George-Alexander Gordon ag[ainst] Janet Gordon &c. 55 No 27 / Reported in Fac: Coll: 21. Dec. 1784. No 187 under the following title

July 28. 1784.

Unto the Right Honourable the LORDS of COUNCIL and SESSION,

"Prescription — How far interrupted "by the minority of substitute heirs.

This case also involved a question of approbate & reprobate

See the interlocutor supra, which the Lords after a hearing in presence, altered, and found that the years of George Alexander Gordon's minority were not to be deduced from the years of prescription. — "Observed on the Bench. — As prescription "operates in favour of that person only "who holds possession, so the privilege "of minority to interrupt is competent "to none who have not the right of "claiming possession, not contingent "but present. On this principle "proceeded the "judgement "in the case "of Macdougall "as did also "the decisions "in that of Leslie [illegible] [illegible] "that of [illegible] [illegible]

THE

PETITION

OF

Janet Gordon, and *Magdalene Grant*, Heirs of Line of the deceaſed *Alexander Gordon* of Whiteley, and *Alexander Duff* of Hillockhead, Huſband to the ſaid *Janet Gordon*, for his intereſt;

Humbly Sheweth,

THAT in the competition betwixt the petitioners and George-Alexander Gordon, who deſigns himſelf only ſon of the deceaſed Charles Gordon, ſome time conſul at Tunis, and is claiming as heir of tailzie and proviſion to the deceaſed Alexander Gordon of Whiteley, which came before this Court, upon a reduction and declarator at the inſtance of the ſaid George-Alexander Gordon, againſt the petitioners, and an advocation by them of the brieves iſſued out for ſerving him heir of tailzie to the deceaſed Alexander Gordon; which proceſſes were conjoined, your Lordſhips were pleaſed, of this date, to pronounce the following interlocutor: "Upon report of the Lords Alva and Henderland, and having adviſed the writs produced, and the informations given in for both parties, find, That the years of the "within mentioned George-Alexander Gordon's minority, from

July 17. 1784.

Elliot 10 Nov. 1749 Fac. Hamilton Blair 6. Dec. 1754. —

"the

A similar decision was afterwards pronounced in the case of the Creditors of Auchyndachy agt. Isaac Grant Fac: Coll. 31. January 1792 which was affirmed on appeal

See the Act 1617 in this Petition p. 7. & the following cases Macdougall July 1739. Kilk. Fisher 17. Dec. 1675 Fount. Ged 5 Dec. 1740 Kilk.

Bells Cases [illegible] N. 5. [illegible]

" the 1775, when his father died, fall to be deduced from the " years of preſcription; but repel the reaſons of reduction " brought by the ſaid George-Alexander Gordon, founded on " the ſeparate ſettlement of the moveables executed by the with- " in mentioned Bailie Charles Gordon, aſſoilzie from ſaid pro- " ceſs of reduction and declarator, and decern, and remit to the " macers to proceed accordingly."

As the laſt determination, repelling the reaſons of reduction, prefers the petitioners, they would have acquieſced in the interlocutor as it ſtands, had not their party brought it under review, and that there is a probability of the cauſe going elſewhere. This renders it improper in the petitioners to depart from any ground; and therefore, they will be forgiven for ſubmitting to reconſideration the point regarding the minority, which, on account of its generality and importance, has a claim to the greateſt attention.

It is unneceſſary, in arguing the preſent queſtion to give a minute detail of all the different deeds and circumſtances ſtated in the former papers. Bailie Charles Gordon, in 1724, purchaſed from Alexander Gordon, then of Pitlurg, the lands of Pitlurg and Achorties in Banffſhire. The price of theſe lands, including the redemption-money of certain parts that had been wadſetted, amounted, as the petitioners underſtand, to 60,000 merks Scots; and the diſpoſition by Pitlurg was taken to the Bailie, his heirs and aſſignees whatſoever, to be holden blench of the granter, and his heirs; but under the burden of making payment to James Milne of a wadſet ſum of L. 8873:13:4 Scots, which affected Achorties; and of another ſum of L. 10,874:0:10, which affected Pitlurg, neither of which wadſet ſums were redeemable till Whitſunday 1735. Upon the precept in the diſpoſition, the Bailie was infeft, and his infeftment duly recorded.

Feb. 18. 1725

Bailie Gordon had four children, two ſons, Alexander and John, and two daughters, Janet the petitioner, married to Alexander Duff of Hillockhead, and Elizabeth, now deceaſed, who was married to James Grant of Dalmennoch, of which marriage Magdalene Grant, the other petitioner, is the only ſurviving iſſue.

Nov. 13. 1730.

