1780. *February* . LUTEFOOT *against* PRESTOUN.

No 366.
Pound conform with Butter against Gray, No 363. p. 11183. Prescription of an inhibition found to run from the date of the last execution, and not from registration.

JOHN LUTEFOOT pursues reduction against Glencorss *ex capite inhibitionis*. The defender *alleged* absolvitor, because the inhibition is prescribed since the executions of the inhibition. It was *answered*, The registration of the inhibition was within prescription, and that being a diligence, which if wanting, the inhibition is null, prescription must be reckoned from it. It was *answered*, That decreets of registration are never accounted interruption, much less registration of inhibitions. The LORDS found the prescription to run from the last execution of the inhibition, but not from the registration. It was further *alleged*, That albeit prescription run from the date in question, yet there is not 40 years since the term of payment, before which the creditor *non valebat agere*.

THE LORDS found the prescription not to run from the date, but from the term of payment.

Fol. Dic. v. 2. *p.* 123. *Stair, v.* 2. *p.* 761.

*** Fountainhall reports this case:

THE LORDS found, That naked registration of bonds was not an interruption; and that prescription of bonds runs only from their term of payment, and not from their date; for before the term, *non valet agere*.

Fountainhall, MS.

1682. *November* 22. MOUTRAY *against* HOPE.

No 367.
Prescription does not run against an inhibition but from the date of the comprising used upon the bond granted by the person inhibited, in respect the inhibiter cannot know of the bond until real diligence be done on it.

IN an action of reduction, *ex capite inhibitionis*, pursued by Moutray against Porteous, of a bond granted by the common debtor, whereupon comprising had followed; and it being *alleged* for the defender, That the inhibition was prescribed, being served *in anno* 1633; and it being *replied*, That the prescription was interrupted by a comprising deduced upon the bond, which was the ground of the inhibition, and which diligence being upon the bond, did interrupt prescription thereof, and consequently of the inhibition which was accessory thereto; the LORDS found, That the comprising upon the bond was not an habile diligence, which could be ascribed to the inhibition; but they found, That the prescription did not run from the date of the inhibition, but from the date of the comprising, which was led upon the defender's bond, seeing the inhibiter could not know of the bond, until the diligence was done thereupon, to affect the heritable estate; therefore found, That prescription of the inhibition did only begin from the date of the defender's comprising.

Fol. Dic. v. 2. *p.* 123. *P. Falconer, No* 32. *p.* 17.

*** Sir P. Home reports this case:

No 367.

WILLIAM PORTEOUS having granted bond to Andrew Moutray, upon which there being an inhibition served, and thereafter a comprising led of certain tenements of land in Peebles, belonging to the said William Porteous, which being disponed to John Hope, Andrew Moutray, as heir served to his brother, and John Law, his factor, having pursued a reduction against John Hope, *ex capite inhibitionis; alleged* for the defender, That the inhibition could be no title for the reduction, in respect it was prescribed, there being no diligence done thereupon for the space of 40 years; as was decided the 11th February 1681, Thomas Crawford against James Kennoway, No 9. p. 5170. where Kennoway, having a right to a comprising, did raise a reduction of Crawford's apprising of the same lands; and Kennoway, finding he could not prevail in his apprising, he did add a reason of reduction upon the inhibition for the same debt; the LORDS sustained the defence of prescription as to the inhibition, albeit the reduction was raised within the years of prescription, in respect the reason of reduction *ex capite inhibitionis* was not filled up till after the 40 years were expired from the date of the inhibition; and it is ordinary for accessory diligences to prescribe, albeit the principal right do not prescribe; as in the case of actions for mails and duties, removings, and apprisings, &c.; *answered*, That there being a comprising led upon the bond which was the ground of the inhibition, it was sufficient to interrupt the prescription, even as to the inhibition; for an inhibition, being an accessory security for the same, whatever diligence does interrupt the prescription as to the bond, does interrupt the prescription as to the inhibition, *nam accessorium sequitur naturam seu principalis*; and the foresaid practique does not meet the case; for the question there was not, if diligence used upon the bond should interrupt prescription as to the inhibition, but the question was only, that there being a reduction raised of the other party's right, albeit the reason of reduction *ex capite inhibitione* was not filled up *ab initio* within the 40 years, when that reduction was raised, yet that, after the 40 years were elapsed, the reason could be added; in which case, the Lords sustained the defence of prescription as to the inhibition, in repect there was not a reason of reduction libelled thereupon within the 40 years; whereas, in this case, the pursuer does not found his interruption upon the reduction, but upon the other diligence used upon the bond upon which the inhibition was served; and albeit actions of mails and duties, removings, &c. does prescribe, although the principal right do not prescribe, that is only introduced by a special law, which, upon particular consideration, makes these actions prescribe within few years; which evinces that such actions and accessory diligences would not prescribe in a shorter time than the principal rights, unless the same were provided by a special law; and albeit the inhibition could not prescribe, as it ought not, for the reasons abovementioned, yet the prescription can only run from the time that the defender's disposition of the lands was completed by

real diligence, seeing, so long as the disposition remained in the naked terms of a personal right, the pursuer was not obliged to know if there was any such right made; and so was *in bona fide* not to pursue a reduction thereof. THE LORDS found, That the leading of a comprising upon a bond which was the ground of the inhibition did not interrupt the prescription of the inhibition, seeing that diligence could not be ascribed to the inhibition; but found that the prescription did not run against the inhibition, but from the date of the comprising used upon the bond or disposition craved to be reduced; in respect the party at whose instance the inhibition was served could not know of the bond, until real diligence was done thereupon to affect the lands. No 367.

Sir P. Home, MS. v. 1. No 259.

1687. *July* —. Earl of LAUDERDALE *against* VASSALS of Dundee.

No 368.

IN a question of recognition, *alleged* for the Vassals, That one of the base infeftments being granted 40 years before the other, the process of recognition was prescribed, *quoad* that subject, and so it could not concur to infer recognition; *answered*, The first base infeftment did not comprehend the major part of the ward tenement; and the action of recognition could not begin to prescribe until recognition was incurred. THE LORDS repelled the defence, in respect of the answer.

Fol. Dic. v. 2. p. 124. Harcarse.

*** This case is No 63. p. 6485. *voce* IMPLIED DISCHARGE AND RENUNCIATION.

1688. *June* 28. WILKIE *against* SCOT.

No 369.

ONE having disponed a tenement, with a servitude *altius non tollendi*, and the heritor of the said tenement having offered to build it higher, he was interrupted. *Alleged* for the builder, That the servitude was prescribed *non utendo* for the space of 40 years. *Answered*, Negative servitudes do not prescribe, but after the contrary positive acts are done, just as warrandice; till then, the parties being *non valentes agere*. 2*do*, Predial servitudes are constituted by personal rights, and need not be included in infeftments. *Replied*, It would be an invincible inconvenience, if predial servitudes should not be notified, especially negative servitudes; for positive servitudes, with possession, is a sufficient notification, whether they be included in the infeftment or not.

THE LORDS found, The servitude did not prescribe from the date of the writ, but from the time the party acted contrary to the servitude, by building, or obtaining a declarator of immunity from the servitude.

Harcarse, (PRESCRIPTION) *No* 780. *p.* 220.