

No 374. though the action could have no effect, as when the mails and duties or removings, or blank reductions or improbations, or upon irrelevant reasons, though there be exceptions to exclude all these, yet all of them will stand valid as interruptions; but the law hath required in warnings from lands, not only an execution at the kirk, but on the land and to the possessor, because the warner doth not only assert and own his own right as in teinds, but designs to exclude the right in possession of the parties warned.

THE LORDS repelled the defence of prescription upon the Queen's right of fee and her tack, in respect of the answer on Thirleston's right of fee; and found that the prescription did not run during the Queen's life, whose right of liferent would have excluded Thirleston's, and that he was *non valens agere*, because he could not effectually pursue for attaining possession, though he might have used reduction or declarator; and found the years of the pursuer's forfeiture, in which *non valebat agere ob defectum tituli*, were to be deducted from the years of prescription, and found the inhibition at the kirk-door, without any further, a valid interruption.

Fol. Dic. v. 2. p. 124. Stair, v. 2. p. 602.

* * * Fountainhall reports this case :

1678. *January 23. & 25.*—IN LAUDERDALE and Tweeddale's cause, the LORDS repelled the defence of prescription on Queen Anne's right of fee and tack in respect of Thirleston's fee, against whom no prescription could run during the Queen's lifetime, who was preferable to him *quoad* the liferent, although he might have used reduction or declarator; and found the Duke of Lauderdale was now *valens agere ob defectum tituli* during his own forfeiture, and so these years must deduct off the prescription; and found the inhibition at the kirk-door, without any diligence thereon, a sufficient interruption. See act 192d, Parl. 13. James VI. in 1593.

Fountainhall, MS.

No 375.

Prescription not elided, because the party, being in his Majesty's service, durst not appear during the usurpation.

This sentence was afterwards altered, see Sir P. Home's and Harcarse's reports of this case, *infra*.

1678. *July 24.* Colonel WHITEFOORD *against* The EARL of KILMARNOCK.!!

COLONEL WHITEFOORD having obtained a gift from the King, of all the fruits of the sub-deanry of Glasgow, preceding the year 1629, did, upon his gift, obtain decret conform, and thereupon charged the Earl of Kilmarnock for the teinds of his lands belonging to the said benefice. The Earl suspends, and *alleges* prescription. The charger *answered, imo, Contra non valentem agere non currit prescriptio*, and it is notour, that the charger, during all the time of the troubles and Usurpation, was in his Majesty's service, out of the country, and durst not appear, under the hazard of his life, which was sustained in the case

of the Duke of Lauderdale, (*supra.*) 2^{do}, The charger interrupted by citation at the market-cross against all and sundry, *in anno* 1669. The suspender *replied*, That the charger *valebat agere*, for though it had been true that he run the hazard of his life, if he had personally appeared, yet he might have appeared by a procurator, or by an assignee to his behoof, who could never be excluded upon pretence that the constituent was culpable of crimes; nor is this case any thing like the Duke of Lauderdale's, who was forfeited by the Usurpers, and so *non valebat agere ob defectum tituli*; but the charger was neither forfeited, condemned, nor accused; and as to the general citation, it is not within 40 years from the year 1628. And though it were, it hath no effect but to procure letters of horning, and cannot make interruption without special citation; for when the King was to interrupt the act of prescription against all his subjects, it could not be done but by special act of sederunt, and warrant for a proclamation at the market-cross, which the LORDS declared sufficient for the King; but a general citation of all and sundry at the market-cross, at a private party's instance, cannot interrupt, seeing it passeth of course, and would insecure the lieges.

THE LORDS sustained the reason of prescription, and repelled the answers that the charger *non valebat agere*, seeing he was not forfeited.

Fol. Dic. v. 2. p. 124. Stair, v. 2. p. 642.

* * Sir P. Home reports this case :

1682. *January.*—THE deceased Walter Whitefoord, Colonel Whitefoord's father, having obtained a gift from the King, in the year 1681, of the teinds, feu-duties, and other rents and emoluments of the sub-deanry of Glasgow, from the year 1586 to the year 1628 inclusive, and he having assigned the gift to the Colonel, his son, who having pursued the Earl of Kilmarnock for ten chalders of victual yearly, the saids years, as the teinds of the lands possessed by him belonging to the sub-deanry; *alleged* for the defender, that the gift being granted to the pursuer's father in the year 1631, was prescribed, there being no diligence done thereupon for the space of 40 years. *Answered*, That the pursuer having engaged as a soldier in the King's service in the year 1638, and served the King in the wars, during the late troubles, till the year 1649 that he was taken with Montrose, and ran the hazard of being executed, but with great difficulty was saved, and only banished the kingdom, upon the finding of sufficient caution not to return under the pain of L. 5000 Sterling, and accordingly he went out of the country, and did not return until his Majesty's happy restitution in the year 1660; so that during the time he was banished out of the country, he was *non valens agere*; and it is a principle in law, that *contra non valentem agere non currit præscriptio*; and the same point being formerly debated as to other vassals of the sub-deanry in February 1678, the

No 375.

