about the property of a muir, in which they succumbed, and had a decreet pronounced against them. Before extract, Lord Torfichen interposes, and offers to produce documents that the muir is the property of his vassals. The question is, Whether he ought to be heard?

The Lords found he could, because he had an interest in the question; for though it was not disputed but that he was superior of the muir in question, yet he was not obliged to change his vassal; and it was thought more his interest to keep his own vassal, with whom, or with whose predecessors, he had entered into the feudal contract, than to admit a stranger to the fee. Therefore, though it was not necessary to call him in the process, yet he might come voluntarily into the field, and show reason why the decreet should not pass, at any time before extract, in the same manner as the feuars themselves would have been allowed to produce any new-discovered evidents of their rights.

1739. *November 27.* ——— *against* SHERIFF of SUTHERLAND.

IN this question, the Lords found, That the pursuer, though he had laid his libel solely on the Act of Parliament about wrongous imprisonment, and concluded in terms of it, yet, without necessity of amending his libel, he could alter his conclusion to damages for oppression, and expenses.

1739. *December 5.* THOMAS M'DOUGAL *against* BARBARA M'DOUGAL of M'KERSTON.

[Elch., *Prescription*, No. 20; Kilk., *ibid.* No. 5; C. Home, No. 126.]

IN the year 1669, Henry M'Dougal took the estate of M'Kerston to himself in liferent, and his son Thomas in fee, and the heirs of his body; but with full power to the father to contract debt, burthen the lands, anailyie and dispone as he should think fit. The investiture of the estate stood in this manner till the year 1684, when the father, Henry, in consequence of the power he had reserved to himself, made a bond of tailyie, by which he devised the estate to Thomas his son, the present fiar, and his heirs-male, with a prohibition to anailyie, dispone, or contract debt; and strict irritant and resolutive clauses in case of contravention. Henry died in the year 1692, without executing this bond of tailyie, and Thomas his son continued to possess the estate, upon the investiture 1669, till about the year 1700 that he died; and his son Henry served heir to him upon the footing of that investiture, and possessed the estate in fee-simple. About the year 1716, he executed a settlement of his estate upon his daughter, Barbara M'Dougal, the present defender, and the heirs of her body: in consequence of which settlement she was infeft after his death,

and about the year 1732 entered into a contract of marriage with George Hay, by which he was bound to apply £1500 sterling for payment of debts upon the estate; in lieu of which the estate was disponed to him in liferent, and the heirs-male of the marriage in fee; which failing, to certain other heirs there named. In the year 1736 the above mentioned tailyie, which hitherto had lain latent, appeared; by virtue of which, Thomas M'Dougal, the present pursuer, brother to Harry, the defender's father, claimed the estate as heir-male, and brought a process of declarator and reduction of Mrs Barbara's right, and the marriage settlement flowing from thence.

Mrs Barbara answered,—1*mo*, That the tailyie was prescribed. 2*do*, *Esto* it was not prescribed, yet the marriage settlement, being in favour of a person who contracted *bona fide* with the defender, and for an onerous cause, behoved to subsist.

To the first it was replied by the pursuer,—1*mo*, That the tailyie was not prescriptable. 2*do*, That, *esto* it was prescriptable, it was not prescribed.

It was not prescriptable,—1*mo*, Because it was made in consequence of a reserved faculty engrossed in the rights of the estate, and which, for that reason, could no more prescribe than a reversion or power of redemption; and as the faculty itself could not prescribe, no more could the deed made in consequence of that faculty. 2*do*, That there were not here *termini habiles* for prescription; because Thomas, and Harry his son, were both heirs of the tailyie, and heirs of the investiture 1669. They possessed upon a double title,—the tailyie and the investiture; and so could not prescribe both for and against themselves, which would be as if the right hand should prescribe against the left; and that it was *certi juris*, when a man possessed an estate upon two different titles, he could ascribe his possession to either, and so prescription would run against neither.

