

they should have three years after the purification of the condition, which might run for 40 years, it would unsecure all legal diligences and purchasers from heirs, though for onerous causes; and though the apparent heir's bond in this case be gratuitous, the statute cannot be extended, which mentions expressly gratuitous deeds of the heir's, and makes no exception as to these; neither doth the exception of *non valens agere*, continue any prescription, except where it is expressed, as in the prescription of heritable rights, but it hath no effect in the prescriptions of spuilzies or removings.

THE LORDS found, That though the apparent heir's bond was gratuitous, the diligence upon the defunct's debt, could not be preferred to a prior diligence on the apparent heir's bond, unless the diligence on the defunct's debt were within three years of the defunct's death, and that no impediment could continue the three years; but whether the defunct's creditors might not reduce the gratuitous bond of the apparent heir, that occurred to the LORDS, and they allowed the parties to be heard thereon; and, after a full hearing, reduced the same. See HEIR APPARENT.

*Fol. Dic. v. 1. p. 206. Stair, v. 2. p. 659.*

\*.\* Fountainhall reports the same case:

FOUND, That *non valens agere* takes not place in the short triennial prescriptions, but only in that of 40 years; but found, that the three years mentioned in the 24th act of Parliament in 1661, for preferring the defunct's creditors doing diligence against the predecessor's estate after his death, were not to be understood of *anni utiles* but *continui*, and so found that the said act of Parliament cannot be extended to this case.

*Fountainhall, MS.*

---

1685. *March.* LORD BALLENDEN *against* WILLIAM MURRAY.

IN a competition between the creditors of a defunct and the creditors of an apparent heir, the LORDS found, That the defunct's creditors ought to do exact and complete diligence against his estate within three years after his death, unless they could make appear, that their diligence was retarded without any fault of theirs, by opposition from the heir or other creditors, or the surcease of justice, or the like; and preferred a disposition granted by the heir to one of his creditors, even within three years after the defunct's decease; albeit the creditors of the defunct had obtained a decret *cognitionis causa* within the three years, the decret of adjudication being after. In this process it was also found, That a disposition granted by the heir to the defunct's creditors, within a year after the defunct's decease, was not quarrellable, seeing the clause of the act of Parliament is conceived in favours of the defunct's creditors; nor yet that

No 5.  
and the creditor had done diligence within three years, counting from the term of payment.

No 6.

No 6. such a disposition by the heir to one of his own creditors, is quarrellable by another of his creditors.

*Fol. Dic. v. 1. p. 206. Harcarse, (PRESCRIPTION.) No 773. p. 219.*

\* \* See The case of Ker against Scot, *voce* ARRESTMENT, No 22. p. 690. ; and *voce* COMPETENT, No 34. p. 2715., in which the principle of the above decision was recognized.

1711. February 9.

MR JAMES GRAHAM Advocate, *against* CAPTAINS JOHN M'QUEEN and WILLIAM DRUMMOND.

No 7.  
Under apparent heirs, in act 24th Parl. 1661, are comprehended *nominatim* substitutes in bonds or other rights; so that the creditors of the institute are preferable to the creditors of the substitutes.

In a competition betwixt Mr James Graham, as decerned executor *qua* creditor to Mrs Alison Fletcher, relict of John Graham, general post-master, and Captains M'Queen and Drummod, executors-creditors to Captain David Graham, for the sum of 1000 merks, which the Earl of Strathmore and his cautioner were obliged by bond 'to pay to Mrs Alison Fletcher, and failing of her by 'decease, to the said Captain David Graham, or to Mrs Alison's assignees what-soever;'—THE LORDS preferred Mr James Graham to Captains M'Queen and Drummond, executors-creditors to Captain David Graham the substitute; and decerned the Earl and his cautioner to make payment to Mr James, he confirming before extract; reserving to Captains M'Queen and Drummond action of recourse against the representatives of Alison Fletcher, the institute and fiar of the bond, as accords; in respect the predecessor's creditors doing diligence within three years, are preferable to the creditors of the apparent heir, act 24th Parl. 1. sess. 1. C. II. whether in a real or moveable estate, under which heirs substitute are comprehended; for albeit substitutes *nominatim* are preferable to the heirs or executors of the institute, 18th January 1625, Wat *contra* Dobie\*; 15th January 1630, Thomson *contra* Merkland†; such substitutes may be excluded by the institutes' creditors; seeing substitution or succession takes only place, after payment of the debt of the institute, who was fiar and proprietor, as in this case.

*Fol. Dic. v. 1. p. 205. Forbes, p. 494.*

No 8.

Creditors of a defunct are preferred before those of his heir. The heir cannot dispoise the estate in prejudice of his

1747. November 26. WILLIAM TAYLOR *against* LORD BRACO.

ARCHIBALD GEDDES of Essel having died 29th August 1697, Andrew his son and heir apparenr sold the estate to Duff of Dipple, 26th of April 1698. The father and son had joined in a bond of borrowed money to John Taylor, for the sum of L. 800 Scots; and this claim lay over many years, but was saved from prescription by the minority of the creditor's representatives. William

\* *Voce* SUBSTITUTE and CONDITIONAL INSTITUTE.

† *Voce* HUSBAND and WIFE.