

S E C T. II.

Non valens, vi majore, by unjust banishment, &c.

1666. December 8.

LESLIE against LESLIE.

PATRICK LESLIE of Balquhoyn pursued a general declarator of the single and liferent escheat of John Leslie of Balquhoyn, against James Leslie and his spouse, as nearest of kin to the said John. It was *alleged*, That the horning was prescribed, the declarator being raised forty years after the horning. It was *replied*, That though prescription should run against the King (which was denied) yet in this case it could not; the King being minor the time of the prescription diverse years, and the government being interrupted; so that there was not *tempus utile* during the usurpation; and the King is not in use to dispose of escheats, until application be made to his Majesty; and, by the act of Parliament, it is provided, that the negligence of his officers should not prejudice him.

THE LORDS found, That the horning did not prescribe, in respect of the King's minority, and interruption foresaid.

It may be asked, If that reply of his Majesty's minority and interruption were not competent? And if the escheat were gifted by a Lord of regality or a superior, *quid juris?* And it seemeth that a horning being *pæna*, and once execute, doth not prescribe; seeing the rebel, if he should survive forty years, his liferent would fall to the superior; and there is no reason that he should *lucrari*, and be in better case *ex culpa*, and by the continuance of his rebellion for so long a time.

Fol. Dic. v. 2. p. 124. Dirleton, No 59. p. 25.

1678. January 25. Duke of LAUDERDALE against The E. of TWEEDALE.

THE Duke of Lauderdale, as successor to the Lord Thirleston, chancellor, his grandfather, having right to that part of the Abbacy of Dumfermling on the south side of Forth, whereof the teinds of Pinkie are a part; and having used inhibition at the parish-kirk door *in anno* 1664, pursues the Earl of Tweedale as heritor and intromitter with the teinds of Pinkie, since the inhibition, for a spuilzie, and before, for wrongous intromission. This cause being disputed the 23d of this instant and decided as to the defences then proponed; the defender now further *alleged* absolvitor, because he and his authors have bruiked the teinds in question since the year 1593 without interruption, in so far as *in*

No 373.

In a declarator of escheat, found that the horning did not prescribe on account of the King's minority, and interruption of the government.

No 374.

Non valens agere ob defectum tituli, the party being forfeited at the time, was sustained to stop the running of the positive prescription.

No 374. *anno* 1593, Queen Anne was infeft in fee in the Abbacy of Dumfermling on both sides of the water, and from thenceforth used all deeds of property, and her right is ratified in Parliament 1612, and a council appointed for management thereof; likeas, the Queen granted a tack of these teinds to the Earl of Dumfermling chancellor and his son, "and two heirs succeeding them;" to which the defenders has right by apprising against Dumfermling, so that the Queen and the defender's other authors have bruiked peaceably these teinds, not only 40 years, but above 70 years. It was *answered* for the pursuer, That the defence ought to be repelled, because contra non valentem agere non currit præscriptio, and there is not 40 years run in which the pursuer or his predecessors could have possessed, or insisted in process for possession; because it is offered to be proved, That Thirleston was infeft in fee by the King *in anno* 1584 in the Abbacy of Dumfermling on the south side of Forth erected in the Lordship of Musselburgh, and that his right is excepted from the general act of annexation 1587, and is repeated in the annexation of Dumfermling 1593, bearing expressly, "That upon Thirleston's resignation in favours of Queen Anne in life-rent, and of himself in fee, both were infeft;" and, by a ratification by King Charles the First, *anno* 1641, and by ratification in 1661, "It is declared that all other rights are to be null and void, and not to be derogate by the act *salvo jure*;" so that the pursuer or his predecessors could not pursue during the life of Queen Anne, but would have been excluded by her life-rent-right, and she having died *in anno* 1618, from thence to the year 1664 there intervenes but 46 years, out of which there must be deducted eight years in which the pursuer was not only captive for his loyalty, but also sequestrated and forfeited; and so during that time non valebat agere ob defectum tituli; and as the longest prescription of 40 years in the Roman law gave occasion to our act of prescription 1617, so the exceptions competent by that law upon solid reason must be allowed by ours, such as captivity or absence *rei publicæ causa*. It was *replied* by the defender, That the answer is noways relevant to elide the defence upon prescription, which is the great security of property; and though it be introduced in imitation of the Roman law, yet it is not to admit of all the exceptions thereof, but only the exceptions expressed in the act, viz. falshood, minority, interruption, and reversions contained in the bodies of rights and no others; and in the long prescription account is not made per tempus utile sed per tempus continuum; and none would pretend that the not sitting of the Session or the Usurpation, or any absence will afford exception against our act of prescription; yea, Thirleston and his successors, even during the Queen's life might have reduced the Queen's right of fee, as being posterior to his, or declared that the Queen could not introvert his possession, having accepted a life-rent right from him; nor doth it appear that she did accept the same, or possessed thereby, but by her heritable right, which was some few months after; and in the long prescription no consideration is to be had of the quality of possession. *2do*, The interruption alleged by the inhibition of the teinds at the

kirk is not a relevant interruption, unless there had been a process and citation of the defenders or their authors thereon. It was *duplied* for the pursuer, That his answer stands most relevant, for though the act of prescription be an excellent law, and hath special exceptions, yet these cannot exclude others; for in making laws, exceptions arising from the nature of the right neither need nor use to be mentioned, but such as would not be implied in the nature of the right unless specially excepted, such as minority, which stops not the course of prescription, even the shortest prescription, by the nature of prescription, but by special exception and reversions incorporate; but the answer is founded upon the nature of prescription, which cannot run against *non valentem agere*, and if the defender's grounds were good, that no exception could be sustained against prescription but what is expressed, the current of the Lords' decisions and our customs would be overthrown; for, when parties pursue upon conditional obligations upon rights of warrandice or relief, or when wives pursue for implement of their contracts of marriage, prescription being ever alleged it is ever sustained, yet it runs not from the date of these rights, but from such time as the parties *valebant agere*, as from the term of payment, purification of the condition, distress, or the husband's death; nor was it ever heard that this duple was sustained, that all these parties might have used declarator within 40 years after their right; and therefore prescription was not introduced for a snare but for a security, as if a wadsetter should superinduce an absolute right from another and bruik 40 years, albeit the reversion were not incorporate, yet the granter might redeem; and prescription by any other title, by which the wadsetter acted as absolute proprietor, would be excluded, because the wadsetter's possession continued to be the granter's possession; and yet there is no special exception therefor in the act of Parliament but *ex natura rei*; and though reversions engrossed be only there excepted, yet all other reservations, as liferents and others, are secure against prescription, because the possessor by the chief right possesses for all; and whatever might be alleged against absence or want of judicatories, yet sequestration and forfeiture, excluding *pro tempore* the pursuer's right, put him out of all capacity of acting; but absentees might act by procurators, general or special, and none should leave their actions so near prescription, or excuse themselves upon the accidental ceasing of judicatures, which cannot be for a considerable time. And as for inhibitions of teinds, they are the most proper way to interrupt tacit relocation, or any other pretence against the heritors, who have no right to the teinds of their lands as heritors, but the teind-masters have as good right to the teind as he hath to the stock; and therefore the law requires only inhibition by the King's letters under the Signet published at the parish-church, prohibiting "the heritors or others to meddle with the teinds or hinder the teind-master to draw the same, under the pain of spuilzie;" which is a much more public execution than an execution on the first summons, which may be done by any footman and two witnesses, which will interrupt prescription though no further progress were used; yea,

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