Of this date, Bailie Gordon executed a diſpoſition and aſſignation, in favour of Alexander his eldeſt ſon and heir, and his heirs and aſſignees, by which he conveyed to him his whole moveable debts and effects as ſpecified in the deed, with a ſmall piece of land in the neighbourhood of Elgin. By this deed, the Bailie declares the purpoſe of the diſpoſition to be, to clear off the wad-

ſet

ſet rights upon the lands of Pitlurg, *&c.*; and he appoints whatever ſhould be over, to be ſettled upon good ſecurity, perſonal or real, to enable his ſaid eldeſt ſon to pay the following proviſions to his younger children, *viz.* 4000 merks to his ſon John, 3000 merks to his daughter Janet, the petitioner, and 3000 merks to his daughter Elizabeth. This deed alſo contains a nomination of tutors and curators to his eldeſt ſon and younger children.

Soon after this, the Bailie was ſeized with an illneſs, of which he died in leſs than two months; and, while in this ſituation, was prevailed on to execute an entail, whereby he diſpones the ſaid lands of Pitlurg and Achorties, to the ſaid Alexander Gordon his eldeſt ſon, and the heirs-male lawfully to be procreated of his body; which failing, to John Gordon his ſecond ſon, and the heirs-male of his body; which failing, to Robert Gordon writer in Edinburgh, (who afterwards ſerved himſelf as tutor,) and the heirs-male of his body; which failing, to Charles Gordon, brother-german of the ſaid Robert, and the heirs-male of his body; which failing, to his own neareſt heirs-male, and the heirs of their bodies whatſoever. This diſpoſition is burdened with the payment of the wadſet ſums contained in the contracts of wadſet with Milne, and the above mentioned proviſions in favour of the younger children. Nov. 23. 1730.

Bailie Gordon died upon the 11th January 1731, being the forty-ninth day after the date of the ſettlement, and the tutors nominated by the firſt deed declined to accept; upon which the ſaid Robert Gordon, the writer, who was the eldeſt ſon of the Bailie's eldeſt brother Robert, took out a brief from Chancery, directed to the Sheriff of Moray, for ſerving himſelf tutor in law to Alexander Gordon. In the courſe of the ſervice, James Gordon, the immediate elder brother of Bailie Gordon, appeared, and proteſted againſt the ſervice, on the footing of his being tutor in law; and further, that Robert Gordon ſhould not be allowed to found on the ſaid tailzie, as it was executed on deathbed, to the prejudice of the heirs at law. The Sheriff, however, allowed the ſervice to proceed, May 6. 1731. reſerving to James Gordon to reduce it as accords.

Robert Gordon, ſoon after his ſervice, preferred a petition in name of himſelf and pupil, then ten years of age, for a warrant to record the tailzie, which was granted of courſe; and the tailzie was recorded, but no infeftment ever followed upon it. Nov. 17. 1733.

At Whitſunday 1735, the tutor paid out of the perſonal eſtate, to Milne, the wadſet ſum of Achorties, being L. 8873 : 13 : 4, and took from him a renunciation, with a procuratory in favour of Alexander May 14. 1735.

July 11. 1735. Alexander Gordon, and the ſeries of heirs named in the tailzie; and the renunciation was duly regiſtered.

When Alexander Gordon attained the age of fourteen, he choſe curators for himſelf, of whom Robert Gordon, who had been his tutor, was none. Alexander Gordon, and his curators, being fully ſenſible of the irrationality and injuſtice of the tailzie executed by Bailie Gordon when on deathbed, borrowed money for re-
July 20. 1739. deeming the wadſet of Pitlurg; and, in July 1739, obtained a decree of declarator of redemption againſt Milne; and, having there-
Nov. 22 —— by attained the full poſſeſſion, they, of this date, took out a precept of *clare* from Alexander Gordon of Pitlurg, the ſuperior of theſe lands, for infefting Alexander Gordon of Whiteley, as heir to his
Nov. 26 —— father, in ſaid lands; and, upon this precept, he was infeft in the lands of Pitlurg, Achorties, *&c.*

Alexander Gordon, and his curators, afterwards raiſed a proceſs
April 6. 1743. of reduction of the tailzie, upon the head of deathbed, againſt the heirs of entail, all of whom were regularly cited, but none of them
July — —— compeared. Lord Kilkerran, Ordinary, allowed a proof, which having been led, and adviſed by the whole Lords, upon a prepared
Feb. 23. 1744. ſtate, judgment was pronounced, finding the reaſons of reduction proven, and reducing and decerning.

In 1747, he took a new diſcharge and renunciation from Milne, the wadſetter of both wadſets, wherein, after narrating the diſpoſition by Pitlurg to Bailie Gordon, and infeftment on it, and his own abſolute title, precept of *clare*, and infeftment thereon, and the ſaid decree of reduction of the tailzie, Milne renounces and reſigns the ſaid lands in favour of the ſaid Alexander Gordon, as having right to the reverſion, in manner above expreſſed, that the right of property being conſolidated with the right of reverſion thereof in his perſon, the ſame may be lawfully bruicked, poſſeſſed and enjoyed by him, his heirs and ſucceſſors, as their own proper heritage, in all time coming; which renunciation was duly regiſtered.

