

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* absolvitor, *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.

No 365. though an undelivered writ doth infer that it is incomplete and ineffectual, yet that rule hath many exceptions, as if it contained a clause dispensing with not delivery, as in this case, albeit the writ had not been delivered, yet sasine being given thereupon, the delivery of sasine is sufficient, the sasine being in the public register, especially seeing Doctor Arnot had no children, and these two brothers were the nearest of kin, so that the Doctor having done no positive deed in the contrary, the keeping of the writs imports not a revocation of the gift.

THE LORDS found that the pursuer needed not prove the delivery, and also found, that though the writs had not been delivered, they were effectual, there being a sasine registrate, but if there had been a positive deed done by the Doctor, alleged in the contrary, they would consider the same.

The defender further *alleged*, That this annualrent relating to no stock of money, but an irredeemable constitution, behoved to be liable to a proportional part of the public with the lands affected therewith.

Which the LORDS sustained. See WRIT.

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

* * * Dirleton reports this case :

DOCTOR ARNOT having disposed to one of his nephews, an annualrent out of certain lands belonging to him, and thereafter having disposed to another of his nephews, the elder brother of the annualrenter, the foresaid lands, a poiding of the ground was intented, at the instance of the person who had right to the annualrent : And it was *alleged*, That the disposition of the annualrent was never delivered by the Doctor, but was beside him the time of his decease, and was *viis & modis* gotten out of his charter chest, and given to the pursuer : To which it was *answered*, That the pursuer had the paper in his hands, and it was presumed to be delivered : And, *2do*, Though it should be supposed, that the said right was among the Doctor's papers the time of his decease, yet the Doctor having made the said right public by an infeftment, and sasine thereupon, to the pursuer, which was registrate, albeit he might have evacuate the said right by destroying the disposition, yet nevertheless having kept the same by him undestroyed, it ought to be construed in law, that being uncle to the pursuer, and having given the said right upon the account of the said relation, he kept the same by him to the pursuer's behoof, unless it could be made appear that the Doctor did any deed to recal and evacuate the said right.

THE LORDS repelled the defence of not delivery, in respect of the answer.

Reporter *Hutton*,

Clerk *Hay*.

Dirleton, No 272. p. 132.