No 381. and possession conform, could not infer prescription; because Sharp having married the liferenter, it was one common possession to both, and so long as the liferenter lived the fiar was not obliged to take notice of any collusive infeftment betwixt husband and wife, being without any title. It was *answered*, That the infeftment being public, not holden of the wife herself, but of her superior, and registrate in the register of sasines, the fiar did, or was obliged to know the same: Neither needs the defender alledge any title in a prescription of 40 years, further than his own infeftment, which, though his author had no pretence of right, is sufficient by the act of Parliament 1617. It was *answered*, That whether the heritor were obliged to know or not, prescription could not run against him during the life of the liferenter, for the fiar could not effectually pursue for attaining possession so long as the liferenter lived, as was found in the case of the Earl of Lauderdale against the Viscount of Oxenford, No 379. p. 11205.

The Lords found the prescription to run only from the death of the liferenter, after which the fiar was only *valens agere*. See Proof.

Fol. Dic. v. 2. p. 124. Stair, v. 2. p. 47.

No 382. Prescription found not to run during the liferenter's possession against a fiar, from whose right a liferent was reserved.

1680. *February* 5. Brown *against* Hepburn.

In anno 1611 Hamilton of Barefoot wadset the lands of Easter-Monkrig, to Brown of Colstoun, with the burden of the liferent of Agnes Machan, which wadset contained a clause irritant, 'That upon not payment of the sum within a year thereafter, the reversion should expire;' whereupon declarator of expiration followed. This Colstoun having right to this wadset, pursues this Barefoot for exhibition of the writs and evidents of the wadset lands; who *alleged* absolvitor, because the wadset right was prescribed. It was *replied*, 1*mo*, That Agnes Machan's liferent being reserved, who lived till the year 1645, the wadsetter *non valebat agere*, during that time, and it is not 40 years since. 2*do*, The pursuer interrupted by a process in anno 1668 against Barefoot. The defender *duplied* to the first, *non relevat*, that Machan's liferent was reserved, for though that excluded actions of mails and duties, it hindered not declarators. And as to the interruption by action, *non relevat*, unless it had been renewed every seven year, conform to the 10th act Par. 1669. It was *triplied* for the pursuer, That he opponed the act, which relates only to interruptions made after the act, as it is clear by the first part of the act, bearing, 'That all interruptions, as to rights of lands, by citation, shall thereafter be executed by a messenger at arms;' and though the posterior clause, that all interruptions by citation, whether in real or personal rights, be renewed every seven year, it doth not repeat the words 'in time coming,' yet it is the general rule of law, that all respect the time to come, unless they particularly express the time past; and if this were sustained to take away old interruptions, as to which the

most cautious men imagine no necessity of innovation, it would at one blow cut off all interruptions before this act of Parliament. No 382.

THE LORDS found the prescription run not during the life of the liferenter, and found the interruption valid before the act of Parliament, though not renewed, and that the said act did relate to posterior interruptions.

Fol. Dic. v. 2. p. 125. Stair, v. 2. p. 752.

*** Fountainhall reports this ease:

THE LORDS found the prescription did not run during the liferentrix's lifetime, the wadsetter being then *non valens agere*, though he might raise a declarator, &c. and found the interruptions, appointed by the act of Parliament in 1669, is only of bargains, and writs made after the date of the said act, and not for rights before, which seems irregular; for laws can only be said to be drawn backwards when a deed in time coming cannot save the prejudice.

Fountainhall, MS.

1724. *February* 18.

Sir GILBERT ELLIOT of Stobbs, *against* JAMES ATCHISON Merchant in Edinburgh.

No 383.
Objected to an adjudication, that it was prescribed, no diligence having been done on it for 40 years. *Answered*, Prescription could not run, because the adjudger was *non valens agere*, the subject being liferented for an aliment the whole of that time, and the adjudger thereby excluded from the mails and duties. Found that the prescription did not run.

IN a multiplepoinding raised by the tenants and possessors of five tenements of land in Edinburgh and Canongate, a competition did arise betwixt Sir Gilbert and Mr Atchison.

Mr Atchison's right was a disposition to the subjects by John Murray, who had acquired right by progress to an apprising dated in May 1668; and Sir Gilbert's interest was an adjudication led against the said John Murray, for a debt of his father's, dated in July 1680.

Atchison *objected* to Sir Gilbert's adjudication, That it was prescribed, there having been nothing done upon it since March 1681, that the Magistrates were charged as superiors.

It was *answered* for Sir Gilbert, *1mo*, That prescriptions could not run against his adjudication, because he was *non valens agere*, in respect that in the very right adjudged from his debitor the relict had a right of liferent in the subject, which excluded him from the mails and duties during her lifetime, and that he intented process within a few months after her decease. *2do*, That Sir Gilbert having by his diligence denuded the heir of his debitor of all right competent to him upon the fee of the tenements in question, the liferentrix her possession did thereby become his, especially after the adjudication came to be an irredeemable right by the expiration of the legal; so that Sir Gilbert's right was clothed with the positive prescription.

It was *replied* for Atchison, That the defence of *non valens agere* was not relevant; for albeit the the relict's right did not extend to the whole tenements,