[17*th July* 1835.]

ROBERT BROWN, Esq. and others (Trustees of James Campbell), Appellants.—*Attorney General* (*Campbell*) —*Lushington.*

Mrs. ELIZABETH SINCLAIR and others, Respondents.—*Lord Advocate* (*Murray*)—*Stuart.*

Decree in Absence—Prescription—Minor—Title to Exclude.—A decree of certification contra non producta was obtained against a pupil in an action of simple reduction of his father's disposition and sasine, brought on the ground of the disposition having been granted in trust, without value, to defraud the granter's creditors; and an action of reduction-improbation was thereafter brought of the disposition and sasine on the same grounds, with the additional ground of forgery, the summons in which was taken to see by a procurator for the pupil, and the production satisfied, and decree in terms of the libel pronounced, because of no farther appearance; but the pupil had no tutors or curators, and no tutor ad litem was appointed to him in either action; and a reduction being brought of these two decrees, and of the titles following thereon, by the heirs of the pupil, upwards of forty years afterwards; and it having been found by the Court of Session that these decrees did not form a valid title to exclude the reduction, in respect, 1. That they were to be held as decrees of certification or reduction, pronounced in absence. 2. That such decrees were liable to be opened up at any time within the period of the long prescription, and that the personal citation of the pupil was no bar to a reduction after his death. 3. That the minority of the parties in right for the time to challenge the decrees fell to be deducted from the period of prescription. 4. That the various

sales and transferences which had been made to singular successors (against those of whom in possession the reduction was directed) did not bar the action; and an appeal being taken to the House of Lords against this judgment—cause remitted, with instructions to take the opinions of the whole judges.

1st Division.

Ld. Moncrieff.

BY disposition, dated 25th January 1775, Henry Hay, heritable proprietor of the lands of Auchenstarry, in consideration of a certain sum of money paid to him by Henry Sinclair, the grandfather of the respondent, as the agreed on price, sold to Sinclair, his heirs and assignees, the lands of Auchenstarry and others, with the pertinents lying and bounded as therein mentioned. The term of entry to the lands was declared to be Martinmas 1778, and the disposition contained all the usual clauses of an absolute and irredeemable disposition for an adequate price paid. In virtue of this disposition Sinclair entered into possession, and was duly infeft on the 14th April, and recorded his sasine on the 10th May 1775.

This disposition and sasine formed the title on which the respondents, as heirs to their grandfather, claimed the lands of Auchenstarry, and in virtue of which they sought to reduce the subsequent and conflicting titles made up by the appellants and their authors.

The title in virtue of which the appellants, on the other hand, alleged that the respondents were excluded from inquiring into the validity of the feudal progress made up by the appellants, consisted of two decreets of certification or reduction obtained by the appellants' authors in the following circumstances.

Henry Sinclair died in the month of July 1776, leaving a widow, Margaret Hay, by whom he had an

only son, Henry, a posthumous child, born 16th March 1777. The widow afterwards married David Auchinvole, and these parties, in virtue of the pupil's right to the lands, entered into possession, and drew the rents up to 1786.

No claim was made to the lands either by Henry Hay or his creditors, during the lifetime of Henry Sinclair the grandfather, or for about nine years thereafter. In the spring, however, of 1785, Thomas Baird, alleging himself to be a creditor of Henry Hay, for 42*l.* 6*s.* 6¾*d.*, with interest and penalty, raised a summons of adjudication, directed against Henry Hay, then in America, or elsewhere abroad. This summons was executed edictally against Henry Hay, the sole defender, as forth of the kingdom. No appearance was entered in this action of adjudication, and decree in absence was pronounced therein on 11th August 1785.

In the following year Baird brought an action of reduction against Henry Sinclair, the infant, and against his mother and step-father as his tutors and curators, alleging as the principal ground of the reduction that the conveyance in 1775 by Henry Hay to Henry Sinclair the grandfather was without consideration, and in trust only, and to a conjunct and confident person, and calling for production of the disposition and sasine. Appearance was made for the parties who had been summoned, and they took the summons to see, but returned it without defences, and without satisfying the production. A decree was pronounced reducing the disposition, with certification contra non producta.

In 1787 William Hay, the son of Henry Hay, brought a reduction-improbation against the same parties, upon the same grounds, and also of forgery, with the

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usual concurrence of the Lord Advocate. To this action the defenders appeared, and produced the deeds and writings called for. In the subsequent stages of the proceedings they did not appear, and decree of reduction and improbation was obtained against them in absence on the 27th February 1788.

At the date of both of the above decrees Henry Sinclair, the posthumous child, was a pupil, being, when the first of them was obtained, nine years of age, and when the second was obtained from ten to eleven years of age. He had no tutors or curators at any period of his pupillarity or minority. No tutor ad litem was appointed to him, and he never represented his father on any of the passive titles known in law—an alleged service to his father having been expede by the authors of the present appellants while he was a pupil.

He eventually married, and died on 27th April 1807, leaving three daughters—Elizabeth, Margaret, and Jane, the present respondents. He had no other children except Henry, a son, born 8th September 1801, who died in pupillarity. Poverty and ignorance of their rights appear to have prevented the respondents from raising the present action till 1832.

Their father survived his majority only nine years, and the eldest of the respondents attained majority between eleven and twelve years before the present action was instituted.

In the meanwhile Mr. Hay having made up titles to the property conveyed it to a purchaser, and it was ultimately acquired by James Campbell of Petershill, of whom the appellants were the testamentary parties.[1]

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[1] For a detail of the progress see the Lord Ordinary's note, p. 107.

In February 1832 the respondents brought this action to set aside the decrees obtained by Baird and Hay, and the subsequent titles made up by virtue thereof.

The appellants met the action by maintaining that their title, being fortified by prescription, included the title of the respondents.

The record being closed, the Lord Ordinary pronounced the following interlocutor and note on the 13th May 1834:—" Sustains the title to exclude founded by " the defenders (appellants) on the decree of certification, " dated 19th July 1786, and the decree of reduction-im- " probation and declarator, William Hay against Henry " Sinclair and others, dated 27th February 1788, pro- " duced, together with the several conveyances exe- " cuted, the titles made up posterior thereto, and prior " to the execution of the summons in the present " action of the 8th February 1832, as set forth and " produced in this process: Therefore sustains the " defences, assoilzies the defenders, and decerns; finds " expenses due, and remits the account when lodged " to the auditor to be taxed.

" Note.—Baird obtained a decree of adjudication of " the lands in question in 1785. This right being " apparently affected by a disposition of Henry Hay, " the debtor, in favour of Henry Sinclair, his brother- " in-law, in January 1775, on which infeftment had " passed, Baird brought a reduction of these titles, and " obtained decree of certification against Henry Sin- " clair, the son of the original disponee, in July 1786. " Baird then made a full conveyance to William Hay; " and this William Hay, after being served heir to his " father, brought another action of reduction-improba- " tion and declarator against Henry Sinclair, then said

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" to have been a minor or pupil, and his tutors and " curators, if he any had, and against his mother and " his step-father. The extracted decree bears that " Henry Sinclair, Margaret Hay, and David Auchin- " volle were personally cited, and the tutors or curators " edictally. Appearance was made for the defenders " generally, and the production was satisfied, but no " order was made for the defenders to abide by the " writs as in an improbation for forgery. Great avi- " zandum was made, and the case remitted for dis- " cussion, and then the extract bears that decree was " pronounced, reducing, improving, &c. ' the defenders " failing to compear.' This was followed by a charter " of confirmation and precept of clare constat in favour " of William Hay, on which he was infeft in April " 1788. William Hay sold the lands to Cowburgh, " who obtained a disposition, and was infeft April 29, " 1788. Cowburgh sold to Dr. Lapsley, and his son " was infeft in March 1803. The son's commissioners " sold to Campbell, who was infeft, and obtained con- " firmation in 1820. Campbell disponed to the defen- " ders, Brown and others, who obtained infeftment, " and made a transaction of sale with the defender, " Mr. Murray Garthshore.

" Henry Sinclair, against whom the decree in 1788 " was obtained, is stated by the pursuers (respondents) " to have been of the age of between ten and eleven, " and to have died on or about the 27th April 1806, " having thus survived the date of the decree, and, " according to the pursuer's statement, at the age of " twenty-eight.

" In this state of the case the question is, Whether " the pursuers are entitled now to open up the decrees

" obtained in 1786 and 1788, to the effect of setting " aside the titles on which the pursuers and their " authors have been in possession of the property, as " onerous purchasers, for considerably upwards of forty " years before the date of the summons? The Lord " Ordinary thinks that it would be a singular case " of hardship if this could be done, or if these third " parties purchasers were post tantum temporis re- " quired to support the decrees of reduction by an " investigation of the merits of them—a thing next " to impossible, however good the grounds might be; " but it does not appear to him that the plea of the " pursuers can be sustained in point of law.

