

Pitfoddles, and so not prescribed. *3tio*, The summons of compt and reckoning is within the 20 years. *4to*, Salton being forfeited from 1686 to 1690, (when it was rescinded) all that time must be subduced from the prescription, *quia contra non valentem agere non currit*. *Duplied*, *Quoad* the former objections opposes the debate; and as to the prescription, it must still take place here; for whether it be used by way of defence or action, *non refert*, seeing the reason introductive of prescription is to punish negligence, which is evident on Salton's part; for he should have intented his *actio tutelæ contraria* so soon as the tutory expired, which was in 1680; and if then he had claimed this debt by the compt-book, the minor could have better cleared the matter than he can do now; so he is evidently prejudged, and this compensation being extrinsic, it should have been applied *tempore habili* by consent, or a Judge. To the *second*, The using the book against Pitfoddles does not interrupt the prescription *quoad* any articles but that one; so it may prescribe against one part, and be interrupted *quoad* another, as was found, 27th November 1630, Lauder, No 1. p. 10655.; and 5th July 1665, Mackie, No 378. p. 11204.; because *in libello articulato quot sunt res tot sunt actiones*; for though the *actio universalis* may keep up, yet the *modus probandi* of some articles may prescribe. To the *third*, The summons of compt and reckoning is no interruption, unless this article of Salton's debt had been *speciatim* inserted; see 11th February 1681, Kennoway and Crawford, No 9. p. 5170, where the reason of reduction was not filled up. To the *fourth*, The act 1690 is only of short prescriptions, which this is not. *Triplid*, The book cannot be divided, and so it interrupts *quoad* the whole; and forfeiture is discounted from the grand prescription as well as the short. See 25th January 1678, Lauderdale *contra* Tweeddale, No 374. p. 11193.

On the 30th current, this cause being heard in presence, the LORDS found the compt-book probative of the article, and repelled the prescription.

Fol. Dic. v. 2. p. 124. Fountainhall, v. 2. p. 17.

1803. November 23. POOR O'NEAL *against* The MAGISTRATES of DUMFRIES.

By an act of Parliament passed in the year 1795, for empowering the Magistrates of the different counties of Great Britain to levy men to serve in his Majesty's navy, it was provided, ' That the Justices of Peace, or other Magistrates aforesaid, assembled from time to time at a petty session, within the limits of their jurisdiction, shall, as often as they see occasion, or as shall be requisite, for the performance of this, his Majesty's service, issue out their warrants, under their hands and seals, thereby requiring the constables, &c. of every hundred, &c. in their several limits, every or any of them, (and who shall be aided and assisted therein by sufficient men of the same places), to make, or cause to be made, a general search throughout their several and respective

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' limits, for all such men as they can find, who are or shall appear to them to
' be within any of the descriptions of this act, and to convey all such persons
' before the Justices, or other Magistrates acting in or for such division or place,
' at such time and place as shall have been prefixed for their next and subse-
' quent meeting, (and which time and place shall be expressed in the said war-
' rants respectively).' And by the 24th clause, it is enacted, ' That if any
' action, plaint, suit, or information, shall be commenced or prosecuted against
' person or persons, for what he or they shall do in pursuance or execution of
' this act, the same shall be commenced within six kalendar months after the
' offence committed.'

The Magistrates of Dumfries, conceiving that John O'Neal and his two sons, who resided in the neighbourhood of the town, came under the description of the act, granted a warrant to bring those persons before them for examination. This warrant was dated the 9th June 1795, but the time of the next meeting of Justices was left blank, although the act expressly required the time, as well as the place of the meeting, to be specially expressed in the warrant.

It was thought proper that this warrant should be executed against O'Neal and his sons during the night. Accordingly the constables, attended by a party of soldiers, repaired to his house, and demanded admittance in their official character. This was refused, and when the party were endeavouring to make their way into the house, several shots were fired from within, by which one of the soldiers was mortally wounded. At length the door was forced open, and the party apprehended O'Neal and one of his sons; the other contrived to make his escape.

Next day a number of persons, chiefly consisting of soldiers, having gone to O'Neal's house, they pulled it down, and destroyed every thing which it contained.

The soldier having died, O'Neal and his son were tried before the High Court of Justiciary for murder. The son was acquitted; but the father was found guilty and condemned. He, however, after having been frequently respited, received his Majesty's pardon, upon the ground, as was alleged, that the verdict had been erroneous, the warrant of the constable being irregular, and such as not to entitle him to demand admittance, and the resistance upon the part of O'Neal being therefore justifiable.

O'Neal, after having been in prison for more than two years, was liberated, and raised an action against the Magistrates of Dumfries, as representing the community and the individuals who subscribed the warrant, concluding, *first*, For a sum of money as a *solatium* for the suffering he had undergone, in consequence of the illegal warrant they had granted; and, *secondly*, For reparation of the loss he had sustained by the destruction of his property.

