

rallell case, 25th January 1678, Duke of Lauderdale *contra* the Earl of Tweeddale, *infra, h. t.* Replied, That whatever might be done in the short prescriptions, as the triennial, or the like, yet, in the grand 40 years prescription, no time is discounted, save what is done by an express law; else if one would precisely make it only to consist of *tempus utile*, wherein judicatories are sitting, and there is *copia ad eundi prætorum*, then Sundays and Mondays behoved also to be discounted, and all the anniversary vacation-days. THE LORDS decided only on the first objections against the legality of the execution, and found it so null, as they would not so much as allow it to serve for an interruption; and so preferred and assoilzied Bearford from this reduction and pointing of the ground pursued against him, for the ground-annual of 48 merks out of the tenement called the Black Turnpike belonging to him.

*Fol. Dic. v. 2. p. 103. Fountainhall, v. 1. p. 688. 774. & 777.*

No 82.

1740. December 5. AGNES GED and her HUSBAND *against* BAKER.

FOUND, that 40 years possession upon an infestment proceeding upon a charter of adjudication, excluded all objections of nullities against the adjudication or grounds thereof, although there had not been 40 years possession since the expiry of the legal; but found that the years of minority were to be deducted.

*N. B.* There is no doubt but it is competent to allege payment within the legal, any time within 40 years after the expiry of the legal.

*Fol. Dic. v. 4. p. 95. Kilkerran, (PRESCRIPTION.) No 6. p. 418.*

No 83.

1745. June 7. JOHN JOHNSTON *against* JAMES BALFOUR.

JOHN JOHNSTON, as adjudger from the apparent heirs of Patrick Stewart of Beath, brought a reduction of the rights of James Balfour present possessor thereof, who, to exclude the pursuer's title, produced a charter, 24th February 1694, of the lands in favour of James Balfour and Marion Bruce, his grandfather and grandmother, and sasine thereon, 19th January 1699, bearing to proceed on an apprising led by them, 29th July 1664; and on these titles alleged possession for more than 40 years.

A proof of the possession being led, it was fully made out, and appeared to have commenced before the date of the charter.

*Pleaded* for the adjudger, That Patrick Stewart dying in the year 1654, Marion Bruce his widow had married to James Balfour, and they had taken possession of the estate under colour of her provisions, which were a liferent of the house and gardens, and of the coal, and an annuity of L. 1000 out of the lands; and she had a direct title to possess the house and coal; and with re-

No 84.

Forty years possession since the date of a charter and sasine, bearing to have proceeded on an apprising, which was not produced, was sustained to exclude a reducer, tho' it was alleged the possession was older than the date of the charter, and had begun upon the obtainers thereof being entitled

No 84. to a liferent annuity, which exhausted the rents, the rather as a tack was produced, let by the liferenter, and it was pleaded, the possession could not be imputed to the apprising which was not produced.

gard to the rest of the estate, though an annuity is no title to demand possession, yet possession may be had upon an annualrent, and tenants may pay an annualrenter without a poinding, who has also action against intromitters with the rents; and it is ordinary in a competition to prefer an annualrenter to the mails and duties, when they do not exceed the annualrent, as they did not here. As she is found therefore in possession, it cannot be doubted she entered in virtue of her liferent; besides there is produced a tack *anno* 1670, granted by her as liferentrix of the lands.

The apprising said to be led *anno* 1664, cannot be founded on as giving a title to possess, since it is not produced, and thus the original of her possession being once determined, she could not change the cause thereof and ascribe it to the charter.

As there is no positive prescription from the possession's not being on a proper title, so the heirs are not excluded by the negative prescription, because the possession of the liferentrix was the fiar's possession, and so no prescription run against them.

*Pleaded* for the defender, That the law does not enquire into the beginning of a 40 years possession, but sustains a title and possession, though in this case the beginning of it has been on the apprising, and the tack mentioned is subsequent to this, and is granted by her husband and her; and nothing can be inferred from her being therein designed liferentrix by the writer, as the liferent was not a title to set tacks; the possession must therefore be applied to the title of property, as the annuity was no title of possession.

Decisions cited for the pursuer, 27th February 1666, Lauderdale against Oxford, *infra, h. t.*, 25th January 1678, Lauderdale against Tweeddale, *infra, h. t. infra, h. t.* 17th January 1672, Young against Thomson, *infra, b. t.* 5th February 1680, Brown against Hepburn, *infra, b. t.*

For the defender, 27th November 1677, Grant against Grant, *infra, h. t.* one in 1726 or 27, Smith of Inveramsay against Seton, and that in the case of Mackerston, (See APPENDIX), 20th February 1675, Countess of Murray against Wemyss, No 15. p. 9636.

It seemed to weigh with the Lords, that the jointure was not a locality but an annuity; however they did not distinguish the house and coal from the rest of the estate.

“ THE LORDS having advised the probation adduced, and writs produced for the defender, found it proved, that he and his predecessors and authors had been in the uninterrupted possession of the lands libelled, upwards of 40 years, by virtue of the infestments produced; and thereupon found that the defender had produced sufficient to exclude the pursuer, and sustained the defence proposed for the defender.”

Reporter, Lord Elchies. Act. R. Craigie. Alt, Ferguson. Clerk, Gibson.

Fol. Dic. v. 4. p. 95. D. Falconer, v. 1. p. 94.