" The pursuers say, 1st, That the decree was against " a pupil having no tutors or curators, and therefore " null, as no tutor was appointed. But it is settled by " the case of Sinclair against Stark, January 15, " 1828, that the decree was not thereby rendered " null, though if it was a decree in absence it might " be liable to be opened up on the merits.

" But the pursuers plead, 2d, That the decree was " in absence, and that the writs having been produced, " and no order made for the defenders to abide by " them, it has not the force of a proper improbation. " The defenders say that it was not a decree in " absence, in so far as appearance was made for all " the parties, and the production satisfied. There " may be some doubt on this point, according to the " principles held at that time; but as there was no " discussion on the merits and no proof taken, it rather " appears that it must be held that it was a decree in " absence. But it does not appear to the Lord Ordi- " nary to follow from this that it may be opened up at

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" this distance of time, and in the circumstances of " the case.

" The defenders plead negative prescription on the " old statutes 1447 and 1467, and maintain that " minority cannot be pleaded against prescription in " such a case. This plea may deserve attention; but " as the reduction affected the titles of an heritable " estate, the Lord Ordinary rather thinks that the Act " 1617 must govern.

" But supposing this to be so, the Lord Ordinary " apprehends that there is another principle of the law " sufficient for the decision of the cause. A decree " in absence may be opened up by a man who was of " full age, as well as by a minor; and in the case of " Campbell against the representatives of Graham, " December 5, 1752, it was even laid down, 'That " 'quoad a decree in absence, minority cannot enter " 'into the question, because a major may be reponed " 'quandocunque against a decree in absence, upon " 'paying expense and damage, and that a minor can " 'have no stronger privilege.' Perhaps this may not " be perfectly accurate; but the Lord Ordinary appre- " hends it to be clear, that if a man of full age would " not be heard in a reduction of a decree as in absence, " after acquiescing in it for twenty years, and seeing " the property sold and resold to third parties on the " faith of the decree, as little will any party be allowed " to challenge a decree which was acquiesced in by " the party many years after he became of age, and " till his death, and farther acquiesced in by his heirs " during many years, and after titles had been repeat- " edly constituted in favour of third parties purchasers. " The Lord Ordinary is humbly of opinion, that though

" by our law a decree in absence may be opened up
" to the effect of inquiring into the merits of it, the
" demand must be made debito tempore, within some
" reasonable time. The principle of the thing is, that
" accidents may occur to prevent the party from appear-
" ing, and that he ought not to be foreclosed by a
" decree pronounced without discussion if the other
" party can be replaced in the situation in which he
" was. But to give this the least colour of justice, the
" claim must be made within such time as to render it
" reasonably possible to restore both parties. The
" Lord Ordinary never heard that it was a general
" rule that any decree may be opened up at any time
" within forty years, and in any circumstances, merely
" because it was allowed to pass in absence. Such a
" rule would lead to the most intolerable injustice.
" Parties would keep up their case till the means of
" contradicting it were lost. Accordingly, in the case
" of Campbell against Graham's representatives above
" mentioned, where there was no room for prescription,
" and the defender in the action was an infant, 'The
" 'Lords sustained the defence that the minute of sale
" 'was at an end by the decree of reduction, and by
" 'the after sale to Edward Cutlar in consequence
" 'thereof.'

" In the present case the parties were cited per-
" sonally; the minor's mother and step-father appeared
" and entered appearance for him; the decree was
" acquiesced in not only till he came of full age, but
" for eight years after he was of age, and till his death;
" and after that it was acquiesced in for twenty-six
" years more, while in the meantime the property had
" been repeatedly sold on the faith of the decree, and

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" titles by charters and sasines completed. Under " these circumstances the Lord Ordinary is of opinion " that post tantum temporis, and in respect of the " sales made and titles created, it is too late for the " present pursuers to challenge the decrees as decrees " in absence."

A reclaiming note was presented by the pursuers (respondents) to the Lords of the First Division, who, on the 3d March 1835, pronounced this judgment:—"The Lords having advised the cause, recall the " interlocutor of the Lord Ordinary reclaimed against, " find that there is no title to exclude, and remit " to the junior Lord Ordinary to proceed further, " as shall be just, reserving all questions of ex- " penses."[1]

The appellants then applied for leave to appeal, lest the judgment should be considered interlocutory, in so far as it did not dispose of the real merits of the case, which was granted.

Appellants.—1. The general principle assumed by the respondents, and recognized by the Court, that a decree in absence may be opened up in any circumstances within forty years of the date at which it was pronounced, is destitute of any authority; no dictum of any text writer in favour of this doctrine has been produced, and it is manifestly at variance with the principle upon which the authorities have proceeded. In fact it is assumed that a decree in absence is in reality null and void as a judgment, or as constituting any right in the person of the party who has obtained it,

[1] 13. S. D. & B. 594.

until after the lapse of the period of the long prescription for forty years, when it would become effectual, from the effect of the negative prescription in destroying the title of the other party to call it in question, and not because of any force which it originally possessed. If this statement of the law be correct, it would strike at every decree pronounced in absence of the defender. It would apply to decrees of reduction and of certification as well as to ordinary decrees, because the essential fact of the absence of the party being proved by the terms of the decree, the reason for reponing him is just as strong in the one case as in the other. But Lord Stair states that decrees of certification, although pronounced in absence, are not reducible, and some of the decisions prove that decreets of improbation were held to be irreducible, although they were challenged within a very recent period after the decreet was pronounced. In the cas of Campbell v. Graham it is stated in the report to have been the opinion of the Court "that the decree, "though against a pupil undefended, was still equal to "a decree in absence;" and yet, although challenge was brought of the decree within twenty-one years, upon the ground that it was pronounced in absence, the Court sustained it and dismissed the action. It is true that particular circumstances might attend the absence of the defender, requiring the equitable interposition of the Court, and thus might support the challenge of a decree in absence after the lapse of a long period of time, but such cases must depend upon special circumstances; and if, as in the present instance, third parties had onerously contracted upon the faith of the decree, it would be a matter of difficult con-

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sideration whether such rights could be set aside. But a distinction must be drawn between those cases, where the party who obtained the decree is still in possession of the subjects, and those where it has passed into the hands of third parties onerously contracting. There is no equity which would make the third party suffer, because the defender had permitted decree in absence to be pronounced against him, and to remain unchallenged for a long period of years.[1]

2. That a decree in absence pronounced against a minor is as effectual against him, and is entitled to the same respect as when pronounced against a third party, more especially if the minor survive his minority and the quadriennium utile, without challenging such decrees, is supported by all the authorities, and is recognized by various decisions. The effect of such a decree was specially considered in the case of Graham v. Campbell, and in the late case of Sinclair v. Stark, 15th January 1828. In this last case it was finally decided that the decree against a pupil was entitled to effect, and could not be considered as null and void. But if entitled to the same effect as another decree in absence, it must follow that any challenge of that decree, or attempt to open it up, must be liable to the same rules as those generally applicable; and therefore if the party against whom the decree has been pronounced allows a period to elapse, during which time third parties have onerously contracted upon the faith of the decree, there is no ground in law

[1] Stair, B. 4. t. 20, s. 4.; Rankine v. Crawford, Jan. 16, 1735; Urie v. Gordon, Dec. 1610; Elchies, vol. ii. p. 202; Auchintarry v. Bruce, Jan. 31, 1622; Glendinning v. Gordon, Jan. 5, 1699.

or in equity for setting aside the decree upon the ground that it was originally pronounced in absence.[1]

3. The right of setting aside a decree in absence is a mere right of action; and although the effect of the reduction may be to open to the pursuers a claim to heritable property, yet this right of action is not an heritable right in terms of the act 1617, and therefore the years of minority are not deducible from the long prescription, and the decreets of reduction in question are now unchallengeable and form a good title to exclude, more than forty years having elapsed from the time when the decrees of reduction were pronounced.

