but with a special exception from the decret of certification of the above mentioned deeds which had been produced for Castlehill, although no competition or debate had ensued thereupon, nor were there any further proceedings in this process.

In 1710, Alexander Mackenzie of Fraserdale granted his obligation, to cause Lord Prestonhall, his father, submit and refer all lawsuits between Castlehill and him, and particularly the foresaid process of reduction and improbation, to the determination of two lawyers therein named; and to cause his father implement their decret-arbitral, under a penalty. This obligation was produced, along with a letter, dated in November that year, from Castlehill to Mr John Macintosh advocate, with a copy of the foresaid obligation prefixed, desiring him to cause get the submission ready for signing; and the

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Upon the forfeiture of the late Lord Lovat, Mrs Jean Hay, relict of Castlehill, having right, by progress, to the foresaid bond and adjudication, in 1749, entered her claim upon the forfeited estate of Lovat for the above mentioned accumulated sum of 15,840 merks, and interest thereof from Candlemas 1683.

Objected by his Majesty's Advocate, in behalf of the Crown, That the bond, and adjudication following upon it, were cut off by the negative prescription, more than 40 years having elapsed from the 1683 to the 1749, without any proper document having been taken upon the debt.

Answered; The prescription was interrupted by the aforesaid production made for Castlehill in the process of reduction, improbation, and declarator of right, in 1706; by the great *avisandum* made with the writs produced; and by the exception of these in the decret of certification; all of which were so many judicial documents taken upon this debt, and sufficient to preserve the same from this unfavourable objection of the negative prescription; especially when supported by the after proceedings before mentioned with regard to the submission between Fraserdale and Castlehill, which had a special reference to this process of reduction and improbation, and the title-deeds therein produced; and, all together, they afford the clearest evidence that this claim was not meant to be abandoned.

Replied for the Crown; Nothing less than an explicit demand by some judicial step taken against the debtor, at the instance of the creditor, can be deemed an interruption in terms of law. The negative prescription was introduced, not only as a punishment to the creditor who neglects to follow forth his right in due time, but likewise in favour of the debtor, that the obligations he may have come under may not for ever be kept alive against him. In which case, it very often might happen that a good defence against the obligation might be lost by the lapse of time. So that, in order to interrupt the prescription, it is necessary that a legal explicit demand be made by the creditor against the debtor who is liable in payment of the debt. The pretended interruptions founded on by the claimant were only made against Lord Prestonhall, and his son Fraserdale, who were not the persons properly liable in payment of the debt, being only creditors possessed of incumbrances on the estate of Lovat; and as even an action brought against either of them would not have been sufficient to have interrupted the prescription, far less could any private unfinished transaction with them have that effect. And, particularly, as Fraserdale, who came under the obligation to submit, was in no shape liable for the debt, and had only a mere right of liferent upon the estate, so he could not burden the same to the smallest extent, nor, by any gratuitous voluntary act of his, could he keep alive against the estate a debt, which otherwise would have been extinguished by prescription; and which must now be considered as

appearing under very suspicious circumstances against the Crown, after having lain over for near a century.

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Answered for the claimant; Lord Prestonhall's charter and infeftment were *ex facie* a title of property to the estate, which entitled him to maintain every action competent to an absolute proprietor; and as such, he had brought the above-mentioned process of reduction; in which Castlehill's claim must have been cut off by the certification, had it not been produced, and excepted. And this charter of Lord Prestonhall's became afterwards the cardinal title of the estate in the person of the late Lord Lovat, in whose right the Crown is now in possession. As to Fraserdale, the son, although he was but liferenter of the estate, yet he was also administrator in law for his son, the fiar, and thereby had a good title, on their joint account, to clear the estate of this competing incumbrance, by carrying on the process of reduction and improbation; and, therefore, the compromise he made with Castlehill, in order to stay further procedure in that competition, and the obligation which he granted to cause his father submit the process, must in law and equity have the same effect as if the process had gone on, or as if the submission had actually been extended, and must in every view be available to save this debt from the negative prescription.

Observed on the Bench; As *avisandum* was made in the improbation with the deeds in question, this was a production made in judgment, and a legal document taken upon the debt. It was entering the lists in the competition, and an averment that the debt did then subsist, and was meant to be maintained.

THE LORDS, upon that original state of the case, by two different interlocutors, 12th February 1755, and 9th March 1756, "Sustained the objection of prescription; without prejudice to the claimant to recover further documents to prove interruption."

But afterwards, upon production of the above-mentioned obligation to submit, by Fraserdale to Castlehill, in 1710, with the other writings relative thereto,

"THE LORDS sustained the interruptions of the prescription founded on, and repelled the objections to the claim."

Act. *Lockhart, Ferguson.* Alt. *Macqueen*, and Crown-Lawyers. Clerk, *Kirkpatrick.*
G. C. Fol. Dic. v. 4. p. 113. Fac. Col. No 199. p. 295. & No 46. p. 75.

* * This case having been appealed,

The HOUSE OF LORDS, 24th April 1758, "ORDERED and ADJUDGED, That the two last interlocutors complained of be reversed; and the respondent's claim be dismissed."