To the first it was replied by the defender, That, supposing the faculty was not prescriptable, that was no reason why the deed was not so; for a deed, in consequence of such a reserved faculty, could be no stronger than the deed of an absolute fiar; and nobody doubts but if Harry the first had made a tailyie, not as liferenter with a reserved faculty, but as absolute proprietor, that such a tailyie would have been prescriptable.

As to the second, it was replied,—That it was not true that Thomas and Harry possessed upon both titles: that it was impossible that one could possess upon two such contradictory rights as that of fee-simple and fee-tailyied: that both Thomas and Harry the second possessed the estate upon the investiture 1669, and in all respects behaved as simple fiars, by contracting debts and otherwise: that the unexecuted tailyie could be no title of possession; for although it bore an assignation to the maills and duties, yet that assignation died with the cedent, Harry the first, the tailyier, and consequently could be no title of possession to Thomas, or Harry his son.

This reply the Lords sustained almost unanimously, and found the tailyie was prescriptable.

2*do*, As to the second point, Whether it was actually prescribed? the pursuer argued, that it was not prescribed: 1*mo*, Upon account of the *non valentia agere* of the substitutes of the entail; 2*do*, Upon account of their minority.

As to the first, it was pled, That as the foundation of prescription was the negligence of the proprietor who had neglected, for a tract of years, to follow out his right, or take a document upon it, *non valens agere* behoved to be a reasonable ground of interruption, as it entirely excused the person in these circumstances, from any imputation of negligence or omission. In this case Harry was not *valens agere* while Thomas lived, nor the present pursuer while Henry lived; so the prescription did not run against either, and by consequence not at all: nor is it sufficient to say that the substitute in an entail can bring an action, at any time, to oblige the present possessor to take the estate in the terms of the entail: they must be able to bring an action for attaining possession, otherwise they are still accounted *non valentes agere* in the eye of law; and this is established by a great many decisions. See these decisions quoted in Stair, p. 360, at the foot.

To this it was answered for the defender,—That though the plea of *non valens agere* may be sustained in some cases, yet it could never be in this, where every substitute in the entail had it in his power to bring an action for declaring his right, and obliging the possessor to resign and take the investitures in terms of the tailyie: that if the substitutes could not be reckoned *valentes agere* till they could bring an action for attaining the possession, the consequence will be, that no tailyie will prescribe till the estate goes away from the heirs of tailyie to other heirs; and, even after that, every heir of entail can plead a separate *non valentia agere* till the opening of the succession by the removal of the one before him; by which means it would happen that a tailyie might not prescribe in the space of some centuries. As to the decisions requiring that they should be able to intent an action for attaining possession before they could be reputed *valentes agere*, they either do not apply to the present case, or are unjust, and were obtained through the iniquity of the times.

3tio, With respect to the interruptions by minority, it was pled by the pursuers, that the prescription was interrupted, both by the minority of Harry the second, and his brother, the present pursuer, at least by the minority of this last: that in all prescriptions there must be two persons, one in favour of whom the prescription runs and one against whom; that this is the uniform language of our statutes, by which a person is always supposed, against whom prescription is used and objected: that, in this case, the prescription, if it run at all, behoved to run, in favour of the present possessor, against the substitutes in the entail: that, if so, their minority ought to be deduced both by the nature and reason of the thing, by the authority of the *civil* law, upon which our law, in the matter of prescription, is founded, (L. 48, *de adquirendo dominio*,) and by the words of the statute 1617, which declares, *that, in the course of prescription, the years of minority and lesse age shall no ways be counted*, and that, as well with respect to the positive prescription, or prescription of heritable rights, as the negative prescription, or prescription of actions or obligations, out of both which the years of minority must be deduced; for the words of the law are general, and equally applicable to both prescriptions; and the rubrick of the statute is, *of the prescription of heritable rights*. And, lastly, this is the opinion of all our lawyers, and has never been made a question of till now. See Stair, p. 357.