The right of deducting minorities from the period of the long prescription is a statutory privilege, to be strictly interpreted in a case such as the present, where a claim is made to set aside the rights in the persons of bonâ fide purchasers after possession has been had for a period of forty-six years, trusting to the decrees pronounced by the Court of Session. Certain rights of action are specified in the act 1617 with regard to heritable rights, but an action of reduction of the nature brought does not fall under the statute. Such a right of action is put an end to by the negative prescription introduced under the acts 1469, cap. 29., and 1474, cap. 55., and the right of deducting minority is not given by these statutes. It was found in the case of Paul v. Reid, February 8, 1814, that "a right " of action for the recovery of heritable property, if

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[1] A. v. B. July 1631, Mor. 8969; Bailey v. Silverton Hill, 31 Jan. 1621, 9008; Stair, b. 4. tit. 38. s. 23.; Ersk. B. 4. t. 1. s. 8.; Kames' Elucid. art. 1. p. 2; Jack v. Halyburton, 1743, Mor. 9003; Sinclair v. Stark, Jan. 1828

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"not insisted in within forty years, is lost by the "negative prescription." There is no doubt therefore that the negative prescription is pleadable, without the aid of the positive, against such an action as the present, even if the title to exclude, founded upon the decrees of reduction, had not been pleaded; but where the decrees of reduction must in the first instance be removed out of the way before the heritable right in the person of the appellants can be challenged, the negative prescription to which the right of action is liable is that applied to ordinary obligations and other personal rights, as distinguished from heritable rights of property.[1]

Respondents.—1. The decree obtained by Baird on 19th July 1786 was clearly a mere decree of certification contra non producta in absence. The summons was a summons of simple reduction, raised on the ground that the disposition to the respondents' grandfather had been granted collusively, and without value. It contained no allegation of forgery, or conclusion for improbation; and the extract decree bears that "the defen- "ders still failing to compear, his lordship granted "certification against the defenders for not satisfying "the production." The mere circumstance of a procurator for the defenders having taken the summons to see could not make the decree pronounced a decree in foro, as the production was not satisfied, nor even a day taken to satisfy it, and no farther appearance was made.

As to the second decree, the Lord Ordinary observes

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[1] Bank. b. i. p. 186; Ersk. b. iii. tit. 7. s. 16.

in his note:—" The defendants say that it was not a ". decreet in absence, in so far as appearance was made " for all the parties, and the production satisfied. " There may be some doubt on this point, according " to the principles held at that time. But as there " was no discussion on the merits, and no proof taken, " it rather appears that it must be held that it was a " decree in absence." There are not any principles which were recognized at the time referred to which should render it more a matter of doubt then than now that this decree was in absence. Mr. Erskine says, " By the usage of Scotland litiscontestation can- " not be formed without extracting an act or warrant " by which a proof of special facts is granted to either " party, or to both." " As there is no room for " supposing any quasi contract formed betwixt the " parties, where the defender, who is one of them, " does not appear in judgment, therefore, in that " kind of litiscontestation which is made either in " absence of the defender, or where, after his appear- " ance, he withdraws or passes from it, (which any " defender may lawfully do before litiscontestation, if " he have offered no peremptory defence,) the decree " given forth in the cause is, in the opinion of Lord " Stair himself, considered barely as a decree in ab- " sence." The same doctrine is laid down by Bankton and by Lord Stair, and is confirmed by the decision, Chirurgeons of Glasgow v. Reid, the report of which bears, that " by the regulations of 1672, chap. " 19, a decreet is not understood to be in foro, unless " appearance be made for the party, and defences pro- " poned;" so that a decreet of suspension was found

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not to be in foro, though appearance had been made, but no debate; and also by the case of the Representatives of Smith v. Semple, in which it was found that an advocate's appearing for a party and making no defence, but declaring that he had nothing to object to the libel, did not make the decree pronounced a decree in foro. See also Erskine, b. iv. t. 3. s. 6., and the more recent authorities alluded to in Mr. Ivory's note thereto (113.)

A point more necessary to be attended to is, that the decree of 27th February 1788, on which it is evident the appellants must mainly rest as their title to exclude, and which seems to have been chiefly in the contemplation of the Lord Ordinary in his note, is to be considered as a mere simple decree of reduction in absence, and has in no respect the force of a reduction-improbation.

The summons on which it proceeds no doubt appears to have libelled, pro forma, that the disposition and sasine in favour of the pursuer's grandfather were false and forged, and to have concluded that the same should be reduced, improved, &c.; and on this summons, if the production had not been satisfied, decree of certification contra non producta might have been obtained, as in a proper improbation.

But, in point of fact, the production was satisfied; and this being done, the appellants' authors had three courses open to them to pursue: — 1st. They might have taken an order on the defenders in the action of reduction-improbation to abide by the writs as genuine; and if this order had not been complied with, then the appellants' authors might have ob-

tained a certification different altogether from a certification contra non producta, but still having the force of a reduction-improbation: 2d. They might have led a proof of the falsehood, although in absence, and obtained a decree on the ground of forgery, if the proof was sufficient to authorize such a judgment: or, 3d. They might have abandoned the pro formâ reason of forgery, and taken a simple decree of reduction in absence on the other reasons of reduction libelled, viz. that the disposition to the respondents' grandfather was granted in trust, without value, and for the purpose of defrauding the granter's creditors.

This last was the alternative which the appellants' authors adopted. The extract-decreet produced shows, that after the production was satisfied the whole proceedings were at the instance of the private party alone, and on the motion of his procurator, without any farther appearance being made for the King's advocate. The motion for great avizandum, on 19th January 1788, was made by the procurator for William Hay alone. The petition to the Inner House, praying for a remit "to have the reasons discussed," was presented solely in his name; and when the remit was granted, "Mr. James Grant, procurator for the "pursuer" William Hay, "was the only party who "resumed the libel" before the Lord Ordinary, "and "craved his lordship would sustain the reasons of re-"duction," which was done accordingly, and decree pronounced "conform to the conclusions of the libel."

That the appellants' authors, after the production was satisfied, could not obtain a decree as in a process of improbation without adopting one of the two methods

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first above pointed out, appears from the following amongst other authorities. Mr. Erskine says, "Hitherto "the effect of reductions has been treated of where the "writings called for are not produced by the defender; "where they are produced the pursuer must insist on "the special grounds of reduction which he has set "forth in his libel." Again he says, "A party who in "any process founds upon a writing suspected of "forgery may be compelled by the adverse party to "declare in judgment whether he is willing to abide by "it as a true deed. If he decline to abide by it, the "deed is declared to be improbative or false." Thus, in the case of Henderson against Henderson, the report bears, "in an improbation, the production being "satisfied, and the writs produced, the term was cir-"cumduced against the defender for not compearing to "abide by the same; upon which, without further "proof of the forgery, the lords found that decree "ought to follow upon the implied certification in the "act for abiding by, that the writs could make no faith, "in the same manner as in a certification for not pro-"duction." In Grant against Grant, "The lords, in "like case, decerned again in the same manner; and "farther, left it in the pursuer's option, either to take "out certification against the bond for not abiding by "the same, or to insist in the improbation of it; or, "lastly, to insist in the declarator of its nullity as "wanting witnesses, in respect the instrumentary wit-"nesses were far under age."

Thus also, in the cases of Dunbar against his vassals, and Earl of Lauderdale against his vassals, "it was "sustained that the defender had produced sufficient to

" exclude the pursuer, and that till his rights produced " were discussed and taken away there could be no " certification contra non producta."

By the law of Scotland a decree obtained in absence, although against a party of full age, and valens agere, may in the ordinary case, unless the challenge has been barred by special circumstances (of which afterwards) be opened up by reduction at any time within forty years. This rule of the Scots law has sometimes been remarked upon in the House of Lords as appearing rather anomalous to English lawyers, who did not fully understand in what manner a decreet in absence in the Scotch Courts is obtained; but it was never doubted, so far as the pursuers know, either in the House of Lords or elsewhere, that such was actually the rule of the law of Scotland. In England it is believed that no decree is pronounced without the case undergoing some investigation and consideration on the part of the judge; so that it may be highly proper that an English decree, though in absence, should partake somewhat of the nature of a res judicata. But in Scotland, where a pursuer, if his opponent, from whatever cause, whether sickness, absence, infancy, or poverty, is prevented from appearing, may obtain as a matter of course, without inquiry or investigation, any decree which he chooses to ask, it would be highly dangerous and unjust to allow that decree either to have, or easily to acquire, the force of a res judicata against the defender.

The Lord Ordinary says that he " is humbly of " opinion that though by our law a decree in absence " may be opened up to the effect of inquiring into the " merits of it, the demand must be made debito tempore, " within some reasonable time." But if the period

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of forty years is not to be held to be the period within which a decree in absence may be challenged, there are no data for limiting or fixing that period at all. The question will arise in every case, what is a reasonable time? and will be differently determined by different judges according to their peculiar views and feelings.

