

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 payment, and not from the date of it.

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

No 364. bond bears no annual rent, yet the wife having power to uplift the sum may employ it for her liferent use. As to which right, the LORDS found, that prescription could only begin as to it from the husband's death, and that the husband in his life could not have discharged or uplifted the sum without consent of the wife, or employing it otherwise than in the terms contained in the bond, or for her liferent-use after his death.

*Fol. Dic. v. 2. p. 123. Stair, v. 2. p. 334.*

\* \* \* Dirleton reports this case :

A BOND being granted by the Earl of Wemyss to Henry Bruce and his wife Gaw, and the longest liver of them two, and to the said Bruce his heirs ; and the said Gaw the relict having intented a pursuit for payment of the sum due thereby, it was *alleged*, It was prescribed, there being more than 40 years elapsed since the granting. It was *answered*, That the time of the husband's lifetime the bond did not prescribe against the pursuer, being clad with a husband, and so *non valens agere*.

The LORDS, upon the report made by my Lord Newbyth, did *ex tempore* find, That it did not prescribe during the husband's time ; though some of them were of the opinion, that the case was of importance as to the consequence, and was to be further thought upon and debated, in respect it cannot be said but there was a person *valens agere* ever since the date of the bond, the husband all this time being *valens agere*, and after his decease, the wife ; and the husband's silence, being fiar, and the person who had right for the time, being joined with the relict her silence, and both being joined by the space of 40 years, all the reasons of prescription concurred in the case, *viz.* That debtors should be secured after so long a time and that there is *præsumptio juris*, the bonds may be made up, and nothing thereon done till all the witnesses were dead : And that maxim *contra non valentem agere*, &c. is to be understood in the case, where there is not a person having right *valens agere*, by the space of 40 years ; or in the case of temporary and momentary prescriptions, but not in prescriptions *longissimi temporis* ; otherwise prescription, being the great salvo and security of people, might be eluded, and a person acquiring a right of lands, possessed by his author peaceably, for the space of 40 years without any interruption, should not be secure ; seeing it may be pretended, That the husband, having been silent 40 years, without any interruption, his wife, who pretends right to the lands by liferent or otherwise, *non valebat agere* during the marriage.

*Dirleton, No 271. p. 131.*

\* \* \* Gossford reports this case :

IN a pursuit at Janet Gaw's instance against the Earl of Wemyss, for payment of 2834 merks, in a bond granted by the Earl and his father to Henry

Bruce the pursuer's husband, and her the longest liver of them two, in October 1632, it was *alleged* for the Earl, That the bond was prescribed, there never having been any diligence done since the date of the bond, being 42 years. It was *replied*, That the prescription could not run against the pursuer, because she had no right to pursue until after her husband's decease, who survived the date of the bond above 20 years; and in law *contra non valentem agere non currit præscriptio*. The LORDS did repel the defence, and sustained the pursuit, notwithstanding the bond did bear no annualrent; and that the Earl of Wemyss was a most responsible debtor, and that the pursuer, after her husband's death, by the space of 20 years did no diligence, and was in no plentiful condition, upon that ground that she was not a conjunct fiar, but only substitute in case she survived her husband, so that after his decease her right did only begin; and yet the presumptions were most strong, that the bond had been discharged, and in law, albeit several persons be substitute, and all of them be dormant for the space of 40 years, being majors, the law grants the benefit of prescription, seeing some of them might have done diligence, and did it not until the 40 years were run out; and every one of them who were to succeed ought to have considered, that it was incumbent to them to do diligence to prevent the hazard of prescription.

No 364.

Gosford, MS. No 758. p. 470.

1675. June 23.

BRUCE against BRUCE.

DOCTOR ARNOT having no children, but his sister having two sons, Andrew and David Bruces, he did dispone an annualrent of 200 merks yearly to David the younger son out of his estate, the first terms payment thereof being the first term after the disponer's death; thereafter he did dispone his estate to Andrew Bruce the elder brother. David Bruce was infeft in the annualrent, and now pursues a pointing of the ground against James Bruce heir to Andrew, who *alleged* absolutor, *imo*, Because David Bruce the pursuer his right is prescribed, being granted *in anno* 1626. It was *answered*, *Contra non valentem agere non currit præscriptio*, the pursuer's right could have no effect till the Doctor's death.

THE LORDS repelled the defence in respect of the reply.

The defender further *alleged*, That the pursuer's right was never a delivered evident, but remained still by the Doctor, and was amongst his papers at his death, when his nephew Andrew was out of the country, and therefore the pursuer ought to prove the delivery thereof. It was *answered* for the pursuer, That the having of any writ in favours of the haver presumes the delivery, unless the contrary be proven, *viz.* That the writ was in the custody of the defunct, or depositate, &c. *2do*, Though it were acknowledged that the writ remained by the disponer at his death, it doth not annul the right, because

No 365.

Prescription of a writ found not to run from the date of it, but from the term at which it was payable.