Alexander Gordon of Whiteley continued to poſſeſs the lands, upon the unlimited title that had been made up as above mentioned, in 1739.

1759. In 1759, he brought a proceſs of valuation of the tithes of Pitlurg, in which the only titles produced for him, were the diſpoſition granted in 1724, by Gordon of Pitlurg, to his father Bailie Gordon, and his heirs and aſſignees whatſoever, infeftment thereon, and the precept of *clare*, which he himſelf had obtained in 1739, with the infeftment upon it.

The ſaid Alexander Gordon of Whiteley died on the 10th of Auguſt 1783, without any heirs of his body, and without having made any ſettlement of his eſtate, real or perſonal, whereupon, as his brother John predeceaſed him, the ſucceſſion opened to the petitioners, and they obtained themſelves ſerved heirs-general, and of line to him, upon a brief directed to the Sheriff of Edinburgh. They likewiſe obtained a precept of *clare* from Mr Gordon-Cumming of Pitlurg, the ſuperior, whereupon they were infeft, and are now in poſſeſſion. Sept 12. 1783.

While theſe titles were completing, the ſaid George-Alexander Gordon deſigning himſelf the only ſon of the deceaſed Charles Gordon, the fourth ſubſtitute in the foreſaid diſpoſition of tailzie, had taken out a brief from Chancery, directed to the Bailies of Canongate, for ſerving himſelf heir-male, and of proviſion, to the late Alexander Gordon of Whiteley, under the foreſaid diſpoſition of tailzie, executed by Bailie Charles Gordon. He alſo raiſed and executed a ſummons of reduction and declarator againſt the petitioners, calling for production of the foreſaid tailzie, precept of *clare*, and infeftment, 1739, decreet of reduction of the tailzie obtained before this Court in 1744; the diſcharge and renunciation of the wadſets granted by Milne in 1747, with the late titles which the petitioners had made up as heirs of line to the ſaid Alexander Gordon of Whiteley; and concluding for reduction of all theſe writings, except the foreſaid diſpoſition of tailzie, upon this ground, That the decreet reducing ſaid tailzie, was obtained by the deceaſed Alexander Gordon, upon a diſguiſed ſtate of his father's ſettlement, of date the 13th and 23d November 1730, which, though connected together, he took upon him to reduce the foreſaid deed of tailzie, the ſecond branch of the ſettlement, while, at the ſame time, he accepted of, and homologated the firſt part of his father's ſettlement, and that the ſaid decree proceeded in abſence of the heirs of tailzie, who were called as defenders in the proceſs. Aug. 28. — Dec. 1. —

The petitioners, the defenders in the preſent action, offered a bill of advocation of the ſaid brief, which was paſſed; and having come in courſe before Lord Eſkgrove Ordinary, his Lordſhip advocated the brief, and remitted the ſame to the macers to proceed therein, in common form. And afterwards, upon a petition, the Lords Alva and Henderland were appointed aſſeſſors to the macers. Dec. 19. —

The petitioners ſtated two objections to George-Alexander Gordon's ſervice; 1*ſt*, That the tailzie on which he claimed had been reduced and ſet aſide by the decree of this Court in 1744; and,

2*dly*, That the ſaid tailzie was extinguiſhed, and cut off by the negative preſcription, and a fee ſimple eſtabliſhed in the perſon of the late Alexander Gordon, by poſſeſſion for more than forty years, upon the unlimited title he made up in 1739, he not having died till Auguſt 1783.

To the *firſt*, it was anſwered on the part of the claimant, That he was entitled to be heard, and reponed againſt the decree 1744, which had gone in abſence, without a material defence having been ſtated, *viz.* That the diſpoſition and aſſignation to the moveables, executed but a few days before the tailzie, was to be connected with it, and the two conſidered as making but one total ſettlement; and as by that ſettlement, the purſuer had received a moveable ſucceſſion beyond the value of the heritage put under reſtriction by tailzie, he could not be allowed to approbate and reprobate. To the *ſecond* objection, it was anſwered, that where preſcription is pleaded to cut off the right of a minor, the years of minority muſt not be reckoned as part of the forty years; and that Charles Gordon, conſul at Tunis, father of the claimant, in whom was veſted the eventual right of ſucceeding under the diſpoſition 1730, and of challenging any attempt made by the late Whiteley to defeat that ſettlement, (the two preceding ſubſtitutes, John Gordon, Whiteley's brother, and Robert Gordon, writer in Edinburgh, having both predeceaſed him without iſſue male), died at Tunis in 1775; at which time, the claimant was an infant of only two years of age, having been born in Auguſt 1773, from which period the claimant was the perſon againſt whom the preſcription was ſuppoſed to be running, and whoſe right of ſucceſſion was thereby cut off; and if the years of his minority were deduced, the preſcription was not near completed at the time of Whiteley's death.