If the period were to be held to be less than forty years, it is impossible to see that the effect of this rule would be any thing else than to introduce a new and a shorter prescription, unknown in the law of Scotland. But all prescriptions, whether long or short, are limited to a certain number of years; and the question arises, to what number of years is this new prescription to be limited, seeing there is no statute or rule of the common law to fix it to any thing else except the period of the long prescription? To say that it is to be limited to a reasonable period is to fix it at the most unreasonable of all periods, for no man can tell what it is.

But farther, a decree of certification, such as that obtained by Baird in 1786, pronounced in an action of simple reduction, is only good in a question with the particular debt or title in virtue of which it was obtained. The writs called for remain valid as against all the world besides, and even in a question with the particular right in virtue of which certification was obtained, that certification has effect only "aye and "until the writs called for be produced."

Mr. Erskine says, "Simple reductions, where impro-
"bation is not also libelled, are now seldom made use
"of, because the certification in these is only temporary,
"that the deed called for by the pursuers shall be held
"as void till it be produced. In consequence of certi-

" fication obtained by the pursuer he will enjoy all the " fruits or other benefit formerly carried by that deed " till he be put in malâ fide by the production of it; for " after it is produced, at whatever distance of time after " pronouncing the decree of certification, that decree " loses its whole effect, and the deed may be founded " upon even against the pursuer at whose suit the cer- " tification was granted." The same doctrine is laid down by Lord Stair, and is understood to be matter of trite law.

Again Mr. Erskine says, " Decrees in absence of the " defender have not the force of res judicata against " him; for where the defender does not appear he can- " not be said to have referred his cause to the decision " of the Court, in virtue of the contract implied in litis- " contestation. Vide supra b. 1, s. 69, 70, which is " the true ground upon which a decisive sentence be- " comes final. The defender therefore may be restored " against such decree; but if he was personally cited, " he must first make payment to the pursuer of the " costs he has incurred in recovering it."

Lord Stair says, " Decreets of Session, in foro con- " tradictorio, cannot be reduced upon what was pro- " poned and repelled, or competent and omitted, which " doth not extend to emergent reasons, or such as are " new come to knowledge, but in that case, or when the " decreet is in absence, simply or by the defender's " passing from his compearance before peremptors pro- " poned, subsequent reductions will be sustained upon " distinct reasons, as in other rights."

The same doctrine is laid down by Bankton, and is confirmed by the following amongst other decisions. In Sutherland's Trustees v. Lockhart, &c., an objection,

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stated by way of exception to a decreet in absence, after the death of the defender, was repelled, on the ground that the decreet had been produced in a subsequent multiplepoinding, in which the defender had appeared, and objected to other claims, but stated no objection to the debt contained in that decree. But although the decree in absence in the case of Sutherland's Trustees (which was not brought under reduction) was sustained against the exception taken to it on the special ground of homologation, the general rule laid down was as follows:—" That where a decreet in absence had been " preceded by no personal citation, unless the pursuer " had, by the authority of the judge, intimated to the " defender his resolution of making a reference to oath, " it was competent, not only to the creditors, but also " to the representatives of the defender, to bring it " under challenge at any time, and that it would be " necessary for the pursuer to support the decreet by " the same evidence which would have been required " if appearance had been made for the defender." As to the rule (also noticed in the case just quoted), where a party has been personally cited, and afterwards dies without challenging the decree, the respondents will immediately have occasion to speak to it.

3. In calculating the prescriptive period within which the decrees founded on by the appellants may be challenged, the minority of the parties in right for the time to bring that challenge should be deducted on the following grounds: 1st. That minority is equally applicable to the prescription introduced by the statutes 1469 and 1474 as to that introduced by the statute 1617, except that under this last statute the express burden of proving forty years majority is laid on the

party pleading the prescription. 2d. That the first-mentioned statutes do not govern a question like the present, of feudal rights, which falls under the express words of the act 1617.

The act 1469 enacts that all creditors by obligation shall follow forth their right, and take document upon it within forty years, otherwise that the right shall prescribe. The act 1474 merely declares that the first-mentioned act shall extend to obligations made prior to the date thereof, as well as to subsequent obligations. These acts do not apply to heritable rights, which cannot be lost by the negative prescription, unless acquired by another party by the positive.

The argument of the appellants that the respondents have lost their right of action by the negative prescription, in reckoning which they say minority is not to be deducted, goes to this, that although a feudal progress by charter and sasine for forty years would not give the appellants a prescriptive right (because there minority must be deducted), yet they have a prescriptive right by the decrees founded on, which are thus better as a title to lands than charter and sasine would have been. This, however, will not do. The decrees bear on the face of them to be decrees of reduction of a disposition and sasine of the lands of Auchenstarry, and the only prescription which can be pleaded is that introduced by the statute 1617, chap. 12, which declares that the years of minority shall in no ways be counted, but only the years during which the party prescribed against was major, and past twenty-one years.

There is no authority for the argument that minority is not to be deducted in reckoning the years of prescription under the statute 1469. Minority falls to be deducted

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by the common law, and would have been so under the act 1617, although that act had not contained an express provision to that effect. Accordingly, M'Kenzie says, " It is observable that prescription upon this act " (1469, chap. 29,) runs not against minors, and contra " non valentes agere, though neither of these are ex- " cepted in this act, because these exceptions are war- " ranted by the common law."

4. The next question is, what is the effect of the alleged sales and transferences referred to by the Lord Ordinary in barring the present action, supposing it to be otherwise competent?

Here it is to be recollected, that the present question comes before the House on a sort of preliminary or prejudicial plea as to the validity of the decreets of 1786 and 1788, as forming a title to exclude; and that the production has not been satisfied, or ordered to be so, so far as regards the titles alleged to have been made up or granted subsequent to these decrees. These latter titles are not therefore regularly before the Court, and, judicially, this House does not know that such sales and transferences as those referred to by the Lord Ordinary ever took place, or what was the nature of them, or the particular circumstances with which they were attended. It is therefore extremely difficult to see how the alleged fact that sales and transferences have been made, can be taken into account at the present stage of the cause in judging of the title to exclude, founded on the decrees, which alone have been put into process to satisfy the production.

Apart from this, however, the respondents apprehend that the doctrine laid down by the Lord Ordinary upon this part of the case is a new doctrine.

The question as to whether the action is barred by the mere lapse of time, is quite different from the question, whether it is barred by the sales and transferences referred to by the Lord Ordinary, who seems to a considerable extent to mix up these questions together, for he says, that, "to give this the "least colour of justice, the claim must be made within "such time as to render it reasonably possible to "restore both parties." If this were a correct view, then the question would not be, what time has elapsed since the date of the decrees, but what particular circumstances have in the meantime intervened; and can both parties be restored to the same situation in which they were? The whole sales and transferences founded on might have taken place within one year, as well as within twenty years; and, on the other hand, twenty years, or even a longer period, might have elapsed without a single sale or transference being made, or any other circumstance occurring to prevent parties from being placed in the same situation in which they were at the date when the decrees were pronounced.

The mere lapse of time, therefore, if no prescription be run, has nothing to do with the matter at issue. If the respondents are not entitled to be heard now on the merits of the decrees, they could not have been heard within twelve months after they were pronounced, provided the subjects had passed into or through the hands of singular successors.

This doctrine of the Lord Ordinary, which, it will be particulary observed, is not founded upon, and does not assume homologation of any kind, but mere acquiescence in the acts of the opposite party, cannot be

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acceded to by the respondents. It is not alleged that they or their authors were parties to any of the sales, dispositions, or transferences said to have been made, or that they subscribed any relative deed, or did any act by which these were homologated or recognized; and in these circumstances it is certainly a new and a startling application of the doctrine of acquiescence to hold that it is to have the effect of depriving the respondents of their heritable estate vested in them and their ancestor by charter and sasine, and to transfer it to the appellants, who don't even (in the present shape of the case) claim upon charter and sasine at all, but merely on certain decrees which are said to afford them a valid title to exclude. Even when applied to moveable rights, the doctrine of acquiescence is of very doubtful effect, except in so far as it operates as evidence of an arrangement or understanding between the parties, and even to this extent it requires to be applied with great caution. But in a question of feudal rights it is humbly thought that the doctrine of acquiescence is nothing else than a new, indefinite, and fluctuating kind of prescription, the introduction of which would shake the security and change the principles which regulate the whole feudal property in Scotland.

