1672. *January* 17. YOUNG *against* THOMSON.

No 381.
Found in conformity with Lauderdale against Viscount of Oxenford, No 379. p. 11205.

GEORGE HILL having acquired right to a tenement of land in South Queensferry, takes the same to himself, and Thomson his wife in conjunct fee, and their heirs, and after his decease to the wife's apparent heir: Thomson is infeft as heir to the wife in the tenement, as if she had been fiar: There being no heir of the marriage, the husband's brother's son is infeft as heir to his uncle in the same tenement, who disponed the same to Robert Hill, and granted him a procuratory of resignation, whereupon resignation being made in the superior's hands, the superior *propriis manibus* gives sasine, and there is one instrument, both of the resignation and sasine: This right coming now in the person of Young, he pursues reduction of Thomson's right, upon this ground, that thereby he was served heir to the wife, who was conjunct fiar, but was only liferenter, and not fiar. The defender *alleged*, 1*mo*, That the pursuer had no sufficient title to reduce, not having shown a clear progress from George Hill, the husband and conjunct fiar; because he shows no real right or infeftment in the person of Robert Hill, one of his authors, but only a sasine wanting a warrant; for there is no precept of sasine mentioned in the sasine, neither was sasine given by the disponer *propriis manibus*; but the sasine only relates to a procuratory of resignation, containing no warrant for a sasine; and albeit the sasine produced bear resignation to be made and accepted in the superior's hands, and that the superior thereupon did immediately grant sasine; yet that is not *legitimus modus*, because the superior should either have granted charter or precept; and a sasine by a superior *propriis manibus* was never accustomed or approved: And though sasines *propriis manibus* by disponers are valid, and the assertion of the notary is trusted therein, because the disposition being the warrant thereof is subscribed by the disponer; yet the assertion of a notary cannot be trusted in relation to the superior's giving sasine *propriis manibus*, because there is no writ subscribed by the superior. It was *answered*, That there is no party here competing, deriving a more solemn right from the same superior: And though sasines by superiors *propriis manibus* are not ordinary, yet they were never found void; and the procuratory of resignation being a warrant to resign in the superior's hands, for new infeftment, it is a sufficient adminicle to astruct the sasine.

THE LORDS sustained the sasine, as being both an instrument of resignation, and a sasine given by the superior *propriis manibus*, at the same time the resignation was made.

The defender further *alleged* absolvitor, because he derived right from Sharp, to whom Thomson, who is alleged to be only liferenter, disponed the fee of this tenement *in anno* 1620, which Sharp and his successors have been in peaceable possession ever since, and so the right is secured by prescription. The pursuer *answered*, 1*mo*, That any right made by the liferenter to Sharp,

No 381. and possession conform, could not infer prescription; because Sharp having married the liferenter, it was one common possession to both, and so long as the liferenter lived the fiar was not obliged to take notice of any collusive infeftment betwixt husband and wife, being without any title. It was *answered*, That the infeftment being public, not holden of the wife herself, but of her superior, and registrate in the register of sasines, the fiar did, or was obliged to know the same: Neither needs the defender alledge any title in a prescription of 40 years, further than his own infeftment, which, though his author had no pretence of right, is sufficient by the act of Parliament 1617. It was *answered*, That whether the heritor were obliged to know or not, prescription could not run against him during the life of the liferenter, for the fiar could not effectually pursue for attaining possession so long as the liferenter lived, as was found in the case of the Earl of Lauderdale against the Viscount of Oxenford, No 379. p. 11205.

The Lords found the prescription to run only from the death of the liferenter, after which the fiar was only *valens agere*. See Proof.

Fol. Dic. v. 2. p. 124. Stair, v. 2. p. 47.

No 382. Prescription found not to run during the liferenter's possession against a fiar, from whose right a liferent was reserved.

1680. *February* 5. Brown *against* Hepburn.

In anno 1611 Hamilton of Barefoot wadset the lands of Easter-Monkrig, to Brown of Colstoun, with the burden of the liferent of Agnes Machan, which wadset contained a clause irritant, 'That upon not payment of the sum within a year thereafter, the reversion should expire;' whereupon declarator of expiration followed. This Colstoun having right to this wadset, pursues this Barefoot for exhibition of the writs and evidents of the wadset lands; who *alleged* absolvitor, because the wadset right was prescribed. It was *replied*, 1*mo*, That Agnes Machan's liferent being reserved, who lived till the year 1645, the wadsetter *non valebat agere*, during that time, and it is not 40 years since. 2*do*, The pursuer interrupted by a process in anno 1668 against Barefoot. The defender *duplied* to the first, *non relevat*, that Machan's liferent was reserved, for though that excluded actions of mails and duties, it hindered not declarators. And as to the interruption by action, *non relevat*, unless it had been renewed every seven year, conform to the 10th act Par. 1669. It was *triplied* for the pursuer, That he opponed the act, which relates only to interruptions made after the act, as it is clear by the first part of the act, bearing, 'That all interruptions, as to rights of lands, by citation, shall thereafter be executed by a messenger at arms;' and though the posterior clause, that all interruptions by citation, whether in real or personal rights, be renewed every seven year, it doth not repeat the words 'in time coming,' yet it is the general rule of law, that all respect the time to come, unless they particularly express the time past; and if this were sustained to take away old interruptions, as to which the