The macers, after hearing parties, appointed them to lodge informations. Accordingly, informations were prepared, and upon an application for the now petitioners, which was agreed to by the other party, your Lordſhips remitted the proceſs of reduction and declarator to the proceſs of advocation of the brieves, and conjoined theſe proceſſes; and afterwards, upon adviſing the informations, your Lordſhips, upon report of the Lords Alva and Henderland,

July 17. 1784 pronounced the interlocutor recited in the entrance, which in effect repels the laſt objection, and ſuſtains the firſt; and which interlocutor is now ſubmitted to review, in as far as it finds that the years of George-Alexander Gordon's minority, from his father's death in 1775, muſt be deduced from the years of preſcription.

The

The general queſtion, whether the years of minority muſt be deduced from the years of preſcription, depends upon the conſtruction of the ſtatute 1617, which is as follows: " Our Sovereign " Lord, conſidering the great prejudice which his Majeſty's lieges " ſuſtain in their lands and heritages, not only by the abſtracting, " corrupting and concealing of their true evidents in their mino- " rity and leſs age, and by the amiſſion thereof by the injury of " time, through war, plague, fire, or ſuch like occaſions, but alſo " by the counterfeiting and forging of falſe evidents and writs, " and concealing of the ſame to ſuch a time that all means of im- " proving thereof is taken away, whereby his Majeſty's lieges are " conſtitute in a great uncertainty of their heritable rights, and " divers pleas and actions are moved againſt them after the expi- " ring of thirty or forty years, which nevertheleſs, by the civil " law, and by the laws of all nations, are declared void and inef- " fectual; and his Majeſty, according to his fatherly care which " his Majeſty hath to eaſe and remove the griefs of his ſubjects, " being willing to cut off all occaſion of pleas, and to put them " in certainty of their heritage in all time coming: There- " fore his Majeſty, with the advice and conſent of the eſtates of " Parliament, by the tenor of this preſent act, ſtatutes, finds, and " declares, That whoſoever his Majeſty's lieges, their predeceſ- " ſors, and authors, have bruicked heretofore, or ſhall happen to " bruick in time coming, by themſelves, their tenants, and others " having their rights, their lands, baronies, annualrents, and other " heritages, by virtue of their heritable infeftments made to them " by his Majeſty, or others, their ſuperiors and authors, for the " ſpace of forty years continually and together, following and " enſuing the date of their ſaids infeftments, and that peaceably, " without any lawful interruption made to them therein during " the ſaid ſpace of forty years, that ſuch perſons, their heirs, and " ſucceſſors, ſhall never be troubled, purſued, or inquieted in the " heritable right and property of their ſaids lands and heritages " foreſaid, by his Majeſty, or others, their ſuperiors or authors, " their heirs and ſucceſſors, nor by any other perſon pretending " right to the ſame by virtue of prior infeftments, public or pri- " vate, nor upon no other ground, reaſon, or argument competent " of law, except for falſehood, providing they be able to ſhew " and produce a charter of the ſaids lands and others foreſaid, " granted to them or their predeceſſors, by their ſaid ſuperiors " and authors, preceding the entry of the ſaids forty years poſ- " ſeſſion, with the inſtrument of ſeiſin following thereupon; or,

" where

" where there is no charter extant, that they ſhew and produce " inſtruments of ſeiſin, one or more, continued and ſtanding toge- " ther, for the ſaid ſpace of forty years, either proceeding up- " on retours, or upon precepts of *clare conſtat*; which rights, his " Majeſty, with the advice and conſent of the eſtates foreſaid, finds " and declares to be good, valid, and ſufficient rights, being cled " with the ſaid peaceable and continual poſſeſſion of forty years, " without any lawful interruption, as ſaid is, for bruicking of the " heritable right of the ſame lands, and others foreſaid: And " ſicklike his Majeſty, with advice foreſaid, ſtatutes and ordains, " That all actions competent of the law upon heritable bonds, re- " verſions, contracts, or others whatſoever, either already made, " or to be made after the date hereof, ſhall be purſued within " forty years after the date of the ſame, except the ſaids rever- " ſions be incorporate within the body of the infeftments uſed " and produced by the poſſeſſor of the ſaid lands for his title of the " ſame, or regiſtered in the clerk of regiſter his books; in the which " caſe, ſeeing all ſuſpicion of falſehood ceaſes, moſt juſtly the actions " upon the ſaids reverſions ingroſſed and regiſtered, ought to be " perpetual: Excepting always from this preſent act, all actions " of warrandice, which ſhall not preſcribe from the date of the " bond or infeftment whereupon the warrandice is ſought, but " only from the date of the diſtreſs, which ſhall preſcribe, it not " being purſued within forty years, as ſaid is: And ſicklike, it is " declared, That, in the courſe of the ſaids forty years preſcrip- " tion, the years of minority and leſs age ſhall nowiſe be count- " ed; but only the years during the which the parties, againſt " whom the preſcription is uſed and objected, were majors, and " paſt twenty-one years of age."