The Lord Ordinary founds the view which he has adopted on the single case of Campbell against Graham's Representatives, 5th December 1752. The respondents do not think it too bold to say, that even if this case were precisely in point, it could hardly be a sufficient authority on which to found a general rule of this kind, so contrary to the principles of our law, and to the authority of other decisions. It is worthy of remark

that the case is not collected in the Faculty Reports, or by any of the other reporters of that period, except Lord Kames, although it is difficult to believe that it could have been overlooked by any of the reporters if it had been intended to establish the important general doctrine which is now inferred from it. The session papers are preserved, and appear to have been looked into by Lords Craigie and Cringletie in forming their opinion in the case of Sinclair against Stark. The inference which these judges drew from this case of Campbell was, that "it shows that the Court held "decrees even of reduction-improbation, obtained "against a pupil in absence, without the previous ap- "pointment of a curator ad litem for him, to be void "and null." This conclusion was founded upon a passage in the reclaiming petition for Campbell, to the effect that "it appeared from your lordships' reasoning "upon the report that no stress was laid upon these "decrees, which, upon the several grounds above stated, "were so obviously void and null." The decision must in this view have gone entirely on the ground that Cutlar, the purchaser, was not called as a party to the action; that the decree of certification obtained by him was not brought under reduction; that Graham's representatives could not make specific implement, and that therefore Campbell must either bring a proper action of reduction against Cutlar of the decree of certification obtained by him, or content himself with a claim of damages against Graham's representatives.

The report is in no view very distinct or satisfactory. The case may have contained, and most probably did contain, specialties which do not appear from the report. For example, it is not said whether the minute of sale con-

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tained a conventional irritancy, nor is it said whether the minors suffered any lesion by the value of the lands being greater than the price agreed to be paid. It will, however, be observed, that in the case of Campbell there were two decrees in absence against the pupil, — the one of declarator obtained by Graham, and the other of certification in a reduction-improbation obtained by Cutlar. It was the decree of declarator of irritancy alone that was brought under reduction, and it is the unchallenged decree of certification or reduction alone which is mentioned in the judgment, and on which the Court seem to have proceeded, the decree of declarator of irritancy in absence being apparently held void and null. It is somewhat remarkable, however, and shows the inaccuracy of the report, that although it is stated that "Graham had sold the lands, trusting to "his decree of reduction," Graham, in point of fact, had obtained no decree of reduction at all; and although the interlocutor bears that "the lords sus- "tained the defence that the minute of sale was at an "end by the decreet of reduction, and by the after "sale to Edward Cutlar in consequence thereof," yet, in point of fact, the sale was not after but prior to the reduction, which was brought by Cutlar himself three years after he had made the purchase.

In the present case it will be recollected that there was no certification obtained as in a reduction-improbation, which is one point of difference between this case and that of Graham. A second point of difference is, that here the pursuers' ancestor stood vested by sasine on the face of the records, open to all the world, as the feudal proprietor of the lands. Any person, therefore, purchasing from William Hay,

was bound to know that he had no right to the lands, except in virtue of his decrees of reduction, which bore on the face of them to be against a pupil undefended; whereas in Campbell's case the only right which the pupils had was a latent minute of sale, which could not have enabled them to compete either with Cutlar, or with any other bonâ fide purchaser obtaining a disposition and infeftment from Graham, whatever claim of damages the pupils might have against Graham himself. A third point of difference between the present and Campbell's case is, that there the pupils were under a counter obligation to pay an adequate price on receiving a right to the lands. If they could have paid this price, and accepted of a disposition, Graham would of course have granted it, and it would have been most unreasonable to hold that he could neither obtain implement of the bargain from the pupils, nor sell the lands to any body else. The pupils could not obtain a disposition to the lands without paying the price, which, it is to be presumed, was their value, and therefore it was of little moment to them whether the sale was carried through or not. The present case is very different. The pupil's lands were taken from him gratuitously, without his receiving a single shilling in return. The case is the same as if the pupil had granted a gratuitous disposition of his estate, which would clearly have been void and null. A fourth point of difference between the two cases is, that in Campbell's case the father of the pupils had come under an express written obligation, which it was incumbent on the pupils either to fulfil or to allow it to be irritated.

The minute of sale most probably contained an express clause of irritancy, and such a clause was at all

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events implied. Against the obligations contained in that minute of sale, as being their predecessor's deed, the pupils could not have pleaded the maxim "minor "non tenetur placitare," as the respondents' ancestor might have done.

The Lord Ordinary proceeds chiefly upon the hardship of opening up the decrees, when it is no longer reasonably possible to restore both parties to the situation in which they were, and when "the means of con-"tradicting" the respondents' claim may probably be lost. Here also the fact that the pupil's lands were in the present case evicted from him gratuitously is of importance. Mr. Erskine says, "Where, from after acci-"dents, restitution cannot be complete on both sides, "a distinction must be made between voluntary and "necessary contracts. In voluntary the minor ought "to be restored fully, though the other party who had "it in his power not to have contracted should be a "sufferer, since it is for the benefit of minors that resti-"tution was intended. Thus a minor who is restored "against a sale cannot be compelled to pay the price "to the purchaser, unless in so far as it has been in "rem versum."

That it was quite competent for the appellants' authors to have led a proof, although in absence, appears from certain of the authorities already quoted as well as from any others. Thus, in the case of Henderson, the certification which the Court granted in the event of a tutor ad litem not being appointed was, not that they would decern, but that they "would grant proof" without farther delay. Lord Bankton says,—"A pur-"suer sometimes, to strengthen a decree in absence, "leads a proof, and for that purpose extracts an act;

"this is called litiscontestation reo absente." Thus in sundry cases, in January 1674, the lords found "that a minor non tenetur placitare" in a reduction of his father's rights; but that this did not "hinder "the examining of writer and witnesses ex officio, "to lie in retentis, lest the direct manner of im- "probation perish medio tempore;" only, "the debat- "ing the reasons, or advising the said probation, "must stop and lie over till majority." Again, in Kello against Kinnear, it was held that a minor was not obliged to defend a reduction of a comprising led by his father, and said to be extinguished by intromission, but that "witnesses may be examined to prove "possession, that the depositions may lie in retentis "till majority." In like manner, in Gordon against Farquhar, the defence of minor non tenetur was sustained, although it was pleaded that the action was founded on the ancestor's fraud; but the Court "allowed the pursuer to lead a probation by witnesses, "to lie in retentis." It is needless, however, to multiply authorities to show that both by the ancient and modern practice of the Court it was quite open for the appellants' authors to have led a proof by witnesses (in so far as parole testimony was competent), although in absence of the pupil, and that in fact it was their duty to have done so.

It thus appears, that if the situation of the appellants be at all different or more disadvantageous now than it was when the decrees challenged were pronounced, this is owing to the fault or omission of their authors themselves, and therefore that they are not entitled to found on that circumstance.

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But in fact the plea, that the respondents are barred by the sales and transferences which have taken place from challenging the foresaid decrees, is contrary to the whole current of authorities.[1]

LORD BROUGHAM.—By a disposition executed 25th January 1775, Henry Hay conveyed the lands of Auchenstarry, for a price stated in the deed "to be their "just and true value," to Henry Sinclair the elder in fee. Upon this conveyance he was duly infeft, and his sasine regularly recorded. He died in July 1776, leaving his widow with child, and she was delivered eight months after. The child, Henry Sinclair the younger, consequently came of age in March 1798; but

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[1] *Respondents' Authorities.*—Fraser v. Fraser, Feb. 1728, Mor. 12194; M'Donald v. Common Agent in ranking of Kinloch, 4th Feb. 1790, Mor. 12199; Nicholson v. Macleod, Nov. 23, 1810, Fac. Col.; Bankton, b. iv. tit. 23, sec. 10; Little v. Graham, 4th Feb. 1826, 4 Shaw and Dunlop, 424; Lord Barnbugil v. Hamilton, 12th Feb. 1567, Mor. 8915; Earl of Roxburgh v. Chisholm, Feb. 1688, 2 Supp. p. 116, 187; Ballantine v. Daylell, 4th and 19th Dec. 1695, 4 Supp. p. 287; Stair; Erskine i. 7, 13; i. 7, 34; i. 7, 38; i. 7, 43; vide M. 9056, 9063, 9084, &c.; Countess of Kincardine v. Purves, 7th Jan. 1698, Fount. Fol. Dict. v. 1. p. 584; Bruce, 24th Jan. 1577, i. Fol. Dict. 579; Ker v. Hamilton, 25th Feb. 1613, M. 8968; Lockhart v. Lockhart, 25th July 1626, M. 8958; Baron v. Harvie, 20th July 1626; Fleming v. Forresters, 17th July 1661, i. Fol. Dict. p. 586; Aitken v. Hewat, 8th Jan. 1628, M. 9907; Durie, p. 324, M. 8908; Jack v. Halliburton, 1743, M. 9003; Banatyne, 14th Dec. 1814, F. C.; M'Turk v. Marshall, 7th Feb. 1815, F. C.; Agnew v. Earl of Stair, &c. 1 Shaw's Appeal Cases, 333; see also Rankin, May 31, 1821, 1 S. & D. 43; Sinclairs against Stark, Jan. 15, 1828, F. C.; Fac. Coll. ut supra, p. 382; ibid, p. 381; Bank. iv. 23, 11; Maule v. Maule, July 7, 1831; printed papers, p. 21; Erskine, iii. 7, 8; Kames' Statute Law, p. 291; Mackenzie on the Statutes, p. 67; vide Bankton, iv. 45, 14; Select Decisions, No. 27, p. 30; Fol. Dic. vol. i. p. 589: Erskine, 1. 7, 41; Henderson v. Knockhill, 1st July 1628, Mor. 8969; Bank. b. iv. t. 36, sec. 6; 3 Supp. 39; Kello against Kinnear, 5th Jan. 1671, Mor. 3066; Gordon against Farquhar, 4th Feb. 1695; Lindsay v. Ewing, 15th Jan. 1770, Mor. 8997; Agnew v. Stair, 1 Shaw's Appeal Cases, p. 333.

