

No 353.

Replied for the charger ; A minor may be restored in all cases against lesion by negligence as well as by positive deeds ; because *contra non valentem agere non currit præscriptio*. Which privilege is founded *in jure communi*, upon the lubricity of the judgment in that age. Minority is indeed *ob majorem cautelam* expressly excepted by statute from prescription in cases whereby a notable prejudice may arise ; and in all cases where that *superabundans cautela* hath been neglected by the legislators, it is virtually and tacitly excepted.

THE LORDS found, That the years of minority are not to be deducted to preserve and continue the cautionary obligation ; and found, That the minor hath no benefit of restitution against the cautioner. THE LORDS thought, That the act 1695 doth not introduce a prescription of cautionary obligations, but makes that no man engaging for another in any bond for sums of money, can be bound for the said sums longer than seven years, with this provision, that legal diligence by inhibition, horning, arrestment, or any other way done within the seven years against the cautioner for what fell due in that time, shall stand good and be effectual after expiring of the seven years. By which statute a cautioner's obligation *intra septennium* is like that of a husband for his wife's moveable debts during the marriage ; and, as a husband, after dissolution of the marriage, is no further liable to pay his wife's debts than *in quantum lucratus*, or in so far as his estate, heritable or moveable, was affected by diligence *stante matrimonio* ; so a cautioner, after elapsing of the seven years, is only bound by legal diligence affecting his real or personal estate within the seven years, for what fell due in that time.

Forbes, p. 642.

1714. February 23.

The Earl of MARCHMONT *against* Mr JAMES HOME of Ayton.

No 354.

The Lords refused to sustain prescription of a moveable bond, in respect of the interim minorities of the creditor's nearest of kin, though not confirmed executors to him.

THE Earl of Marchmont having, as executor to Robert Home of Kimmerghame, pursued Mr James Home of Ayton, as representing Alexander Home his predecessor, for payment of a sum contained in a bond granted by him and William Home, merchant in Edinburgh, to Alexander Ritchie, and conveyed to Robert Home of Kimmerghame, grandfather to Robert Home, the pursuer's immediate predecessor ; the defender *alleged* the bond was prescribed ; to which the pursuer *replied* upon interruption by the minorities of the last Robert Home, and of George his father, and by a charge of horning given upon the bond to William Home one of the co-principals therein.

Answered for the defender ; *imo*, Minority is not an interruption of prescription, but only deducted from the years of prescription ; *2do*, The minority of no person is deducted from prescription but such as had right to the subject ; and so it is, that neither George nor Robert Homes were confirmed executors *qua* nearest of kin to old Robert, creditor in the bond ; *3tio*, The charge of

horning cannot interrupt the prescription, because the same was not given to Alexander Home the defender's predecessor, but only to William Home the other co-principal, which cannot interrupt the prescription as to Alexander Home, who never knew any thing of such a charge.

Replied for the pursuer; *imo*, It is true that minority is not, in the strictest sense, an interruption that cuts off prescription, so as to make it begin again from the time of the interruption, but only stops the course of prescription during the years of minority. *2do*, Seeing minors are just as ready to neglect the establishing titles in their person to their heritable and moveable estate as to do necessary deeds for interrupting of prescription, it imports not whether the pursuer's author's titles were established by confirmation or not; and, as a summons executed by an apparent heir before his service was sustained to interrupt prescription, 24th July 1672, Edington *contra* Home, Div. 16. *h. t.*, much more must it be interrupted by the apparent heir's minority. *3tio*, Though, in order to interrupt the positive prescription founded on the act of Parliament 1617, it be necessary to certiorate the person in whose favours it is running, because there it is his own possession that acquires him the right; yet the prescription of obligations *non utendo* in virtue of the act 28th, Parl. 5. James III. may be interrupted by taking any document thereupon; and, it cannot be said, that a person who chargeth or pursueth one of several co-principal debtors in a bond, hath not taken a document upon his right, or hath not used it.

THE LORDS repelled the defence of prescription.

Fol. Dic. v. 2. p. 122. Forbes, MS. p. 29.

1746. June 25.

WALTER RUDDIMAN *against* The MERCHANT MAIDEN HOSPITAL of Edinburgh.

WALTER RUDDIMAN printer in Edinburgh, assignee by progress to a bond originally granted by Thomas Young son to Robert Young merchant there, pursued the Merchant Maiden Hospital of Edinburgh as being liable in the debt, by having accepted a gratuitous disposition from one of the representatives of Thomas Young.

The defence was prescription; and the reply, the minority of Thomas Smith, one of the intermediate authors to the pursuer.

Objected, That Thomas Smith having right by assignation, his minority could not be deducted, because the assignation not being intimated, the right was never vested in him, but remained in the cedent till the prescription was run.

No 355.
A right being assigned to a minor, his minority is to be deducted from the prescription, though the assignation has not been intimated.