APPENDIX.

PART I.

PRESCRIPTION.

1776. *January* 31. JOHN ROSS *against* MURDOCH MACKENZIE.

NO. 1. In what circumstances minority may not be deducted from the years of the positive prescription.

THE lands of Auchnacloich and Tollie, were apprised from John Ross of Tollie by two apprisings, at the instance of Alexander Mackenzie of Coul, one in 1644, and the other in 1647, upon which charter and infeftment having been expeded they came by progress into the person of Alexander Mackenzie of Pitglassie predecessor to Murdoch Mackenzie.

In 1663, John Ross, the apparent heir in the reversion of these lands, having purchased certain apprisings, posterior to those deduced by Mackenzie of Coul, did, upon that title, bring a declarator of extinction of Coul's apprisings within the legal.

In this action, a number of judgments were pronounced, (and several points of law decided by them, See No. 8. p. 298, and No. 10. p. 299.,) and a proof allowed of the extent of the intromissions. But no proof being led, the action was abandoned from 1669 till 1709, when it was wakened by Hugh Ross, the grandson of the original pursuer, and son of John Ross the second of that name.

But after calling the wakening and transference in Court, this action was again abandoned, and in 1710, an action of reduction and improbation was brought at the instance of this Hugh Ross against the defender Mackenzie's predecessor, then in possession.

The defence pleaded against this new process was prescription, to which the pursuer replied, That the action of count and reckoning formerly brought within the legal was an interruption of the prescription. Upon the

NO. 1. 3d February 1714, the Court sustained the defence of prescription as to all other grounds of reduction and nullities, except those particularly libelled in the process of count and reckoning, and falsehood; and upon advising a reclaiming petition and answers, adhered. A petition for Hugh Ross was presented, insisting that the prescription had in all events been kept open by the minorities of his grandfather, his father, and himself.

A proof of the minorities having been allowed, some other steps of procedure took place; but Hugh Ross having been killed in a duel some time afterwards, the action was again allowed to sleep.

Hugh Ross left an infant son named John, who, upon attaining majority, raised an action of wakening and transference, the execution of which was prevented by his sudden death also.

He was succeeded by his uncle Robert, who, in the year 1756, executed a summons of wakening and transference; but he, too, having died, leaving his son John, the present pursuer, then only nine years of age, the action again stopped.

In the year 1772, the pursuer recommenced the action against the present defender; and the first step taken by the Lord Ordinary in the process, was to ordain the pursuer to answer a representation which had been presented by the defender in 1714.

Pleaded for the pursuer: The objection of prescription brought forward by the defender cannot avail him, seeing that the prescription was saved by the minority of Hugh, the son of John the second. The principle upon which prescription is grounded, is a presumption that the proprietor has relinquished or abandoned his right. But for this there is no room here. From 1688 to 1708 is the only considerable period of silence. At that time the right to the estate was in the person of Hugh the son of John, a minor of one year old. John Ross his father, the second of that name, was not seised in the estate. The disposition, therefore, in 1688, in favour of his son Hugh, denuded him of all the right which he had, and placed it in the infant heir, who, in a question of prescription, must be entitled to the benefit of his own minority, and who would have been so entitled, even if the father had been infeft, the personal right being conveyed to the son. The disposition and the titles conveyed, were, during this interval, held by the uncle for behoof of his nephew the grantee. And if the deed is to be held as fair and regular, having been found in the possession of the grantee, the presumption of law is, that it was delivered of the date it bears; Ersk. B. 3. Tit. 2. § 43. This deed can in no view of the case be supposed *in fraudem* of the defender or his ancestors. The question is not between the creditors of the granter and the grantee, nor between the Crown and the grantee, but between the grantee and a person insisting to carry the right upon a plea of prescription. It

was fair and lawful to have prevented the currency of prescription by any means. NO. 1.

Pleaded for the defender: The exception of minorities is rested on the deed 1688. Latent family deeds set up as grounds for interrupting prescription, have ever been suspected and viewed with the most jealous eye. There is no record from which minorities can be discovered, or to which creditors or purchasers can have recourse. Minority, therefore, supposing it applicable to the positive prescription, is a plea of the most dangerous consequence to the security of land-owners in Scotland, who, in all other cases, can see the full state of the title from the established records, upon the faith of which all transactions respecting real rights proceed. And accordingly, in every case where minorities have been pleaded, the most liberal construction has been given to the salutary statute of prescription against latent family deeds brought forward to interrupt it. If the deed now founded upon was truly granted of the date it is made to bear, which there is much reason to suspect, the law will not presume that it was delivered by the father, and put out of his own power to alter or recall it; the deed being from a father to his infant son, the presumption is, that it remained in the keeping, and under the power of the father. The minority of Hugh, therefore, cannot be admitted as an interruption to the prescription.

The Court pronounced an interlocutor, finding, "That the minority of "Hugh, the son of John the second, is to be deducted from the years of pre-"scription pleaded on." But this interlocutor they afterwards altered, and found that the minority was not to be deducted.

This last judgment was affirmed upon appeal.

Lord Ordinary, *Auchinleck*. Act. *Ilay Campbell*. Alt. Dean of Faculty (*Dundas*.)

J. W.

1776. *July* 5. Poor JOHN ROBERTSON *against* JANET ROBERTSON.

NO. 2.
How far an action brought by a person in his own right, will interrupt the negative prescription of the same claim which might have

IN 1763, an action was brought by John Robertson against Janet Robertson, as representing her father Donald, who was the eldest son by the first marriage of Paul Robertson of Pittagown, grandfather to both parties, for payment of 1000 merks provided by the marriage-contract of his second wife, the mother of the pursuer, to the heirs male or female of the said marriage The Court (23d July 1766) found the pursuer entitled only to one-third of these thousand merks, as there were also two other children of the marriage.