in 1785, after the widow and a second husband whom she took had possessed the property for nine years on the child's behalf, Baird, a creditor of Henry Hay, the vendor, brought an action of adjudication against him, he having then gone to America, cited him edictally, and obtained a decreet in absence 11th August 1785. The year after Baird brought an action of reduction against H. Sinclair the younger, an infant, and against his mother and step-father as his tutors and curators. The principal ground of the reduction was the alleged fraudulent conveyance in 1775 by Henry Hay, whose disposition to H. Sinclair the elder was averred to be without consideration and in trust only, and to a conjunct and confident person. Appearance was made for the defenders, who had been summoned: they took the summons to see, but returned it without defences, and without satisfying the production. A decree was pronounced reducing the disposition with certification, contra non producta. In 1787 W. Hay, son of the vendor, brought a reduction-improbation against the same parties upon the same grounds of fraud and trust, with the usual concurrence of the Lord Advocate. To this action the defenders appeared, and produced the deeds and writings called for. In the further stages of the procedure they did not appear, and decree of reduction and improbation was obtained against them in absence, 27th February 1788.

In 1807 Henry Sinclair the younger died, leaving three daughters his heirs portioners, who are stated to have been in poverty, and the eldest of whom attained majority in 1818, the youngest in 1826. In July 1832, and not before, they brought the present action, to set aside the decrees obtained reducing the title, upon

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which they had been served heirs to their grandfather, their father never having taken up the title or incurred any representation.

Having stated the proceedings and judgments up to the commencement of the present action, it is fit that we now attend to the manner in which the property has been dealt with, under the authority or supposed authority of these judgments. In 1788, a year and a half after Baird's decree of reduction, his son served heir to him, and conveyed to William Hay, son of Henry Hay, the elder Sinclair's author, the debt adjudicated to him, with the decrees he had obtained. William Hay having in that year obtained his decree of reduction, obtained infeftment of the estate, and soon after sold the property to Cowburgh, who was infeft, and enjoyed it from April 1788 to July 1793, when he sold it to Dr. Lapslie; and his son and heir, W. Lapslie, being infeft in it in March 1803, conveyed it to Mr. Campbell, who was also infeft. In 1820 he executed a trust disposition in favour of some of the defenders in this suit (now the appellants), and these sold the estate in 1824 to one of the others, Captain Garthshore, who has possessed it ever since, and improved it; so that all possession in the pursuers (now respondents), or those under whom they claim, had ceased forty-four years before they brought their action. There had been no less than five conveyances to purchasers for value, and three infeftments taken by heirs to it; and it had thus passed from hand to hand no less than eight times without any interruption by purchase or by descent, while all have dealt with it and enjoyed it, and laid out money in its improvement as well as transfer, without any doubt of the title, that is of the decrees upon the

faith of which for nearly half a century they were acting. In such a case as this it may fairly be stated that every Court ought to require a clear case before they alter the possession, and render all that has been done nugatory and fruitless. Nevertheless there may exist, even in such a case, a title paramount to those which have eight times over been obtained; and, notwithstanding the lapse of so long a time, that title may defeat all the others by the strict rules of the law.

This statement, though somewhat long, presents for our consideration a very simple case, as far as the facts are concerned. An estate is sold in 1775, and possessed for eleven or twelve years by the purchasers. The conveyance is set aside by two decrees, in absence, in 1786 and 1788, which the vendor's creditors and heirs obtained. At the date of these decrees the purchaser's heir is a minor, and for ten years afterwards. He then attains majority and lives nine years, and dies leaving infants, one of whom attains majority in 1818 and lives twelve years, when at length she brings, with her co-heirs, an action to set aside the decrees of 1786 and 1788, and all the titles made to purchasers on the faith of them during forty-four years; so that more than forty years elapsed since the decrees, more than thirty since the first minority ceased, and a party valens agere came in esse, more than twenty, during which all minority was out of the question, and a party valens agere existed; and about eight or nine, during which, without any interruption or interval, all the parties concerned were of full age. It is of course to these circumstances that the learned Lord Ordinary refers when he speaks of setting aside those decrees "post tantum "temporis."

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I have termed the decrees decrees in absence, for I can hardly consider that any question now remains as to whether they were in absence or in foro contentioso. The parties were served, and in the action of 1788 at least, the reduction-improbation, personally, for the extract bears that they were all "personally appre-"hended." But the Lord Ordinary assumes that they made no appearance beyond satisfying the production, and his interlocutors proceeded upon the footing of the decree against them being in absence. Two questions are therefore here raised, and both of the first importance. 1st. Within what limits is the right of being reponed against decreets in absence competent to parties defenders? 2d. When the negative prescription is set up as a defence, are the years of minority to be deducted?

These are the main and fundamental questions which this case raises; but it also gives rise to a further discussion upon the peculiar effects of decrees in actions of reduction and improbation, and upon the kind of prescription which is applicable to decrees.

1. The peculiarity of the Scotch law and practice, which allows proceedings to go on and judgment to be obtained against a party not present or represented in Court, gives rise to the chief difficulty in this case. In England no step can be taken till the defender appears, and if he cannot be secured or made to come an outlawry and sequestration are resorted to, so that his property is secured, and his personal rights forfeited as the penalty of his contumacy; but the proceeding stops there, and the suit can extend no further, and can bear no fruits. This has oftentimes been lamented among us, but the difficulty of finding a course at once consistent with protecting the safety of the one party

and adjudication on the rights of the other has hitherto been found insuperable; and assuredly such examples as the present case affords, of the mischiefs resulting from the Scottish practice, are not likely to make us resort to that as a substitute for our own, whatever changes we may be disposed to make in our procedure. If, which some of the cases, especially that of Campbell v. Graham's Representatives, 5th Dec. 1752, seem to assert, any person, though of full age, may at any time, quandocunque, set aside as of right a decree pronounced against him in his absence, no bounds can be set to the evils which such a rule would engender; in truth it would be far better to refuse the decree as a matter of course, for it becomes wholly futile and of no avail, and possession would be just as good without it. But even were we to take the position with this reasonable restriction, that quandocunque only means any time within the period of the negative prescription, still the evils of such a principle are very great. A party, knowing that witnesses are living who could destroy his title, has only to lie by for thirty-nine years, or until they die at an earlier time, and then produce his case by way of action for being reponed; or he is to be reponed as of right, and then his adversary must proceed of new and prove his case without his witnesses. It is indeed said that the party so acting pays the penalty of his contrivance by remaining out of possession, and no doubt he does so in many cases; but what if the matter in dispute be a reversionary right, as to land for building leased at a peppercorn rent, and with a grassum long ago taken? Or what if it be a right of church patronage, where there is only an enjoyment as often as a vacancy occurs? In these cases the defendant loses nothing by delaying to appear until the lease is near

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expiring, or the incumbent is on his death-bed; and he may thus come forward at his own time, when his adversary's proofs are gone, without losing any thing by lying by. But obvious as these consequences are, of allowing defenders to be reponed, it may be admitted that some such proceeding is the necessary consequence of suffering pursuers to obtain decrees in absence. The question only is, Whether or not the same latitude should be allowed in cases where the default is altogether wilful, where the party has been duly served, and personally? Surely in that case he ought to allege some ground for his not having appeared, or some ground for opening the decree. But the rule alleged is applicable to the case of a party not only served but appearing, nay, not only appearing, but taking part in the early stages of the litigation, and only making default before litiscontestatio has taken place. It seems hard to reconcile the great latitude contended for with such a default as this.