The petitioners humbly conceive, it is clear from this ſtatute, that the years of minority ought not to be deducted from the poſitive preſcription. The ſtatute firſt introduces a poſitive preſcription, or rather a *preſumptio juris et de jure*, that a perſon who has poſſeſſed upon charter and ſeiſin for more than 40 years, has a good right, and declares the ſame to be unchallengeable by his Majeſty, or any perſon whatever, upon any ground, reaſon or argument competent in law, with the ſingle exception of falſehood.

Then the ſtatute proceeds to introduce the negative preſcription. It had made but one exception as to the poſitive, but it makes three as to the negative. *1ſt*, As to reverſion, ingroſſed in the body of infeftments; *2dly*, As to actions of warrandice; and, *laſtly*, As to the years of minority.

In

In order to make way for deducing minority from the poſitive preſcription, it muſt be ſuppoſed, that the exception as to minority, in the ſtatute, does not relate merely to the negative preſcription to which it is ſubjoined, but to the poſitive preſcription, introduced by the firſt part of the ſtatute. But this ſeems to be contrary to every rule of conſtruction and interpretation. The ſtatute introduces two diſtinct kinds of preſcription, with a limitation as to each. After explaining the firſt preſcription, it adds a limitation, *viz.* of *falſehood*, with a general and comprehenſive clauſe, excluding, in the ſtrongeſt terms, every other. Then it proceeds to the next kind of preſcription, after explaining which, it adds three limitations or exceptions, of which minority is the laſt. But upon what principle of interpretation, the exception ſubjoined to the laſt ſpecies of preſcription ſhould be underſtood to be in addition to the exception ſubjoined to the firſt, eſpecially as the ſtatute, in enacting as to the firſt, has declared, in the moſt expreſs terms, that there ſhall be but one exception as to it, is not very obvious.

No argument can be drawn from favour to minors, or the ſuppoſed hardſhip that would be put upon them by not excepting minority from the poſitive preſcription, as it is clear, that perſons equally entitled to favour with them, are not excepted; ſuch as lunatics, idiots, perſons *non valentes agere*, by reaſon of forfeiture, and the like; and it is with great reaſon that the ſtatute entered into no ſuch diſtinctions, as if it had, the ſecurity of the records muſt have been ſhaken, and rendered next to nothing.

The deciſions upon this point are not at one. In the caſe of Henry Elliot *againſt* William Elliot, obſerved by Falconar, 10th November 1749, it was found, that minority made no interruption. It is thus ſtated by the Collector: "James Scott of Briſto, "with conſent of James his eldeſt ſon, diſponed 10th May 1692, "in which month he died, to William his ſecond ſon, on the nar- "rative of the receipt of a certain ſum of money, the lands of "Borthwickbrae, Chiſholm and Woodburn, and the Kirklands of "Ancrum; and William, with conſent of James, diſponed, 1695, "the Kirklands to Thomas Porteous, who was infeft 1696; and "both the brothers, 1697, diſponed the lands of Chiſholm and "Woodburn to Sir James Stewart of Goodtrees. Afterwards, "the heirs of Thomas Porteous diſponed the Kirklands to Wil- "liam Elliot.

"John Elliot of Thorleſhop had been creditor to old James "Scott, by his obligation in 1684, on which right Henry Elliot

" his grandſon purſued a reduction of the diſpoſition to William " Scott, as gratuitous to a conjunct perſon, in defraud of credi- " tors.

" *Anſwered*, Preſcription.

" *Replied*, Interruption by minority.

" *Duplied*, Minority may interrupt the negative preſcription of " the purſuer's ground of reduction running in favour of Sir James " Stewart, who made not his right real; but Thomas Porteous " having taken infeftment on the diſpoſition to William Scott, " and that by William Scott to him, there is a poſitive preſcrip- " tion run in favour of the defender, his predeceſſor, which is " not interrupted by the minority of the purſuer, who had a right " of reduction, but no real intereſt in the eſtate, having only ad- " judged after the courſe of the preſcription.

" The Lord Ordinary, in January 1749, Suſtained the defence " upon the poſitive preſcription proponed for William Elliot, as " to the lands of Ancrum, poſſeſſed by him, his predeceſſors and " authors, upwards of 40 years, upon the charter and ſeiſin 1696; " and found, that the interruptions of the negative preſcription " run againſt the bond, did not interrupt the poſitive preſcription, " as to the foreſaid lands of Kirklands."

