

SECT. IV.

Effect of the Negative Prescription, relative to Rights of Property.

1711. July 6.

POOR JOHN STUART *against* The CHILDREN of the Deceased WILLIAM CUMING of Pittouilly.

No 33.

A wadset right, affected with a liferent *in gremio*, having been disposed to one, who afterwards acquired the reversion, the liferent right was found prescribed, by the not commencing action thereon for payment within 40 years after it took effect.

SIR ROBERT INNES of Balveny having wadset to George Cuming of Bregach the davach lands of Lettermundich, he *in anno* 1629 disposed the wadset to Duncan Cuming his son, and Jean Gordon his spouse, who in the year 1634 transferred it to George Cuming merchant in Elgin, with the reservation of Jean Gordon's liferent. James Sutherland of Kinminity, who purchased the right of reservation from Sir Robert Innes, did, *in anno* 1657, by a contract of vendition with George Cuming and William Cuming of Auchry, afterwards of Pittouilly, his eldest son, expressly narrating the wadset, and whole progress of rights above-mentioned, dispose the lands irredeemably, to George and William Cumings, who were publicly infest upon Kinminity's resignation. John Stuart, as representing the said Jean Gordon his grand-mother, pursued the children of William Cuming now deceased, as representing their father and grand-father, for payment of the rents of the wadset lands from the decease of Duncan Cuming, Jean Gordon's husband, *in anno* 1654, till her own death in the year 1682.

Alleged for the defenders; Jean Gordon's liferent right is prescribed, no action having been raised, nor document taken thereon for 40 years after Duncan Cuming her husband's decease.

Replied for the pursuer; Though the liferent right, had it been in a paper apart, might have prescribed; yet the defender's predecessors having possessed by virtue of rights with this liferent *in gremio*, it could never prescribe so long as these rights stood.

Duplied for the defenders; All actions, on any ground whatsoever, not pursued within 40 years, prescribe, except reversions incorporated or duly registered, 12th act, Parl. 22d, James VI.; and a liferent right is not a reversion; nor doth the long prescription require *bonam fidem*, but only a colourable title. Besides, though the irredeemable right by which the defender's authors possessed, narrate the wadset, they cannot be understood to have possessed thereby, since they entered not to the possession till they acquired the irredeemable right; and common stile requires the narration of many writs that will never make real burdens upon subsequent conveyances.

Triplied for the pursuer; There is a great difference betwixt *mala fides* arising from the title of possession, and that which ariseth from other extrinsic

evidence, *v. g.* of an anterior right ; for a purchaser's right acknowledging another's, cannot be free of the burden thereof by the positive prescription ; as a vassal cannot prescribe against his superior, except as to bygone duties preceding 40 years ; because the vassal's right acknowledgeth the superior's, and he possesseth both for himself and for the superior ; *2do*, Neither can the negative prescription take effect in the present case ; for the clause in the act 1617, whereby it is ordained, that all actions upon whatsoever ground, shall prescribe, except incorporated or registered reversions, hath by law and decisions been qualified with other limitations and exceptions ; so *contra non valentem agere non currit præscriptio* ; upon which account, bonds prescribe not from the date, but from the term of payment ; and inhibitions prescribe not from their date, but from the date of the disposition in prejudice thereof. THE LORDS have also found, That one was not obliged, for interrupting prescription, to raise a declarator of his right, while it stood affected with a liferent that would have excluded his process ; *3tio*, Obligations for annual prestations, as *jus annui redditus*, or a liferent right, not being considered as one, but as many obligations *quæ renascuntur* yearly, do not prescribe from the date of the first obligation, but every year runs a course of prescription from the time it fell due, L. 7. § 6. C. De Prescript. 30. & 40. Ann.

THE LORDS found, That there being no action intended for payment of Jean Gordon's liferent for 40 years after Duncan Cuming her husband's decease, her right, and the pursuer's claim thereupon, is prescribed.

Fol. Dic. v. 2. p. 98. Forbes. p. 519.

1728. December 24.

PRESBYTERY of PERTH against The MAGISTRATES of PERTH.

IN a declarator of the property of lands, the defenders, who had been above 40 years in possession, without offering to produce any title, objected to the pursuers the negative prescription. The *answer* was, That where a complete right of property is once established, such right must for ever remain, unless where transmitted by conveyances legal or conventional, or unless where acquired by a third party, in virtue of the act 1617, by the positive prescription, which holds *a fortiori* in this case, the defenders having produced no sort of title. THE LORDS repelled the allegiance of negative prescription, in respect of the answers, that the defenders had produced no title. See APPENDIX.