To this it was replied by the defender, That, in prescription, there was no necessity to suppose two persons, nor indeed to involve the question with the consideration of persons at all. By the first statute introducing prescriptions, (1469, Act 28,) it is enacted, That obligations shall be followed out, and document taken thereon, within the space of forty years, *otherwise they shall prescrive, and be of nane avail;* without any mention of a person against whom the prescription runs. In the same manner, by the Act 1617, introducing positive prescription, it is statuted, that whosoever shall bruik lands forty years upon charter and sasine, shall not be troubled, pursued, or inquieted by any person whatsoever: that, in this case, there is an obligation upon which no document has been taken for upwards of forty years:—there is possession upon charter and sasine for above 60 years; therefore, in terms of the statutes above mentioned, the obligation is *prescrived and of nane avail;* and the right of the possessors is good against all persons whatsoever, without any consideration against whom the prescription runs.

But, secondly, if it was necessary to suppose a person against whom prescription runs, it is no new thing in the law of Scotland that prescription should run for and against the same person. Put the case, that there are two contiguous tenements in the possession of different heritors, and that the tenants of one of them are in use to pasture upon the other; afterwards, these tenements become to be joined in the person of one heritor; would any body say that the prescription of the pasturage would thereby be interrupted? And yet, in this case, while the tenements are in the person of the same heritor, the prescription behoved to run for and against him. In the same manner here, the prescription run for and against Thomas and Harry as being both heirs of tailyie and heirs of the investiture 1669.

Thirdly, Mrs Barbara, the defender, has acquired right to the lands by the positive prescription, and thereby freed herself from the obligations of the tailyie. Now, minority does not interrupt the positive prescription. The first proposition they proved thus: By the Act 1617, forty years' continued possession upon charter and sasine gives a right which is good against any prior infeftment, much more is it good against any less noble right, such as a personal right arising from a bond of tailyie. The forty years' possession, at the same time that it gives the property, works off all burdens and incumbrances upon the property, even real burdens, much more those that are only personal, and that without any necessity to plead negative prescription against those rights. Put the case of an annualrent extending to several tenements, whereof I have possessed one forty years without interruption; I say that tenement will be disburdened of the annualrent, although it has been uplifted out of the others, and so negative prescription cannot be pled against it; and this was decided in the case of *Forrester* against *Feuars, July* 22, 1634, (reported by Durie); by which it appears that the positive prescription not only gives the property but an immunity from all burdens upon the property.

As to the second proposition, that minority does not interrupt the positive prescription,—this appears both from the nature of the thing and the words of the Act. Prescription in our law is not founded upon a presumed dereliction, or introduced as a punishment of the proprietor's negligence in not prosecuting his right within forty years, but the foundation of it is a presumption

of the law, *juris et de jure*, that the possessor's evidents and writs beyond forty years, are lost and destroyed, and any contrary evidents forged and feigned. This appears from the narrative of the Act, wherein the reasons inductive of the Act are said to be, the great prejudices his majesty's lieges have sustained, by concealing, corrupting, and abstracting their true evidents in their minority, and the amission thereof by the injury of time, through war, fire, plague, &c., and also by the forging of false evidents and writs, and keeping the same till all means of improving them are taken away. Now, such being the foundation of prescription in our law, there can be no reason at all for discounting minorities, which are only deduced for this reason, that the negligence of minors in not prosecuting their right ought not to be prejudicial to them. Nor is this repugnant to the words of the statute, which say *that the years of minority or lesse age shall noways be counted;* for these words are only applicable to the negative prescription, to which they are immediately subjoined, not to the positive, which gives a right which is not quarrellable upon any ground, reason, or argument of law, falsity only excepted. And, indeed, were it otherwise, the consequence would be that a tailyie could hardly prescribe, since the minority of the remotest substitute would have as good a right to be deduced as the minority of the immediate, and then there would be the greatest danger of forgery, which the statute 1617 seems particularly designed to prevent; for how easy were it to forge a tailyie dated a hundred years since, by which the succession is given first to a certain series of persons who actually enjoyed the estate, though upon other titles; then, when they come near the present times, they strike off to another line of heirs who now claim the estate by virtue of this tailyie, and pretend that the prescription has not run either by the two rights being in the same person, or by the *non valentia agere* or minority of the heirs of entail. By this means nobody would be secure of their estate, at least no heir of a family, if they might be cut out of it by a latent deed of entail popping out, framed, or pretended to have been framed, perhaps at the distance of eighty or a hundred years backwards.