Mr Falconar adds, that there was a reclaiming petition and anſwers, in which the point of minority was argued, but the next interlocutor proceeded upon this, that William Elliot, the purchaſer, was not obliged to inſtruct the onerous cauſe of the diſpoſition from Scott of Briſto, to William his ſon, after ſo long a time; but the firſt interlocutor is a judgment in point, finding that minority, though it interrupted the negative, did not interrupt the poſitive preſcription.

Some years after this, a contrary judgment was given in the caſe of Hamilton Blair againſt Robert Sheddan, and others, *Fac. Coll.* 6th *December* 1754.

The next caſe, ſo far as the petitioners know, in which this queſtion occurred, was that of Alexander Campbell, the heir-male of the old family of Otter, *againſt* John Campbell of Otter. In that caſe, John Campbell ſtrenuouſly maintained, both in his papers before this Court, and his caſe before the Houſe of Lords:

Appeal caſe, Reaſon third.

" That the deductions claimed on account of minorities, were " not founded in the ſtatute 1617; the deduction directed by that " ſtatute, on account of minority was intended for, and is only appli- " cable to the negative preſcription; and it would weaken too " much the ſecurity given to land property in Scotland from the

" records,

" records, if the ſtatute was to be ſo conſtrued, as to allow mi-
" norities to prevent the general ſalutary rule of the ſtatute
" from having effect: That an uninterrupted poſſeſſion of lands
" for forty years ſhall not thereafter be diſquieted by virtue of
" prior infeftments, public or private, nor upon no other ground,
" reaſon or argument, competent of law, except for falſehood."

Alexander Campbell, in his caſe, on the other hand, maintained: Reaſon firſt.
" It is an eſtabliſhed principle in the Law of Scotland, as it like-
" wiſe was in the Civil Law, that no period of time is to be al-
" lowed in the computation of preſcription, during which the
" owner was in a ſtate of *non valentia agere*, or diſability to recover
" the poſſeſſion. Upon this ground, years of minority, idiocy,
" or other diſability, are always deducted in the calculation of
" preſcription; and, therefore, the interlocutors allowing proof
" of minorities, in this caſe, are undoubtedly right. Upon the
" ſame principle, the time during which the right of the proper
" owner is under forfeiture, is neceſſarily to be deducted from
" the years of preſcription." In this caſe, there was no occaſion to determine the general point, either here, or in the Houſe of Lords. The fact not ſupporting Alexander Campbell in his plea on the minorities, he had been allowed a proof of interruption by minorities, and otherwiſe, but he failed in it. If he had brought ſuch proof, the general point would have received a judgment, both here and in the Houſe of Lords. But this Court paid no regard to the *non valentia agere* of Neil and Alexander Campbells, on account of their forfeitures; and, therefore, found that the purſuer had produced ſufficient to exclude, except as to a ſmall parcel of the eſtate poſſeſſed by the liferentrix, under a title from the old family; and upon mutual appeals, the judgment was affirmed, in as far as it found the titles produced ſufficient to exclude, but reverſed as to the liferented lands.

Lord Kames, in his laſt collection of deciſions, publiſhed as late as 1780, has given a report of the caſe of Blair *againſt* Sheddan; and the petitioners ſhall beg leave to tranſcribe what his Lordſhip ſubjoins to the report, as the account he gives of the deciſion, and the argument he offers againſt it, will, it is thought, very much take off from its weight. After ſtating the interlocutor, his Lordſhip adds, " The Court divided; thoſe who voted for
" the interlocutor did not enter at all into the diſtinction, though
" obvious betwixt the poſitive and negative preſcription, they
" ſuffered themſelves to be led by the authority of Stair and
" M'Kenzie, and by the prepoſſeſſion of common opinion.

" It

" It occurred, at adviſing, that an argument might be drawn " from the ſhort preſcriptions. The triennial preſcription of fur- " niſhings, &c. is not properly a preſcription, but only a pre- " ſumption of payment or ſatisfaction, yielding to a proof of the " contrary. It was found, *Fountainhall*, 27th *January* 1709, Brown " *contra* Brodie, That minority does not interrupt this ſhort pre- " ſcription. The reaſon is, that minority can only have the ef- " fect to relieve from leſion, occaſioned by negligence, but can- " not have the effect to vary a legal preſumption. This conſi- " deration applies moſt directly to the poſitive preſcription, which " is a *preſumptio juris et de jure* of right from poſſeſſion of 40 years, " commenced upon a title of property. There is another caſe, " from which an argument may be drawn, though not ſo directly. " The ſeptennial preſcription of a cautionary obligement, was " found to run againſt a minor, *Dalrymple*, 10th *December* 1712, " Stewart *contra* Douglas, on this principle, that the privilege " of minority does not prevail over a ſtatutory privilege beſtowed " upon another.

