

be assigned to him to satisfy the production ; but reserve to him, at discussing the reasons of reduction, to found upon his titles now produced, and, to the pursuer, his objections against the same, as accords, and remit.

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1776.      *ROSS of AUCHNACLOICH against MACKENZIE of ARDROSS.*

IN the cause between M'Kenzie of Ardross and Ross of Auchnacloch, the Lords found, that a decret of adjudication, though completed by charter and sasine, may be cut off by the negative prescription, as to some of the subjects which have never been possessed, although it has been continued in force as to the other subjects upon which possession had followed ; and, upon this ground, the heir of the family was preferred to the adjudger, with respect to certain of the lands under adjudication, but never possessed by the adjudger ; though, as to the other lands in the adjudger's possession, the adjudger was preferred.

How far diligence against a principal saves against prescription in favours of the cautioner, see reclaiming petition, *Boyd's Trustees against Earl of Home*, refused 27th February 1777.

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1777.      *MARCH . M'TAVISH against CAMPBELL of KILBERRY.*

CAMPBELL of Kilberry granted commission to M'Tavish to be his wood-keeper, and, *inter alia*, with power to cut as much hazel as he should think proper, out of the price whereof he was to retain £12 Scots of yearly wages. Soon after, Kilberry prohibited all cutting of hazel, and M'Tavish having continued in his service for 17 years, pursued him for £17 sterling of wages ; against which, one of the defences pleaded for Kilberry was, the triennial prescription. To this defence, however, the Lords seemed to pay little regard, the debt being constituted by a written obligation ; and M'Tavish having obtained decret against Kilberry, before the Sheriff of Argyleshire, the Lord Auchinleck, Ordinary, found the letters orderly proceeded, and gave expenses : and the Lords adhered.

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*WILSON against CAMPBELL of OTTAR ; and M'LEAN against DUKE of ARGYLE.*

WHERE a person, standing infert in lands as proprietor, purchases in a life-rent affecting these lands, prescription will run in his favours against the person and his heirs from whom the life-rent flowed. The life-rent will be considered as a burden upon his possession ; and his possession, even under that burden, and more so when freed of that burden, will be considered as in virtue of his property as *dominus*, and give him the benefit of prescription. If indeed

the acquisition of the liferent had been the commencement of the possession, some think that it ought to be different; *quia nemo potest mutare causam possessionis, &c.*, as in the case of *Jeffrey Irvine against Douglas*, February 1770, affirmed in the House of Lords, 26th April 1770, where a person entering by tack, but afterwards acquiring the right of property, was not allowed to ascribe his possession to the last, but to the first, in competition with the person from whom the tack and the possession flowed. The above general point was fixed by decree of the House of Lords, in the case of *William Wilson against Campbell of Ottar*; and the Lords were of the same opinion, 2d July 1777, in the case of *M'Lean of Drunnia against Duke of Argyle*. In the case of *Ottar*, the widow had been regularly infeft in the liferent of certain lands, by way of jointure, and had got possession before any diligence was done against the estate. The adjudger acknowledged her right; and, when he afterwards sold the lands, he excepted the widow's liferent from the warrandice, and gave the purchaser an equivalent of other lands during the subsistence of the liferent,—which equivalent the purchaser afterwards exchanged with the widow for her jointure lands. The particular mode of executing this bargain did not appear. On the one hand, it was argued, that the purchaser must be understood as having possessed in right of the widow and of the transaction with her; and therefore could not apply the possession to his own charter and sasine. On the other, that, standing infeft in the lands by charter and sasine, and having possession of them for 40 years *tanquam dominus*, he was secure by the positive prescription, and it was no matter how possession was obtained. The Lords gave judgment in favour of the pursuer, and against the prescription; but this judgment was reversed by the House of Lords. It was conceived to be highly inexpedient and endless for Courts to make inquiries about the origin of possession, after it was continued for forty years, and complete heritable titles in the possessor's person.

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## PRESUMPTION.

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IN different provisions by a father to children, the last is supposed to cancel the first. So argued from the decision, *Emilia Belsches against Sir Patrick Murray*, *New Coll.*, 22d December 1752. But this is a mistake. That decision proceeded upon this principle, That, as there was no natural obligation on *Sir Patrick Murray* to have provided *Emilia Belsches*, it was to be presumed that, by the second provision, he had done all he intended for her, and that he had forgot the first legacy, otherways he would either have included it in the bond or cancelled it. But it seems to be a principle in law, that, where the person who granted the provision is under a natural obligation to provide,