

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.

IN a multiplepinding 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, *imo*, That prescriptions could not run against his adjudication, because he was *non valens agere*, in respect that in the very right adjudged from his debtor the relict had a right of liferent in the subject, which excluded him from the mails and duties during her lifetime, and that he intended process within a few months after her decease. *2do*, That Sir Gilbert having by his diligence denuded the heir of his debtor 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,

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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.

No 383. yet *de facto* she was only possessed of two; so that Sir Gilbert was not in the exception, since he did not condescend how he was debarred from the possession of the other three. *2do*, Though the liferentrix's possession might preserve the right of fee to the heirs of the fiar, or perhaps to singular successors who had got dispositions from them, yet her possession could not support the adjudication with which her right was not connected, and upon which it did not depend, and she neither did nor could acknowledge the adjudger.

It was *duplicated* for Sir Gilbert, That since it was acknowledged that the relict had a right to the liferent of the whole tenements, the exception of *non valens agere* was not competent to him, although she possessed but a part of them; because the exception takes place where the possessor of a right cannot *agere cum effectu*, which is the doctrine of the civil law and of our own, as in the case of deliberation, where no part of that time was ever imputed in the prescription, and as appears from my Lord Stair in the last Division of the 27th § title PRESCRIPTION.. *2do*, The distinction betwixt the heir of the fiar and the adjudger could not serve in the present question; for although Sir Gilbert did not grant the liferent-right himself, yet he having by his legal diligence denuded the heir of the fee, with all the burdens thereof, he could plead every thing that was competent to the heir.

THE LORDS found, That the prescription did run against the adjudger during the time that the subject was liferented.

Reporter, *Lord Forglan.*

For Sir Gilbert, *Jr. Elphinstone.*
Clerk, *Hall.*

Alt. *Jr. Colvill.*

Edgar, p. 35.

1782. *March 1.*

EARL of DALHOUSIE *against* MAULE.

No 384.

IN the case of an entailed lease, the substitute heirs being considered as *non valentes agere cum effectu*, before the succession opened to them, it was found that prescription did not operate against them.

Fac. Col.

* * This case is No 175. p. 10963.

The subject PRESCRIPTION is continued in Vol. XXVII.