No 80.

The Lords found, That the extracts of the sasines could not satisfy the production in the improbation, nor could they be a title for prescription, and therefore granted certification, superseding the extract till July next, that the tenor might be closed, and ordained the same to be taken in *incidenter* in this process.

Stair, *v.* 2. *p.* 803.

No 81.

1681. *November.* Pourie *against* Lord Balmerinoch.

It was debated, but not determined, if an unregistered sasine, which is null by act of Parliament *quoad* singular successors, might be a title of a valid prescription, as a writ wanting witnesses, or labouring under some other nullity might be.

Harcarse, (Prescription.) *No* 757. *p.* 214.

1695. *December* 17.

The Administrators of Heriot's Hospital *against* Robert Hepburn.

No 82.

A procuratory of resignation, with a sasine relative thereto, was found a sufficient title for prescription, although the precept was wanting.

The Lords advised the debate between the Administrators of Heriot's Hospital and Robert Hepburn of Bearford, anent the mortified annualrents acclaimed out of his tenement in Edinburgh, called the Black Turnpike. On the 29th of December 1691, the Lords had found, that Bearford's and his author's prescription and immemorial possession without interruption, both prior to the act introducing prescription in 1617, and since the same, could not defend him, because the Hospital consisting of minors, (as all *orphanotrophia*,) prescription could not run against them; and which decision is recorded in Stair's Institutes, B. 2. T. 12. § 18.—The Lords having heard them at great length on their mutual reasons of reduction against one another's rights; such as that the Hospital's mortification was *a non habente potestatem*, no right being shown in the Bishop, the mortifier, except an obligement by the two sisters, called Crichton, to dispone, which was merely personal, and never perfected, and related only to a part of the land;—and, on the other hand, it was *objected* against Bearford, That he produced nothing but unconnected and inconsistent progresses from the Robisons and the Crichtons; and, at best, they were only sasines upon hesp and staple, which, though a manner of conveyance within burgh, yet give no right without production of their warrants, as had been frequently decided, and, particularly, 21st June 1672, Mitchell against Cowie, *voce* Proof; and 11th February 1681, Irvine against Corsen, Ibidem.—The Lords thinking both their rights defective,

shunned to determine thereon, but recurred to the first point anent the prescription; and, after considering the act of Parliament 1617, they found sufficient ground to repone Bearford against the former interlocutor, there being, as yet, no final definitive sentence in the case to make a *res judicata*; and found the exception of minority, contained in that act, as sufficient to elide prescription, was only that species of minority that run out and terminated at the age of 21, which was not Heriot's Hospital's case; that never expires, the boys being always turned out at their age of 16, and so it is a succession of perpetual minors; and found the Hospital not within the exception of the act of Parliament, which is *stricti juris* not to be extended, especially to *casus insoliti et incogitati*; and, therefore, preferred Bearford on the head of prescription, unless the Hospital would reply upon interruptions within the last 40 years. The case was learnedly argued on both sides; for instances were given in behalf of the Hospital of perpetual minorities, and yet such as would have the benefit of the exception in the act of the grand prescription. Thus, one dying at 21, and leaving a boy of a month old, and he marrying at 20, may leave another infant, and so for many generations, and yet they would all have the defence of minority. The title of the Lord Jedburgh is entailed to the eldest son of the Earls of Lothian, and sleeps while that does not exist, and so soon as he attains to be Earl; so this may prove a continued tract of minors, and would certainly have the benefit thereof. On the other hand, it was *urged*, How insecure this would render all commerce and transactions with such Hospitals, and destroy property; and at this rate, if they were infeft in wardlands, they would be in perpetual ward, which were absurd and prejudicial to the Hospital's interest; and in France, where they have such foundations, called Maison-Dieu des enfans trouvez, being Hospitals of foundlings, though minors, yet their Lawyers observe, they have not the privilege of minority.

No 82.

1697. *June* 10.—WHITELAW reported the Administrators of Heriot's Hospital against Robert Hepburn of Bearford, mentioned December 17th, 1695.—THE LORDS had found the Hospital had not the benefit of the exception of minority, contained in the act of prescription, but that the same ran against them, as well as if they were majors; and since that time, the LORDS, by another interlocutor, found that sasines upon hasp and staple having no other warrant but the clerk of the burgh's assertion, was not a sufficient title for prescription, and not contained in the act of Parliament 1617, which mentions sasines upon retours, charters, and precepts of *clare constat*, and no word of hasp and staple; so that acts of Parliament being *strictissimi juris*, are not to be extended; and these being omitted, it must be presumed to be *casus de industria omissus*, and not *per incuriam*. Bearford reclaimed against this by a bill, showing this preparative would wholly frustrate and evacuate the benefit of prescription *quoad* lands within burgh, where the usual way of infefting was by hasp and staple. THE LORDS waved the reconsideration of this point, in regard he founded on

