

1665. February 17. BUTTER against GRAY of Balbrino.

JAMES BUTTER having pursued Gray for payment of a sum of money; he *alleged* prescription, because 40 years had run from the date of the bond, being the last of December 1624, before any judicial act, or other interruption done thereon. The pursuer *replied*, That he had cited the defender, upon the first summons upon the 24th of December 1664, which was six days within the 40 years from the date. *adly*, It was much more within the 40 years, from the term of payment of the bond, from which only, and not from the date, prescription runs, *quia contra non valentem agere non currit præscriptio*. The defender *answered*, that the citation on the first summons was not sufficient, unless there had been an act of continuation, or some judicial act, within the 40 years; because the act of Parliament bears expressly, if the creditor follow not, and take document within 40 years, the bond shall expire.

THE LORDS found the reply relevant, and that the citation on the first summons was sufficient, being within 40 years of the term of payment.

*Fol. Dic. v. 2. p. 123. Stair, v. 1. p. 272.*

1675. June 22. GAW against the Earl of WEMYSS.

IN anno 1632, the late Earl of Wemyss and this Earl granted bond to Henry Bruce, and Janet Gaw his spouse, by which they acknowledge to have received from them the sum of 2834 merks, and therefore became obliged to pay the said sum to the said Henry and Janet, the longest liver of them two, and to the said Henry his heirs and assignees; whereupon Janet having charged the Earl he suspends upon prescription; it was *answered* for the charger, *Contra non valentem agere non currit præscriptio*, and therefore the husband's negligence cannot prejudice his wife, nor was she in capacity to charge for the sum till his death. The suspender *answered*, That the wife might have intented an action for interruption, even in her husband's time, and if the bond be prescribed against the husband, as he might have discharged the sum, which would have excluded the wife, so prescription against him is a legal discharge, and there being no annual rent due by this bond, the wife cannot have a liferent-right, but the sum being payable to the longest liver, she is in effect substitute to her husband, so that prescription begun against him is continued after his death against her, as it is against all successors, even assignees; and if this were not sustained, prescription induced for security of the people would be in a great part evacuate.

THE LORDS found the wife's right not to be a substitution, but that it was a conjunct right to the man and wife, so that she doth not succeed to him, but hath a distinct right from him, resolving in a right of liferent; and albeit the

No 363.  
Prescription  
of a bond  
runs from the  
term of pay-  
ment, and  
not from the  
date of it.

No 364.  
A bond being  
payable to a  
husband and  
wife, and  
longest liver,  
&c. prescrip-  
tion was found  
not to run  
against the  
wife's liferent  
right till after  
her husband's  
death, be-  
cause till that  
time she had  
no action nor  
interest.