LORDS found, that upon the foresaid reason, the prescription could not run against the pursuer; and upon that same ground, the last Parliament, in a case betwixt the Earl of Airly and Mr John Dempster of Pitliver, made an act in-favours of the Earl, that prescription should not run against him during the time that the Earl was serving the King in the late wars, as not being then *valens agere*. *Replied*, That *non valens agere* was not relevant against prescription, unless it were qualified *quo modo* he became *non valens*, as that the impediment was insuperable; for albeit that defence was sustained in favours of persons that had been forfeited and imprisoned during the Usurpation, whereby there was an insuperable necessity of silence imposed upon them, the forfeiture having taken off all right that stood in their person, so that they could neither have pursued in their own name, or made any right to others; yet the pursuer was neither forfeited nor imprisoned, so that either he might have pursued the action in his own name, or granted a factory for that effect; or he might have made an assignation to any person for that effect who might have pursued it, so that his being banished out of the country was so much a superable impediment, as that the pursuer was not *valens agere*; and whatever was done in the process of others of the vassals, was *res inter alios acta* as to the defender, and cannot prejudice him; and it seems the defence in that process has been repelled by collusion; for in the same process there being formerly report made to the LORDS, there was an express interlocutor in July 1678, where the allegiance of *non valens agere* was expressly repelled, as appears in the Lord Stair's Book of Decisions, v. 2. p. 642, (*supra*.)

THE LORDS found, That the Colonel was not *valens agere*, in respect of his banishment, and therefore repelled the defence of prescription.

Sir P. Home, MS. v. 1. No 95. p. 141.

. Harcarse reports this case :

1681. *January 31.*—IN a pursuit for teinds at the instance Colonel Whitefoord against Lord Kilmarnock, the defender objected prescription.

Answered for the pursuer; That he was not *valens agere*, in so far as he was banished the kingdom during life, for adhering to the King's service, and assaulting Dorislaw at the Hague in Holland.

Replied; Though the exception of *non valens agere* be sustained, as interruption of prescription in the case of forfeiture, where the party could not claim his right, it were a dangerous preparative to sustain such a thing in this case, where process might have been intended in the name of the pursuer himself, though banished, or in name of his factors. And my Lord Airly's case, which is more favourable, required an act of Parliament; and the same point was repelled in the year 1678, (*supra*.)

THE LORDS having considered the circumstances that Colonel Whitefoord was then in, during the late troubles, they sustained the interruption of *non valens agere*.

Thereafter the pursuer *contended*; That interruption must be sustained in his favours from the year 1638, seeing he was in the King's army in England, and so *absens reipublicæ causa*; which the LORDS repelled, because he might have assigned or pursued, notwithstanding his being in the King's army.

No 375.

Harcarse, (PRESCRIPTION.) No 758. p. 214.

1698. November 24. FLETCHER of Aberlady *against* FLETCHER of Salton.

I REPORTED Fletcher of Aberlady against Andrew Fletcher of Salton, who had been tutor to Aberlady's uncle, and in the compt and reckoning some articles fell to be controverted. The *first* was, That Salton, the tutor, craved allowance and deduction of L. 2400 Scots, which Sir Andrew Fletcher, his pupil's father, had uplifted of his means; for proving which article of discharge, Salton produced, *1mo*, A registered factory he had given to Sir Andrew, his uncle, in March 1765, when he went abroad, to uplift his rents and annualrents, and sell his victual, &c.; *2do*, He produced a holograph compt-book, all written with the said Sir Andrew's hand, containing his whole domestic deburements *de die in diem*, and a particular account of what he uplifted of Salton's money, either from his debtors, or the baxters and brewers who had bought his victual, by virtue of the factory, with a petty account of what he had expended on his affairs, and drawing it to a balance, he was debtor in the sum aforesaid;—*3tio*, He produced a discharge given by the said Sir Andrew, as factor, to Sir George Kinnaird, of a year's annualrent of L. 8000 he owed Salton; all which conjoined with the compt-book, the factory antecedent, and the discharge subsequent, were a sufficient verification and instruction of that debt whereof Salton craved allowance from his pupil. *Answered* for Aberlady and the Laird of Culter, his tutor, That the writs produced proved no debt owing by Sir Andrew or his representatives, save only the discharge of Sir George Kinnaird's annualrent, which being subscribed under his hand, they are willing to allow; but the compt-book can never constitute nor prove a debt for Salton against Sir Andrew's heirs, for these five reasons; *1mo*, By the law of Scotland, no writ is probative unless it be subscribed, and even when it is signed, it is null, if it want the writer's name and witnesses. It is true, there is a specialty introduced in merchants' compt-books, that they prove against them, but that is when they are produced by themselves, and founded on; but this privilege was never extended to gentlemen's compt-books; for *Mascardus de probationibus*, and all the other doctors, speak of the *libri mercatorum* only, which in some cases in Italy *fidem faciunt pro scribente*, but *semper probant contra scribentem*; but with us neither prove for nor against the writer, unless subscribed, which this book is not. The *second* objection is, That it can never operate in favours of Salton, because, on his uncle Sir Andrew's death, he made himself master of

No 376.

Four years during which a party had been under forfeiture were deducted from the vicennial prescription of a holograph writ.