No 82. another title of prescription, *viz.* a procuratory of resignation, and a sasine following thereon, in 1517, with 40 years possession subsequent to the same. To which it was *answered*, This was no more authorised for a title of prescription by the act of Parliament, than a sasine by hasp and staple, and was not the immediate warrant of the sasine, wanting a precept of sasine. *Replied*, If it had been on a precept, he needed not recur to prescription; for the validity of such a complete right would have preferred him; and according to Sir George M'Kenzie's Observations on the said act, a disposition alone, without any other warrant of the sasine, is enough for prescription.—The Lords found this procuratory of resignation, with a sasine relative thereto, a sufficient title for prescription. Then it was *objected*, That the sasine produced was only a transumpt out of the official (in whose place the Commissaries after the Reformation succeeded) of Louthian's book, and bore no citation of parties, but only by a general edictal one at the church-door of St Giles's. *Answered*, It was already sustained as sufficient to exclude prescription, and satisfy the production, and could not be quarrelled now.—The Lords found the transumpt probative *in re tam antiqua*. Then, for connecting the progress for making up the 40 years, the Lords remitted the perusal of the evidents to the Reporter.

1697. *June* 18.—The cause between Heriot's Hospital and Bearford, mentioned 10th June current, was farther heard, upon the interruption produced by the administrators, by a summons executed in 1648; against which many nullities were objected by Bearford; as that the body of the summons is blank, both as to the names of the persons defenders, and the writs; and though Bearford's father be named in the executions, yet that cannot connect nor tack it to the summons; because the execution is on a paper a-part, and does not express the pursuer, and might have been the execution of another process; likeas, the prescription has run since; for the next interruption is not till December 1689, and so there is 16 months above the 40 years; and though, at the Revolution, some time was counted, yet that will not bring it within the 40 years. *Answered*, Executions unformal and null in themselves *quoad* the effect of sustaining process, yet may be good and valid interruptions, as has been oft found by the Lords; 25th November 1665, Whyte *contra* Horn, No 44. p. 10646.; 14th July 1669, Earl of Marshall *contra* Leith, No 8. p. 10323.; 6th July 1671, M'Crae *contra* Lord M'Donald, *infra*, *h. t.*; and 9th January 1675, M'Intosh *contra* Fraser, *infra*, *h. t.*: And though it be in a paper a-part, and not indorsed on the back of the summons, yet that has been sustained for an interruption, the pursuer giving his oath that he found it so; 11th February 1673, Muir of Rowallan *contra* Lawson, *infra*, *h. t.* And, to prove that prescription is not run since that interruption *in anno* 1648, not only must the inter-reign in 1689 be deduced, but also the surcease of justice at the English invasion, and the time the Hospital was then under sequestration, must be subduced, they being *non valentes agere*, as was decided in a pa-

rallell case, 25th January 1678, Duke of Lauderdale *contra* the Earl of Tweeddale, *infra*, *h. t.* *Replied*, That whatever might be done in the short prescriptions, as the triennial, or the like, yet, in the grand 40 years prescription, no time is discounted, save what is done by an express law; else if one would precisely make it only to consist of *tempus utile*, wherein judicatories are sitting, and there is *copia adeundi prætorem*, then Sundays and Mondays behoved also to be discounted, and all the anniversary vacation-days. THE LORDS decided only on the first objections against the legality of the execution, and found it so null, as they would not so much as allow it to serve for an interruption; and so preferred and assoilzied Bearford from this reduction and poinding of the ground pursued against him, for the ground-annual of 48 merks out of the tenement called the Black Turnpike belonging to him. No 82.

Fol. Dic. v. 2. *p.* 103. *Fountainhall, v.* 1. *p.* 688. 774. & 777.

1740. *December* 5. AGNES GED and her HUSBAND *against* BAKER.

FOUND, that 40 years possession upon an infeftment proceeding upon a charter of adjudication, excluded all objections of nullities against the adjudication or grounds thereof, although there had not been 40 years possession since the expiry of the legal; but found that the years of minority were to be deducted. No 83.

N. B. There is no doubt but it is competent to allege payment within the legal, any time within 40 years after the expiry of the legal.

Fol. Dic. v. 4. *p.* 95. *Kilkerran*, (PRESCRIPTION.) *No* 6. *p.* 418.

1745. *June* 7. JOHN JOHNSTON *against* JAMES BALFOUR.

No 84.
Forty years possession since the date of a charter and sasine, bearing to have proceeded on an apprising, which was not produced, was sustained to exclude a reducer, tho' it was alleged the possession was older than the date of the charter, and had begun upon the obtainers thereof being entitled

JOHN JOHNSTON, as adjudger from the apparent heirs of Patrick Stewart of Beath, brought a reduction of the rights of James Balfour present possessor thereof, who, to exclude the pursuer's title, produced a charter, 24th February 1694, of the lands in favour of James Balfour and Marion Bruce, his grandfather and grandmother, and sasine thereon, 19th January 1699, bearing to proceed on an apprising led by them, 29th July 1664; and on these titles alleged possession for more than 40 years.

A proof of the possession being led, it was fully made out, and appeared to have commenced before the date of the charter.

Pleaded for the adjudger, That Patrick Stewart dying in the year 1654, Marion Bruce his widow had married to James Balfour, and they had taken possesion of the estate under colour of her provisions, which were a liferent of the house and gardens, and of the coal, and an annuity of L. 1000 out of the lands; and she had a direct title to possess the house and coal; and with re-