" The Advocates who pleaded for minority, aſſimulating our " poſitive preſcription to the Roman *Uſucapio*, inſiſted, That there " can be no poſitive preſcription, but in conſequence of the ne- " gative; and, therefore, that as minority interrupts the latter, " it muſt alſo interrupt the former. Were this argument to hold, " there could not be a poſitive preſcription of a right of proper- " ty; for ſuch a right of property does not fall by the nega- " tive preſcription. The poſitive preſcription puts an end to " every claim. Why? Not that a claim of property is loſt *non* " *utendo*, but that the ſtatutory title is a good evidence of proper- " ty againſt all the world; and if the poſſeſſor be proprietor, no " other can be. I purchaſe an eſtate affected by an adjudication. " The adjudger is firſt infeft, and he obtains a decreet of expiry " of the legal; yet his claim is not good againſt my ſtatutory " title, though his claim of property is not loſt by the negative " preſcription, becauſe it could not begin to run till the legal " was expired.

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

In

In further illuſtration of his Lordſhip's poſition, that there may be a poſitive preſcription, without a negative running at the ſame time, the petitioners ſhall only put the caſe of a man's executing an entail in favour of his ſon, and the heirs-male of his body, under ſtrict, irritant, prohibitory and reſolutive clauſes, without carrying the line of ſucceſſion any farther: That the ſon neglects the entail, and makes up titles in fee-ſimple, upon which he poſſeſſes for 40 years without having any heirs-male of his body; that afterwards, he has heirs-male of his body, the petitioners apprehend, there can be no doubt, that he would have acquired a fee-ſimple in his perſon, by poſſeſſing 40 years on unlimited titles, though there was no perſon, *in rerum natura*, againſt whom a negative preſcription could run.

But ſuppoſing it to be true, in the general, that the years of minority are to be deduced, even from the poſitive preſcription; yet the petitioners apprehend, the doctrine will not apply to the caſe of a tailzied ſettlement, whereby there are a number of ſubſtitutes, all having a title and intereſt to bring an action for making the tailzie effectual, without knowing to which of them the ſucceſſion is to open firſt.

Suppoſing that the exception of minority in the ſtatute 1617, was meant to extend to the poſitive, as well as to the negative preſcription; yet it certainly muſt be underſtood to have had in view, ſuch minorities only as had a certain definite term, and not ſuch minority as was perfectly uncertain and indefinite, and might have the effect of preventing the preſcription from running for hundreds of years, or for ever; accordingly, it ſeemed to be clearly the opinion of your Lordſhips in the preſent caſe, that it was not the minority of every ſubſtitute in an entail, that could interrupt, nor indeed, that of any other, than the neareſt ſubſtitute at the time, and it ſeemed to be ſuppoſed, that this would not render the preſcription of tailzies perpetual or uncertain, as the period can never go above 21 years beyond the 40.

But it would ſeem, that this limitation cannot have the effect ſuppoſed. If the neareſt ſubſtitute was to live long after he was minor, no doubt it would; but he may die in minority, and be ſucceeded by a minor, and ſo on. In the preſent caſe, the purſuer ſays, he was but two years old in 1775, when he came to be the neareſt ſubſtitute, and therefore, according to his argument, the preſcription could not be completed till 1798; and ſuppoſing him to die in 1793, and the next ſubſtitute to be but a year old,

twenty years more would be neceſſary to complete the preſcription, and ſo on. The limiting therefore the deduction of minority to that of the neareſt ſubſtitute at the time, muſt render the period of preſcribing againſt a tailzie very long and uncertain; and it is clear, that ſuch minority could never be in the view of the Legiſlature at paſſing the ſtatute 1617. Accordingly, ſo Lord Bankton lays it down, vol. ii. p. 163. as follows: "Rights mortified to pious "uſes have not the privileges belonging to minors, becauſe the "exception cannot be extended: Nor is the reaſon the ſame; "for the term of minority is certain, whereas the other is infinite; "and if ſuch exception took place, theſe things would be abſo-"lutely exempted from preſcription, contrary to the expreſs terms "of the ſtatute, which comprehends all kinds of rights not ſpe-"cially excepted."

And ſo it was determined in this Court, in a caſe obſerved in the *Dictionary*, *v.* ii. *p.* 122, where it was found, that preſcription might run againſt Heriot's Hoſpital, though a foundation for minors; and the reaſon given for the deciſion is in theſe words: "That the "minority ſufficient to elide preſcription, was only the ſpecies of "minority that runs out and terminates at the years of 21, which "is not the caſe of Heriot's Hoſpital, which never expires, the "boys being always turned out at their age of ſixteen, whereby it "is a ſucceſſion of *perpetual minors*; and found this Hoſpital not "within the exception of the act of Parliament 1617, touching "preſcription, which is *ſtricti juris*, and not to be extended, eſpe-"cially *ad caſus inſolitos et incogitatos*."