Fourthly, and lastly, supposing minorities were to be deduced from the years of the positive prescription, yet it behoved to be only the minorities of those who have the right in their persons, not of those who have only a simple expectancy, a *spes successionis*, such as the substitutes of a tailyie. Put the case of a simple bond granted to A and his heirs; which failing, to B and his heirs; could it be pled, that if A and his heirs did not claim upon that bond for forty years, that it would not be prescribed on account of the minority of B and his heirs? Nor would it be sufficient to say, that B and his heirs were losers consequentially, and therefore their minority ought to be deduced; for, by the same argument, prescription could never run against a man but it would be interrupted by the minority of his heir, who would be a loser consequentially by his predecessor losing a right which in all probability would have devolved on him. Nor do the clauses irritant make any difference betwixt the case of the bond and the case of the tailyie in question; for they give no immediate right to the subject, nothing but an expectancy, a *spes*, which they only make more assured by putting it out of the power of the possessor to frustrate it: and although it might be pled that prescription is interrupted by the minority of an apparent heir, yet the substitute of an entail, before the succession opens

to him, is not in the case of an apparent heir; he has no right to the subject, he has only the expectancy of a right, and his minority can no more be deduced than that of a person who has no concern in the matter. From all which it follows, that, if any minorities are to be deduced, it can only be the minorities of those who had the actual right to the subject, by virtue of the entail,—that is, the possessors, Thomas, and Harry the second; and, as there are no minorities of theirs to deduce, the prescription must be run and complete.

The Lords found that the minorities were not to be deduced, and that the prescription was run and completed. Some of their Lordships founded their judgment upon minority not interrupting positive prescription at all; others upon what was last pled for the defenders, viz. that the substitutes in the entail had not the right in their persons, and for that reason their minorities could not be deduced.

4. As to the question about the contract of marriage, whether, supposing the tailyie were not prescribed, it would annul the provisions in the marriage settlement?—the Lords found that it would not: that Mr Hay, as well for his children as for himself, is in the case of an onerous creditor, who, contracting *bona fide* with a person possessing a tailyied estate, without the clauses irritant inserted in the rights, by the Act of Parliament 1685, concerning tailyies, is safe: that supposing the Act of 1621 might strike against the settlement of the estate by Harry the second, upon his daughter, the defender, yet it could never affect Mr Hay, who was an onerous purchaser from the interposed person, and so, in terms of the statute, was safe: Therefore sustained the contract of marriage, both with respect to Mr Hay's liferent and the provisions for the children of the marriage.

N.B. As to the time from whence the prescription began to run, some of their Lordships thought it run from the date of the deed,—but the majority seemed to be of opinion that it only run from the death of Harry the maker, in the same manner as a latter will.

This affair was decided *in foro contentiosissimo*; for there were two interlocutors of the Inner-House upon it, and a hearing in presence.

1739. *December* 6. MAGISTRATES of —— *against* KIRK-SESSION.

[Elch., No. 1, *Kirk-session.*]

THE question here was about the explication of an Act of Council, by which the election of a precentor was to be by the Kirk-session, with advice and consent of the Council; whether these words, *with advice and consent*, imported a negative in the election, or only a simple power of consenting and reducing the election if an unfit person was chosen?

The Lords found, That these words implied a negative to the Council upon the election made by the Kirk-session, but that the latter could, by an action,