

No 355.

Answered, That all rights competent to minors were saved to them by the statute; and it was only in competition with arresters, or other assignations intimated, that an unintimated assignation was defective.

"THE LORDS found, that there was sufficient presumptive evidence of the minority of Thomas Smith; and repelled the objection, that the assignation was not intimated."

Reporter, *Justice-Clerk*. Act. *A. Macdouall*. Alt. *C. Binning*. Clerk, *Gibson*.
Fol. Dic. v. 4. p. 111. D. Falconer, v. 1. No 122. p. 150.

* * See further in this cause 30th July 1746, *voce* PRESUMPTION.

1747. *January 20.* LADY INVERAW *against* The EARL of BREADALBANE.

No 356.

The minority of one or more creditors only interrupts the prescription of the interest that was in the minor.

WHERE a pursuer's minority was pleaded for eliding prescription of a moveable debt, it was *answered*, That during part of the time in which the pursuer was minor, she had brothers and sisters who had an equal interest with her in the debt pursued for; and though they were now all dead without having made up titles, whereby the right to the whole had devolved upon the pursuer; yet as the brothers and sisters, who were in the right of apparency while they lived, were majors, and that the years of prescription expired before their death, the same was effectual as to their proportions of the debt.

THE LORDS sustained the answer, and found, "That the minority of the pursuer did only save the interest that was in her during her minority."

Fol. Dis. v. 4. p. 111. Kilkerran, (PRESCRIPTION.) No 12. p. 421.

1754. *December 6.*

Captain HAMILTON BLAIR *against* ROBERT SHEDDEN and Others,
Feuers of Kerseland.

No 357.

Minority is deducted from the years of the positive prescription of real rights.

THE question between the parties was, Whether, in computing the positive prescription of real rights, the years of minority are to be deducted?

Pleaded for Shedden and others, That the years of minority are not to be deducted appears from the reasons following:

1mo, According to the latter feudal system, land could only be conveyed by writing. If the vassal could not produce titles in writing, connecting him with the superior, the land returned to the superior. Hence a multitude of titles was necessary, their number must have increased daily, and they might often chance to be lost or mislaid. To remedy these inconveniencies, the act 214. Parl. 14. Ja. VI. 1594, dispensed with the production of many of these titles

after the lapse of 40 years. This act established no prescription, but only a legal presumption that such deeds had existed. The act 12. Parl. 22. Ja. VI. 1617, proceeded further, and, by its first part, dispensed with the production of all deeds beyond 40 years. This part of the statute introduced no prescription properly so called, but only a presumption, the same in nature with that introduced by the act 1594, but more ample. In this the benefit of persons in possession, the supposed proprietors, was considered; as minors ought only to be indemnified from the consequences of that diligence which their nonage occasions; and as real rights cannot, in law, be lost by negligence alone, the exception of minority was not necessary in this part of the statute. But the case is different as to moveable subjects; the right to them may be lost by the negative prescription, the denial of action being equivalent to a forfeiture of the right. Minors ought not to be forfeited for their negligence alone; they are therefore secured from the negative prescription by the second clause of the act 1617. And, supposing the act 1617 to relate to both prescriptions, it may be observed, that it treats first of the positive, then of the negative prescription; in the former part of the act, falsehood only is excepted; but to the latter, this clause is subjoined; 'and sicklike it is declared, that in the course of the saids 40 years prescription, the years of minority and less age shall no wise be accounted, but only the years during the which the parties, against whom the prescription is used and objected, were majors.' This clause respects the negative prescription only, both as it had been last mentioned, and as it is termed the saids 40 years prescription.

2do, The act 1617 introduced prescription in imitation of the civil law; and by that law, minority was not deducted in computing the positive prescription.

3tio, Minority is not deducted from the shorter statutory prescriptions known in our law; thus minority is not deducted in the prescription of warnings, nor in that of house-rents and merchant-accounts; neither ought it to be deducted from the positive prescription in land-rights.

4to, The Crown and lunatics are in a situation resembling that of minors; as the former are not secured from the positive prescription, so neither ought the latter.

5to, Were minority to be deducted from the positive prescription, purchasers, who cannot know the endurance of such minorities, could never be secure.

Pleaded for Hamilton Blair; Minority ought to be deducted from the years of the positive prescription; for that, *1mo*, No distinction is made in the statute between the positive and the negative prescription; the expression, 'saids 40 years prescription,' relates not particularly to the negative prescription; the word prescription is never used till mention is made of it in the exception; it must therefore relate to the title of the act, 'Anent prescription in heritable rights;' and consequently comprehends both prescriptions; for this reason likewise, the exception of minority is properly inserted in this place as respecting both; and the exception of falsehood, being an objection to that title which

No 357.

is requisite in the positive prescription, is properly inserted in the first part of the act. After the years of the positive prescription have run, falsehood only is excepted; but to argue from this, that minority is not to be deducted, is to beg the question; which is, Whether the years requisite in the positive prescription run during minority? The act allows 40 years to majors, within which they may claim; were no longer time allowed to minors, he who could claim, and he who could not, would be in the same condition, which seems unjust; the act supposes that a claim may be made; this comprehends not minors who cannot claim. And here it must be observed, That according to the argument used for Shedden, a minor having a personal claim of debt is secured from prescription, as well positive as negative; but that a minor having a real right to an estate, may lose it by the positive prescription; a proper wadset is a real right, an improper is a debt; and the minor would lose the former, not the latter, which is absurd; the law could not mean to preserve a claim of debt, and yet to destroy a claim of property.

2do, The act 1617 established, in imitation of the civil law, prescription itself, not its particular modes; and supposing that, by the civil law, this prescription took place against minors, yet such minors might by that law have been restored; but restitutions of this nature take not place with us, Stair, lib. 2. tit. ult. § 18. The law of Scotland could not mean to establish the prescription of the civil law against minors, when it denied them the remedy of restitution provided by that law.