The authorities however, and the cases decided, appear to recognize a sufficiently ample right of opening decrees in absence. Mr. Erskine regards them as having none of the effects of decreets, and though giving ground for the plea of res judicata, yet only giving ground for it while unchallenged. Then the cases seem all to recognise the right of setting them aside and going into the merits. But I can hardly say that it any where very clearly appears that this right is absolute and independent of all circumstances; in other words, that whatever length of time may have elapsed, whatever citation of the party may have been had, whatever dealing with the property may have taken place, the party may still come in at the eleventh hour, and if he only proceeds before the years of prescription

expire, may be reponed, and reduce the decree, without more ado than stating his case—the case competent to him during the pendency of the former action, and before the decree. In a word, to put a strong case:—if it be contended that a party served personally, and appearing, and we shall say proponing dilatory defences, but making default before act of litiscontestatio, allowing judgment to go against him for the estate, and standing by for thirty-nine years, while the property is dealt with by mortgage or sale, may at his pleasure come in and urge the same defence on the merits which he might have set up thirty-nine years before, and may then be treated and have his case dealt with precisely as if no decree had ever passed against him,—I must say that I can find no authority of text-writers, and no decision of courts, which bears out this proposition; and yet I cannot say that I find any line drawn which excludes even this as a consequence of what is certainly laid down both by writers and in decisions. It seems rather that the authors and the judges have not contemplated such a case—have closed their eyes to the result of their own propositions, than that they have limited those propositions or restricted their consequences.

To illustrate the imperfection of the information which I have been able to obtain from the books upon this matter, I may take the question of personal service. I cannot find it distinctly laid down how far that important ingredient qualifies the general proposition of the defender's right to be reponed. Yet shall it be said to make no difference whether a decree has passed wholly behind a man's back, and without his knowing that any action had been brought against him, or that

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he has notice and has even appeared, but thought proper afterwards to make default? The mere service without his appearance should seem to be regarded by the statute law as of material importance, else wherefore the very minute directions of the Act 1540, c. 75, which even prescribes the number of knocks to be given at the door by the officer entrusted with the process?

On the other hand, they who deny the utmost extent of the right contended for have great difficulty in finding a middle ground whereupon to take their stand. They cannot maintain so absurd a proposition as that decrees in absence have the same force with those in foro. Even where there has been service on the defender, and therefore wilful default by him, they cannot maintain that he is bound as much as if he had continued in court till the judgment; but they say, that after being served, and suffering judgment to pass without litiscontestatio, he shall only be let in to reduce the decree, if he shows that he is entitled; that is, I suppose, if he explains his default, and comes within a reasonable time. But then I do not find that the cases speak of explaining the default; I find none of them mention time; and the very existence of the negative prescription, at least if we suppose it applies to decreets, would seem to exclude any reference to a shorter period than forty years. It may be fit to consider these cases a little more nearly. The contention of the appellants is, that each case depends on its circumstances, and that according to these the title of the defender to be let in must be judged. The standing by and seeing the property enjoyed, improved, and conveyed from hand to hand, the rights acquired by third parties for valuable consideration, the lapse of time through his

laches, are considered as strong circumstances; they all occur in the present case, and the Lord Ordinary mentions them and relies upon them, though without specifying any particular length of time which shall preclude the right of opening a decreet; for his lordship only says, "post tantum temporis." I must, however, say that I find very scanty authority to bear out these alleged qualifications of the defender's right, although I can hardly say that all consideration of the circumstances of each case is excluded.

Millie v. Millie appears to be a strong decision. It is reported in the Fac. Coll. and in the Dictionary 12176, and was pronounced in 1801, Nov. 27. The decree excepted to was one of absolvitor in an action where the pursuer had not complied with an order to give in a condescendence, but made default, and ten years afterwards brought another action. The defence of res judicata was repelled, and the Court, admitting the "difficulty of opening up a decree," went upon the party's poverty and his agent's neglect to put him upon the poor's roll, which was said to be sufficient ground for calling in the "supereminent power of equity vested in "the Court." Upon this I must take leave to observe, that unless decrees like this are totally unlike all others, no such power can exist in any court, which intends to make its proceedings serious and regular; for it enables any man who has a negligent attorney or a light purse to harass his adversary with a suit, withdraw and suffer judgment to go against him, and then to escape from the force and effect of that judgment. Nor could a like privilege be refused to a defendant whose case is much stronger for such relief. Nothing like the English nonsuit is here to be seen, for it was a decree.

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Mr. Erskine, iv. 3, 6, expressly says, that a pursuer bringing his action is understood to subject himself to the judge's determination.

It is however to be remarked upon this case, that it rather favours the appellants' contention, by indicating that mere absence is not sufficient for allowing a decree to be opened, because the only reason assigned by the Court is the poverty of the party who did not appear, which seems to show that each case is to be determined on its peculiar circumstances, and that some ground for being let in to question the decree must be stated. In Clark v. Newmarch, 17th Nov. 1825, 4 S. & D. 186, the same ground of poverty was taken by the Court, and Millie v. Millie was cited. Although repeated appearances had been made for the defender, and a judgment given upon the merits, the Lord Ordinary here held the decree to be in foro; and in altering his interlocutor, I do not observe that the Court disputed this position, but relied on certain proceedings in England, and on the party's poverty at the time, when she ought to have lodged her duplies, for she had answered fully.

In Smyth v. Nesbit, 9th March 1826, 4 S. & D. 538, there had been a decree of constitution, and an adjudication led on it. The defendant had appeared and taken the process to see, but lodged no defences. The only resistance made to a reduction of these decrees, brought eight years afterwards on the head of absence, was that he must first pay the costs, and which the Lord Ordinary held that he was bound to do.

Kirk v. Kirk, 6th July 1827, 5 S. & D. 905, was a similar case, and the party was let in to question the decree without paying the costs, in consideration that

the document on which it had proceeded was vitiated in the date.

Campbell v. Graham, referred to in the Lord Ordinary's learned and elaborate note, was a decision in 1752, and is in the Dictionary 9021, and taken from Lord Kames' Sel. Dec. As far as regards the point of minority, I shall hereafter consider this case, but it is material also for our present purpose. Graham, in 1728, sold the property in question to Jardine, and afterwards obtained a decree of declarator of irritancy of the sale on non-payment of the price, and this was obtained in absence. Two years after the sale he conveyed to trustees for his creditors, and in 1732 they sold to Cutlar, who, to secure his title, brought a reduction-improbation against Jardine's representatives, and had certification in 1735. After fifteen years from this time, and above twenty from the declarator of irritancy, Campbell, as representative of Jardine, brought a reduction of the declarator on the grounds of absence as well as minority, and also a reduction of the trust deed, and the subsequent proceedings in the reduction-improbation. The defence is stated to have mainly turned upon the certification in the latter action; but this is expressly said to have been disregarded by the Court, who also held the minority set up by the pursuer as unimportant, and decided against him, solely upon the ground of Graham having sold "trusting to his decreet of reduction, though " in absence," (which of course must mean the decreet in the declarator, for he sold before the reduction-improbation, and that was brought by the purchaser,) and " because the other party could not be reponed against " it when it was no longer in Graham's power to " dispone;" and they sustained the defence, that the

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minute of sale to Jardine was "at an end by the de- "creet of reduction, and by the after sale to Cutlar, "and in consequence thereof."

17th July 1835. Upon this case several observations arise. Undoubtedly it supports the Lord Ordinary's interlocutor; but does it not, as reported, go a great deal farther? and does it not go too far? No mention is made whatever of the length of time; the whole is rested upon the decreet of reduction though in absence, and a subsequent sale of the property; nor is it said that the party was cited in the declarator, and it is confessed that he was a minor. Is it then meant to be contended, that if a person brings an action and obtains judgment in the defender's absence, and in his entire ignorance of the proceeding—he being, for example, abroad,—that decreet becomes final, conclusive, and binding, provided he sells to another party before any reduction is brought? So extravagant a proposition is untenable, and yet it is the very point decided in Graham v. Campbell. Even personal service would not perhaps much alter the case, should this be found to have been part of it, because citing a minor seems a nugatory act on all principle, and on none more than this, minor non tenetur placitare super hæreditate suâ. But beside the inaccuracy of the view which the decision takes of the question of minority and reponing, as I am afterwards to show, there is an apparent inaccuracy in the report of this case, which considerably weakens its authority. The decree obtained by the vendor soon after the sale was in a declarator of irritancy, and yet the Court is always made to describe that as "the decree in the reduction." I therefore at first thought that they referred to the decree of certification in the reduction-improbation; but then they expressly

say that is immaterial, on account of the pursuer having a copy, or rather duplicate original (for it is called a double) of the minute of sale in his possession. Again, they say that the decreet, whatever it was, on which Graham acted when he sold to Cutlar, "was, though "in absence, the best security he could have at the "time." Was it so? Then wherefore did the purchaser immediately set about getting a better? The authority of Lord Stair and all others shows that a decree in a reduction-improbation is a far better security than Graham could have by merely obtaining a declaratory decree in the irritancy, and those who advised Cutlar plainly thought so too. Possibly something may have turned on the original conveyance being not a disposition, but a mere minute of sale. An agreement to sell was made, but no price paid; what we here call an equitable title merely was given, and was all that the Court had to deal with, either in irritating under the first action, or reducing under the second. Perhaps the Court considered this circumstance, and the lapse of twenty years, when it refused to let in the purchaser's representatives, and possibly the case is inaccurately reported. It deserves to be more closely examined; and though the Lord Ordinary relies upon it, as he was entitled to do, the Court, in reversing, do not appear to have considered it with any minuteness.