The deciſion is plainly founded upon this ground, That the exception in the ſtatute was only underſtood to apply to ſuch minorities as are temporary, but not to ſuch as are perpetual.

The petitioners have above put a caſe, from which it appears, that the poſitive preſcription will run, though there be no ſubſtitute at all in exiſtence. If ſo, it ſeems to follow, that it ought to run where there is a ſubſtitute in exiſtence, though he be minor, and that the fallacy of the argument on the other ſide, lies in this, That the poſitive preſcription cannot operate in favour of one perſon, unleſs there be another who is loſing by the negative. But even ſuppoſing that poſition to be juſt, it is ſubmitted, that the more proper view of the caſe is, to conſider the heirs of tailzie as a *collective body*, ſome of them having nearer, and ſome of them more remote intereſt; but all of them having intereſt, without knowing to which of them the ſucceſſion is to open; and therefore, in that light, as it cannot well happen,

that

that the whole collective body are minors, ſo it can at no time be ſaid, that the party againſt whom the preſcription is uſed, being the whole collective body, are minors, and conſequently there can be no place for the exception of the ſtatute.

The petitioners have only to add, that this very preciſe point was determined in the noted caſe of Mackerſton, which was as follows:

In 1669, Henry M'Dougal had taken a diſpoſition of the lands of Mackerſton to himſelf in liferent, and to Thomas his ſon in fee, reſerving to himſelf power to alter and diſpoſe of the ſubject at pleaſure; and a charter having followed upon this diſpoſition, both the father and ſon were infeft thereon that ſame year.

In 1684, Henry M'Dougal, in virtue of theſe reſerved powers, made an entail of the eſtate, reſerving his own liferent, and giving the fee to his ſaid ſon Thomas, and the heirs-male of his body; which failing, to the ſaid Henry himſelf, and the heirs-male of his body, with ſeveral other ſubſtitutions unneceſſary to be here mentioned, and limitations upon the ſeveral heirs, not to contract debt, nor alter the ſucceſſion.

In 1692, Henry M'Dougal died, when he was ſucceeded by Thomas his ſon, who had right to the eſtate, both by the charter above mentioned, and by the entail made by his father, but did not expede any charter upon the entail.

In 1701, Thomas died, leaving three ſons, Henry, Thomas, and William, all then infants; and Henry having made up his titles by a ſpecial ſervice, as heir to his father, upon the footing of the inveſtiture 1669, he, in 1715, executed a diſpoſition of the eſtate in favour of himſelf, and the heirs-male of his own body; which failing, to Barbara M'Dougal, his only daughter, and the heirs-male of her body, with other ſubſtitutions; and this diſpoſition was not completed till 1723, when the ſaid Barbara having been ſerved heir of proviſion in general to her father, ſhe came thereby to have right to the procuratory in the diſpoſition 1715; and having reſigned the lands, was publicly infeft therein.

Upon theſe titles the eſtate was poſſeſſed till 1738, when Thomas M'Dougal, the immediate younger brother of Henry the ſecond, having obtained himſelf ſerved heir-male and of tailzie, by virtue of the ſettlement 1684, he brought a reduction of the ſettlement made by Henry his brother in the year 1715.

It

It was alleged for the defender, that the tailzie was loſt by the negative preſcription, and alſo, that the defender's right was eſtabliſhed and ſecured by the poſitive preſcription.

To this defence two different anſwers were made. *1ſt*, That the preſcription could not begin to run till the death of Henry the ſecond, when the ſucceſſion came firſt to divide. *2dly*, It was alleged, that the minorities of the purſuer and his two brothers fell to be deduced from the preſcription. But this notwithſtanding, the Court found, " That the defenders had the benefit both " of a negative and poſitive preſcription; and further found, that " the minorities of Thomas and William M'Dougals could not in- " terrupt the preſcription, and that the purſuer Thomas M'Dou- " gal could not found upon the minority of Henry M'Dougal his " brother, in order to prevent the running of the preſcription in " favour of Henry M'Dougal, and Barbara M'Dougal, who de- " rives right from him."

By this deciſion, the following propoſitions are clearly eſtabliſhed: *1ſt*, That the preſcription of a tailzie cannot be interrupted by the minority of an heir, poſſeſſing an eſtate upon an unlimited title. *2dly*, That it cannot be interrupted by the minority of that heir who is next in the order of ſucceſſion. And, *laſtly*, It was found, that Thomas M'Dougal, who was the purſuer of the proceſs, could not found even upon his own minority, to interrupt the preſcription.

May it therefore pleaſe your Lordſhips, to review your former interlocutor; and to find, that the years of the purſuer's minority, from the period of his father's death, ought not to be deduced from the years of the preſcription.

According to Juſtice, *&c.*

JO. MACLAURIN.