3tio, In the prescription of warnings, minority is not computed, nor in the prescription of house-rents and merchant-accounts; for that the former may be renewed, the latter proved to be owing, by the oath of the debtor; and no argument can be drawn from a prescription, by means of which a particular method of probation only is prohibited, to one by means of which all action is denied.

4to, The Crown and lunatics may be restored; minors not: hence the positive prescription runs against the former, but not against the latter.

5to, The argument from the insecurity of purchasers is not conclusive; for that no supposed inconveniency can weaken the force of a statute; neither, in fact, are any purchasers satisfied with a progress of 40 years; but they examine into the rights beyond that period, in order that some allowance may be made for the chance of the minorities which may have occurred.

“ THE LORDS found, that minority must be deducted from the years of the positive prescription.”

For Shedden, *Mackintosh, J. Dalrymple, Miller, Lockhart. Ait. Burnet, Ferguson, Advocatus.*
D. *Fol. Dic. v. 4. p. 111. Fac. Col. No 118. p. 175.*

* * * Lord Kames reports this case :

No 357.

HAMILTON BLAIR of that ilk, as patron of the parish of Dalry, and as having right thereby to the teinds of the parish, brought a process against the feuers and vassals of Kerseland situated within the parish, for payment of the teinds of their lands bygone and in time coming. The defenders produced charters and infestments derived from Ker of Kerseland, containing an heritable right to the teinds of their own lands, upon which they had been in possession without interruption for the space of 40 years; and insisted that the property of the teinds was established in them by the positive prescription. It was *answered* for the pursuer, That the prescription was interrupted by his minority; and it was *replied* that minority interrupts not the positive prescription. The minority having been admitted, the Lord Ordinary found that the prescription was thereby interrupted; and for that reason repelled the defence. The question being brought before the Court, upon a petition and answers, it deservedly was thought worthy of a hearing in presence; in which the point in general was canvassed, divested of all peculiar circumstances.

“ THE LORDS found the years of minority must be deducted from the years of the positive prescription.”

The Court divided. Those who voted for the interlocutor did not at all enter into the distinction, though obvious, betwixt the positive and negative prescription. They suffered themselves to be led by the authority of Stair and M'Kenzie, and by the prepossession of common opinion.

It occurred, at advising, that an argument might be drawn from the short prescriptions. The triennial prescription of furnishings, &c. is not properly a prescription, but only a presumption of payment or satisfaction, yielding to a proof of the contrary. It was found, Fountainhall, 27th January 1709, Brown *contra* Brodie, No 352. p. 11150., That minority does not interrupt this short prescription. The reason is, that minority can only have the effect to relieve from lesion occasioned by negligence, but cannot have the effect to vary a legal presumption. This consideration applies most directly to the positive prescription, which is a *præsumptio juris et de jure* of right from possession of 40 years, commenced upon a title of property. There is another case, from which an argument may be drawn, though not so directly. The septennial prescription of a cautionary obligation was found to run against a minor. Dalrymple, 10th December 1712, Stewart *contra* Douglas, No 353. p. 11151.; on this principle, that the privilege of minority does not prevail over a statutory privilege bestowed upon another.

The advocates who pleaded for minority, assimilating our positive prescription to the Roman *usucapio*, insisted that there can be no positive prescription but in consequence of the negative; and therefore, that as minority interrupts the latter, it must also interrupt the former. Were this argument to hold,

No 357.

there could not be a positive prescription of a right of property; for such a right does not fall by the negative prescription. The positive prescription puts an end to every claim. Why? Not that a claim of property is lost *non utendo*; but that the statutory title is a good evidence of property against all the world. And if the possessor be proprietor, no other can be. I purchase an estate affected by an adjudication. The adjudger is first infeft; and he obtains a declarator of expiry of the legal. Yet his claim is not good against my statutory title; though his claim of property is not lost by the negative prescription, because it could not begin to run till the legal was expired.

Beside the arguments in law, several considerations dispose me strongly against the interlocutor; the unsettling of property by multiplying law-suits about it; the obstructing the commerce of land, by rendering purchases less secure; and the rendering our records less perfect, by sustaining objections to a title of property which cannot be discovered in the record.

Sel. Dec. No 60. p. 94.

1756. June 24.

CHILDREN of Sir SAMUEL M'CLELLAN *against* The REPRESENTATIVES of Captain MENZIES of Enoch.

No 358.

A bond being conveyed to trustees for the use of children, and not pursued for during 43 years, was found to be prescribed, notwithstanding the minority of the children.

IN the year 1708, James Menzies of Enoch granted bond for L. 500 Sterling to Sir Samuel M'Clellan, payable at the next term.

In the year 1709, Sir Samuel assigned the above bond to certain trustees, for the use and behoof of his children, according to such divisions and proportions as the said trustees should think fit; which trustees he, in the same deed, appointed to be tutors and curators to his children, and declared them not to be liable for omissions.

Soon after he died, leaving his children under age; some of the trustees tutors entered upon their office, but neglected the affairs of the children; so that nothing was done upon the bond for 43 years and a half, nor did the trustees make any division among the children.

After these 43 and a half years, the children brought a process against the Representatives of James Menzies for payment of the bond. The defence was prescription; and the answer was, that the pursuers were minors more than ten of the 43 years and a half.

Pleaded for the defender; The right to the bond was vested in the trustees; they alone had the *jus exigendi*; in such a case, those for whose behoof a trust is taken, are no more than creditors to the trustees to the extent of their debt. Prescription runs against the trustees, and the minority of the children cannot interrupt it.