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with burden of his debts; and therefore, whatsoever goods she had by the same disposition, it was really affected with his creditors debts.—It was *answered* and *alleged* for the Creditors of the relict, That she never accepted of any such disposition, nor made use thereof; but on the contrary, any intromission she had was as executrix to her husband, whereby the property of the goods became her's, and she might dispose thereof; likeas she did dispose of the same in favours of Margaret Masterton, her sister-in-law, with the burden of her proper debts; and so her creditors had best right thereto.—THE LORDS did find, That if the said Alice Thin had only right as executrix, that the proper goods and gear which belonged to her husband, and were intromitted with by her, being yet extant, would belong to the husband's creditors; and so preferred them, conform to a former practick in the case of Ley, No 1. p. 3123. where the LORDS did ordain it to be a practick, that the creditor of the defunct should be preferred to the creditors of the executrix as to his goods; but as to any goods that were acquired by the relict herself, after the husband's decease, and did only appertain to her, and were never possessed in common, They did prefer the relict's own creditors to the creditors of the husband, who had never done any diligence to affect the same, nor had recovered decret against the relict as executrix, to constitute her debtor during her lifetime.

Fol. Dic. v. 1. p. 206. Gosford, MS. No 796.

1678. December 19. PATERSON *against* BRUCE.

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The Lords found, that the axiom *contra non valentem agere, non currit prescriptio*, takes no place in the short prescriptions; and that the three years are not to be understood of *anni utiles*, but *continui*; and therefore, that the act cannot be extended to this case, where the term of payment full sometime after the defunct's death,

IN a competition betwixt Captain Paterson and David Bruce, both having apprised the lands of Thomas Tweedie, from his apparent heirs;—it is *alleged* for Paterson, That he ought to be preferred, because he has the first apprising and infestment.—It was *answered* for Bruce, That his apprising, though posterior, is upon the defunct's debt, and Paterson's is upon a bond granted by the apparent heir; and therefore, by the act of Parliament preferring the diligences for the defunct's debts, before the apparent heir's, the said diligences being done within three years, are preferable.—It was *replied*, That the foresaid act prefers only diligences for the defunct's debt, being done within three years after the defunct's death.—It was *duplicated* for Bruce, That these three years must be *anni utiles*; but here Bruce could use no diligence, because the term of payment of his debt was not come; and the narrative of that act bears, 'That the defunct's creditors either did not know, could not, nor used no diligence;' and there can be no case more favourable than this, where Paterson's right is upon a fraudulent gratuitous bond of the apparent heir's.—It was *triplicated*, That this statute being correctory of the former law, which did not distinguish the defunct's debt, from the heir's debt, cannot be extended beyond the terms expressed, of diligences done within three years after the defunct's death, and if it were otherwise extended to bonds conditional, or whereof the terms were not come, that

they should have three years after the purification of the condition, which might run for 40 years, it would unsecure all legal diligences and purchasers from heirs, though for onerous causes; and though the apparent heir's bond in this case be gratuitous, the statute cannot be extended, which mentions expressly gratuitous deeds of the heir's, and makes no exception as to these; neither doth the exception of *non valens agere*, continue any prescription, except where it is expressed, as in the prescription of heritable rights, but it hath no effect in the prescriptions of spuilzies or removings.

THE LORDS found, That though the apparent heir's bond was gratuitous, the diligence upon the defunct's debt, could not be preferred to a prior diligence on the apparent heir's bond, unless the diligence on the defunct's debt were within three years of the defunct's death, and that no impediment could continue the three years; but whether the defunct's creditors might not reduce the gratuitous bond of the apparent heir, that occurred to the LORDS, and they allowed the parties to be heard thereon; and, after a full hearing, reduced the same. See HEIR APPARENT.

Fol. Dic. v. 1. p. 206. Stair, v. 2. p. 659.

* * * Fountainhall reports the same case:

FOUND, That *non valens agere* takes not place in the short triennial prescriptions, but only in that of 40 years; but found, that the three years mentioned in the 24th act of Parliament in 1661, for preferring the defunct's creditors doing diligence against the predecessor's estate after his death, were not to be understood of *anni utiles* but *continui*, and so found that the said act of Parliament cannot be extended to this case.

Fountainhall, MS.

1685. *March.* LORD BALLENDEN *against* WILLIAM MURRAY.

IN a competition between the creditors of a defunct and the creditors of an apparent heir, the LORDS found, That the defunct's creditors ought to do exact and complete diligence against his estate within three years after his death, unless they could make appear, that their diligence was retarded without any fault of theirs, by opposition from the heir or other creditors, or the surcease of justice, or the like; and preferred a disposition granted by the heir to one of his creditors, even within three years after the defunct's decease; albeit the creditors of the defunct had obtained a decret *cognitionis causa* within the three years, the decret of adjudication being after. In this process it was also found, That a disposition granted by the heir to the defunct's creditors, within a year after the defunct's decease, was not quarrellable, seeing the clause of the act of Parliament is conceived in favours of the defunct's creditors; nor yet that

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and the creditor had done diligence within three years, counting from the term of payment.

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