The first question then to which it is desirable that the attention of the learned judges below should be directed, is the general effects of a decree in absence, whether the right to reduce it arises merely from its being in absence, or depends upon the circumstances of the case; that is the laches of the party, the intermediate dealing with the property, and the time

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suffered to elapse without challenging the decree. If he can come in and set it aside (on payment of costs, or of costs and damages,) by showing that he had a good defence against it, then it must be presumed that nothing short of forty years can exclude him; and this raises the next question for the Court's consideration. But before proceeding to that it is fit that we advert to the special nature of the decrees here in dispute. The certification contra non producta is stated by all the text-writers as of a high nature and binding force. Lord Stair says, it is "difficile to be reduced "much more than improbatory decrees in foro contra-"dictorio." He says he never knew it reduced except in the case of the defender's absence, or service abroad. He elsewhere says, "That where writs are produced and "reduced, the decree is in foro contradictorio, and "hath all privileges of decreets in foro;" which seems to imply that a reduction after the production is satisfied, though in absence of the defender, is as strong to bind as a decree in foro. He adds, that in reduction-improbation, certification contra non producta, albeit in absence, is not reducible, iv. xx. 4, 6, 11. The cases of A. v. B. 16th June 1618, Glendinning v. Gordon, 5th July 1699, and Preston v. Erskine, 24th Nov. 1710, are all strong to show that the party making default, or never having appeared, cannot be reponed against certification in an action of reduction-improbation; no one of these cases, however, is that of a decree reducing after the production has been satisfied. The strength of the appellants' case may probably be found to lie in this point. It certainly deserves to be fully considered, and with this view I wish to throw out a few observations.

I have invaried right, in both Lord Stair's own work and in other quarters, for some qualification of his general position respecting the high nature of the certification contra non producta, and even of the decree reducing writs actually produced, for his dictum in b. iv. t. xx. s. 4. extends to that also; and I can nevertheless have no doubt that two qualifications must be introduced; there must have been personal service, or some equivalent knowledge, and there must be no minority in the case. But for this being assumed, this absurd consequence would follow, that a person's title would be destroyed behind his back by an irreversible decree, or the title of an infant would be destroyed while unable to protect himself. In the present case there is no proof of personal service of the first action, but the defenders appeared by this conveyance and took out the process to see; in the second action the parties were served, appeared, and satisfied the production; but in both suits the real party was an infant under twelve years old.

2. But supposing the decree to have no other privilege than belongs to any decree in absence, and that the forty years prescription can alone cover the defect of litiscontestatio, we find that the defender was not of age till ten of the forty-four years had elapsed, and another minority afterwards occurred of eleven years about 1807. The question then is, Whether or not these periods of minority, one or both, are to be deducted? and I confess that I have much less doubt upon this point than upon any other of the case.

Before adverting to it, however, I must touch upon the case of Campbell v. Graham, to which the Lord Ordinary refers. At first sight it may seem to exclude

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all question of minority, for the Court is represented as saying that "quoad decrees in absence this consideration cannot enter, inasmuch as a major may be reponed quandocunque against it on paying expenses and damages, and a minor can have no stronger privilege." Now this surely cannot be law, and the learned Lord Ordinary appears to have held it incorrect. No one contends for the right of persons of full age at any time to open decrees against them; and it seems a position little more tenable, that infants and persons of full legal age stand upon the same footing as to the force of decreets in absence against them.

But upon what ground, it may be asked, does the application of the negative prescription to decrees rest? If upon the statutes 1469, c. 28, and 1474, c. 54, these refer to obligations; and although it seems difficult to bring a judgment within this term, yet I am not insensible to the force of the citation from Voet, "omnium omnino actionum," &c. Does this, however, go beyond all grounds of action? But if these statutes do not serve the appellants' purpose, they must fall back upon the Act 1617, on prescription of land rights, and then there can be no doubt, for the years of minority are expressly excepted by the provisions of that act. But suppose them entitled to rely upon the older statutes, it appears still that we must imply a similar exception; the ground of prescription is adverse possession long acquiesced in, and abandonment thence presumed of any incompatible title. Now is not the case of minority of a person not capable of contesting the adverse claim almost necessarily to be understood as excepted from this rule? So thought Sir G. Mackenzie, who says in his Observations on the

Statutes, "That the prescription upon the Act 1469, "c. 29, runs not against minors and contra non "valentes agere, because these exceptions are implied "by the common law." He says warranted, and means of course implied, or understood upon common law principles.

I must however observe, that the case appears to me more to fall within the Act 1617, as that of a land right. I think there is force in the argument that such a right cannot be lost by the negative unless gained by the positive prescription; but at any rate I conceive that the old acts have always hitherto been understood to apply to personal obligations and rights only.

Although, however, I strongly lean towards the construction of the respondents upon this point, yet I am desirous to have it reconsidered below, because it is a case of the first importance. There seems to be no decision either upon the question, what course of prescription decreets suffer and run, and under what authority? or upon the question, in what manner years of minority are to be deducted from prescription under the acts 1469 and 1474? Both of these points deserve consideration, although for obvious reasons your lordships would not desire the learned judges below to deal with them, except so far as they may appear to them involved in the present case.

One consideration may perhaps be mentioned under this head. Minors have, by the Scotch as well as the civil law, a right of restitution in integrum, that is, they may, within four years after attaining full age, set aside all deeds executed and contracts made by them, and indeed all acts done in any way by them, on showing them to have been detrimental to their interests. Now

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this extends to judgments in foro, where the minor has been injured by an omission of a right defence, or by urging of a wrong one. It is, however, confined to that; for if the sentence against him be only erroneous in itself, and he was properly defended, the privilege ceases.—Ersk. 1. vii. 38; Stair, 11. xii. 8.

It is possible that some argument may be raised upon this rule of law, and I have considered it with a view to its effect against the respondents' construction; but upon the whole it appears to me insufficient to rebut the force of the reasons in favour of deducting the years of minority. The favour to minors appears in some instances to have been extended very far indeed by the Court. Lord Stair cites a case of Fulton v. Stewart, 1691, in which, because the institution is for children, they were not held bound by decrees; but so absurd a decision was afterwards altered, as might be expected.

In remitting this case to the Court below, with directions to consult the other judges, I have thrown out these observations with a view of pointing out to these learned persons the difficulties which appear to encumber the questions raised, and also for the purpose of showing the parts of the case where almost alone the doubt seems to lie; for it is a great satisfaction to me that this doubt is rather upon the branch of the case which may be said to be peculiarly adapted to the cognizance of that learned body. The difficulty I feel in dealing with the cause turns almost entirely on matters of Scotch law, and chiefly on points of practice—matters and points touching which the principles are wholly different from the law your lordships are used to administer in England. The effects of decreets in

absence, and of costs and of decreets in reductions, and in improbatory actions, form the part of the case upon which I have found it the most difficult to make up my mind. On the other branch of the case, the right to deduct the years of minority, I should not have refused to give my humble advice to your lordships, could I have seen that this branch is sufficient for deciding the cause. It follows from these observations, that the present appeal will in all likelihood be now finally disposed of as far as regards this judicature, for whichever way the Court below shall decide upon points so peculiarly fitted for the cognizance of the Scottish judges as those I have mainly desired them to consider, a further recourse to your lordships appears very improbable.

The House of Lords ordered and adjudged, That the cause be remitted back to the First Division of the Court of Session, with an instruction to the judges of that Division to order the matters of law in question in this cause to be heard before the whole judges, including the Lords Ordinary, and to pronounce judgment according to the opinions of the majority of such whole judges.

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Solicitors.