

No 383. yet *de facto* she was only possessed of two; so that Sir Gilbert was not in the exception, since he did not condescend how he was debarred from the possession of the other three. *2do*, Though the liferentrix's possession might preserve the right of fee to the heirs of the fiar, or perhaps to singular successors who had got dispositions from them, yet her possession could not support the adjudication with which her right was not connected, and upon which it did not depend, and she neither did nor could acknowledge the adjudger.

It was *duplicated* for Sir Gilbert, That since it was acknowledged that the relict had a right to the liferent of the whole tenements, the exception of *non valens agere* was not competent to him, although she possessed but a part of them; because the exception takes place where the possessor of a right cannot *agere cum effectu*, which is the doctrine of the civil law and of our own, as in the case of deliberation, where no part of that time was ever imputed in the prescription, and as appears from my Lord Stair in the last Division of the 27th § title PRESCRIPTION.. *2do*, The distinction betwixt the heir of the fiar and the adjudger could not serve in the present question; for although Sir Gilbert did not grant the liferent-right himself, yet he having by his legal diligence denuded the heir of the fee, with all the burdens thereof, he could plead every thing that was competent to the heir.

THE LORDS found, That the prescription did run against the adjudger during the time that the subject was liferented.

Reporter, *Lord Forglan.*

For Sir Gilbert, *Jr. Elphinstone.*
Clerk, *Hall.*

Alt. *Jr. Colvill.*

Edgar, p. 35.

1782. *March 1.*

EARL OF DALHOUSIE *against* MAULE.

No 384.

IN the case of an entailed lease, the substitute heirs being considered as *non valentes agere cum effectu*, before the succession opened to them, it was found that prescription did not operate against them.

Fac. Col.

* * This case is No 175. p. 10963.

The subject PRESCRIPTION is continued in Vol. XXVII.