

No 465.

might be said to have seen, in his author's right, the relation he stood in to the original disponent, which presumed gratuity, yet Henry Elliot was an onerous purchaser from him. To which it was *answered*, That Thomas Porteous purchased a right which had never been made real; and as there had no prescription run on his infestment before he disposed it, Elliot behoved to look into his progress, and would there see the defect; that there was, at this day, evidence of the gratuity, from the circumstances of the case: A disposition was made to a second son, said to be a young man *in familia*, on the narrative of a sum in general paid. After Bristo's death, a judicial sale was raised, by a creditor, of Borthwickbrae, Chisholm and Woodburn, part of the contents of this disposition, and Borthwickbrae sold, the others being dropt out of the sale; but in this process, no claim made for William Scott, who, with his brother James, sold these others to Sir James Stewart; and James, as apparent heir, in 1699 raised a judicial sale of them, to which William made no opposition; but John Elliot of Thorleshop, the pursuer's grand-father, having obtained decret on the passive titles against, and inhibited, both the brothers, produced his interest. All these transactions were under the observation, and doubtless carried on by the advice of Sir James Stewart, a near relation of the family, who, being conscious of the gratuity of the disposition to William, would not rest his right upon it; but it was not said any decret of sale was pronounced.

*Observed* further, that the disposition to William was with consent of the heir, whose interest it was the creditors' fund of payment should not be withdrawn; as also he was consenter to William's disposition to Porteous, at which time it was probable he saw the price applied to the creditors; but the matter could not be cleared up at this distance of time.

THE LORDS found, that William Elliot, the purchaser by progress, was not obliged to astruct the onerous cause of the disposition from Scott of Bristo, to William his son, after so long a time.

*Act Ferguson.**Alt. Lockhart.**Clerk, Forbes.**Fol. Dic. v. 4. p. 116. D. Falconer, v. 2. No 93. p. 103.*

\*.\* Kilkerran's report of this case is No 35. p. 905.; *voce* BANKRUPT.

No 466.

Inhibition does not interrupt prescription of a real right to teinds.

1765. February 20.

EARL of LAUDERDALE *against* GEORGE INGLIS of Reidhall.

THE EARL of Lauderdale standing infest in the patronage and tithes of the parish of Hailes, having brought a process of reduction and improbation against several of the heritors of that parish, Mr Inglis produced a progress to the lands

and teinds of Reidhall from the year 1693, and pleaded a prescriptive right to these tithes.

Lord Lauderdale produced several inhibitions, with general executions, against the heritors of the parish, at the church-door of Hailes, whereof the latest was in 1731, and contended, that these were so many interruptions of prescription. What he urged in support of this plea was, that the law has warranted the edictal execution of inhibitions of teinds at the church-door, as equivalent to a personal service of the diligence. It is upon this ground, that such important effects are given to these inhibitions. They interrupt tacit relocation, not only as to that year in which they are served, but of all subsequent ones whereof the titular does not receive the tithes. *Bona fides* is no defence to a tenant, who, after inhibition, pays the teinds to a person in possession as formerly, 27th March 1628, Lord Blantyre, No 7. p. 1780. Those who intromit after inhibition, are even liable in a spuilzie. More particularly, it has been expressly determined, that inhibitions had the effect now contended for; 25th January 1678, Duke of Lauderdale, No 374. p. 11193. Indeed, a contrary doctrine would very much endanger the rights of the Crown, as well as other titulars, as they are not usually very exact or rigorous in levying the tithes, and cannot be supposed to be constantly attentive to the transactions among heritors calculated for creating titles of prescription. In fact, they are often ignorant who are in the use of intromitting with the teinds; and therefore, the law has very properly introduced this form of diligence, executed edictally, so as it may come to the knowledge of the whole parishioners, and put those, who have not a legal title, *in mala fide*, to continue their possession of the tithes.

*Answered* for the defender; By the common law of Scotland, no process of law, or step of diligence, has the effect to interrupt prescription, without legal intimation to the party, *i. e.* by the proper officer of the law, and in the manner the law has directed, such as is properly called an execution. Thus, if one should intimate verbally, or write a letter to his debtor, that he had raised a summons against him, it would not interrupt prescription. *2dly*, The execution must be special with respect to the person against whom it is directed. There is no instance of that effect being given to a citation by proclamation or an edictal citation, as it is called; that against tutors and curators is no exception, being only an accessory to the principal execution against the minor himself.

By the statute law 1669, c. 9., 1696, c. 19, several other particulars are required in the interruption of prescription in real rights, not one of which are observed in these inhibitions.

Though it were allowed that these inhibitions would have the effect to interrupt tacit relocation, it would not follow that they would interrupt prescription of an heritable right to tithes. The stile of the letters shews they were

No 466.

meant to affect those only who possessed the tithes by tack or custom, not by real right or infeftment. There is no doubt, they had their origin from the practice of the churchmen, who took this way to intimate their intention to draw the tithes themselves, and not to accept of a tack-duty in place of them. Tacit relocation may be interrupted by a general citation upon letters from the Commissaries; Bankton, b. 2. tit. 8. § 180.; but it could not be maintained that such citation would interrupt prescription of an heritable right to teinds.

The case of the Duke of Lauderdale was but a single one. Besides, the statute 1696 was not then made, and the inhibition there founded on was served in 1664, before the act 1669, which has no retrospect.

“THE LORDS sustained the defence of prescription, and assoilzied.”

Reporter, <i>Barjerg.</i>	Act. <i>Rac.</i>	Alt. <i>Burnet.</i>	Clerk, <i>Ross.</i>
<i>A. R.</i>	<i>Fol. Dic. v. 4. p. 118.</i>	<i>Fac. Col. No 10. p. 16.</i>	

\* \* \* Lord Kames reports this case :

THE Earl of Lauderdale, who is patron in the parish of Colinton, and also titular of the teinds, by unexceptionable titles derived to him from his predecessors, commencing as far back as the year 1588, brought a process of reduction and improbation against sundry of his vassals liable to him in payment of teinds. George Inglis of Reidhall, one of the defenders, produced in process a title to the teinds of his own lands by charter and sasine with 40 years possession, and *contended*, That having acquired right by prescription, he was preferable to the pursuer. It was *answered*, That his possession had been interrupted by inhibitions of teinds frequently renewed. The Court sustained the defence of the positive prescription, because an inhibition of teinds is not a sufficient interruption of such prescription.

From the stile of an inhibition of teinds, it appears to be calculated for the purpose merely of stopping tacit relocation, and to be effectual against those only who acknowledge the inhibitor's right. For it goes no further than to prohibit the heritor from drawing the teinds of his own lands, and ordering him to acquaint the inhibitor that he may come and draw the teinds. Now, neither the prohibition nor order can be understood to concern an heritor who by charter and sasine has right to the teinds of his own land, and who *optima fide* esteems himself to be proprietor.

*Sel. Dec. No 231. p. 305.*