The Lord Ordinary having reported the cause, the pursuer

Pleaded; Every man is bound to submit to an officer of the law having a regular warrant on which he may be legally apprehended; but a man is not ob-

liged to put himself in the power of any one who pretends to be invested with that authority. The constable who came to the pursuer's house during the night, came without a legal warrant, because the enactment of the statute was disregarded. The pursuer was therefore entitled to resist, in the same manner as he would have been justified in his resistance to persons, without any warrant, attempting to make a violent entrance into his house at midnight; and if, in this resistance, one of the assailants happened to be killed, the homicide was justifiable; Hales' Pleas of Crown, v. 1. p. 487., &c.; Hawkins, v. 1. p. 199.; Forster, Discourse Second, c. 8. § 9.

It is true, there is a provision in the statute, by which the period of commencing an action for any wrong done in the execution of the act, is limited to six months. But, during this time, the pursuer was *non valens agere*, in consequence of the injury he had sustained by the effect given to the illegal warrant; for the defenders, by their own conduct, made it impossible for him to use his right within the limited time. And in this case, there was no undue delay, the action being raised as soon as the circumstances of the pursuer put it in his power.

But, independent altogether of the action upon this statute, the pursuer is entitled to reimbursement of the value of his house, under the provisions of the riot-act (1. Geo. I. cap. 5). The damage was done by a mob who assembled in the town of Dumfries, and who proceeded in a riotous and tumultuous manner to demolish the house. The defenders, therefore, as representing the community, are liable for indemnification; Blackst. b. 4. c. 2.

The limitation of the period of action under the riot-act (*viz.* to one year), is in this case excluded by the pursuer's plea of *non valens agere*, resulting from the conduct of the defenders.

Answered; The provisions of the comprehending act, requiring the date and place of examination to be specified, were inserted for the purpose of preventing imprisonment for an indefinite time. It does not appear that the pursuer suffered the smallest damage in consequence of the blanks left in the warrant; nor do any of the losses which he has specified, arise, in the most remote degree, from any cause connected with the warrant. It is not enough for him to say, that the Magistrates committed a mistake; he must shew, that the loss which he sustained resulted from that error.

No action lies at common law against the burgh for an injury to the pursuer's property; and if any action be competent under the riot-act, it can only be where a building has been destroyed in the course of a riot, of such a nature that the rioters are guilty of felony. And it was farther *pleaded*, That even in those cases where the Magistrates or the inhabitants were thought so culpable as to be the objects of punishment, or held liable in reparation, recourse was had to the Legislature, as in the case of the Shawfield mob at Glasgow in 1725, Captain Porteous' execution at Edinburgh in 1736, and the riots in both cities in 1779, when the Roman Catholic chapels were demolished. The pursuer

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was himself the cause of the riot, by the murder which he committed, and is therefore barred, *personali exceptione*, from insisting for damages. The act of Geo. I. has always received a strict interpretation; Reid against Clark, 7th February 1798, Durnford's Reports, v. 7.; and there is a limitation of the period of 12 kalendar months for insisting in any action. It was intended to prevent injury to persons of peaceable deportment, who were not in any degree the cause of the riot by their own conduct.

With respect to the plea of *non valens agere*, it is enough that the statute of Geo. I. is of strict interpretation, and in all its provisions penal. The limitation in the act does not therefore stand on the same footing as the ordinary prescription. And, at all events, supposing the pursuer were entitled to deduct the period of his imprisonment, a year elapsed between the date of his pardon and the commencement of his action of damages.

THE COURT sustained the defences.

Lord Ordinary, *Bannatyne.* Act. *Erskine, Moncrieff.* Agent, *R. Young.*
 Alt. Lord Advocate *Hope, Corbet.* Agent, *H. Corrie, W. S.* Clerk, *Gordon.*

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Fac. Col. No 121. p. 268.

S E C T. III.

Whether a woman under coverture is to be considered as *non valens agere*.—The effect where there is a *medium impedimentum* to bar pursuit.

1665. July.

MACKIE against STEWART.

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During the time a woman is married prescription runs not against her, forbearing to pursue for implement of her contract of marriage, because during that space she is hardly *valens agere*.

By contract of marriage betwixt umquhile William Stewart brother to James Stewart of Burray, and Agnes Shaw his spouse on the one and other parts; the said William as principal, and his said brother as cautioner for him, is obliged to employ 5500 merks upon security, for the liferent right of the said Agnes; whereupon James Mackie, as assignee constituted by her, pursues William Stewart of Maynes as heir to the said umquhile James his goodsir, for employing of the said sum: The contract is dated *in anno 1615*. It was *alleged*, That the contract and this action fell under prescription by the act of Parliament. It was *answered*, That prescription runs not *contra non valentem agere, ita est*, the wife *stante matrimonio* could not pursue, and is in the condition of a minor against whom prescription sleeps during minority; and so it could not run against her, who could not by herself pursue her own husband, and though she could, yet she was not obliged to do it. It was *replied*, William Shaw her father was