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ten years. 2*do*, The clause of exception doth rather concern the quality of interruption by wakening, than the time of prescription.

The Lords found the action prescribed in ten years, though there was no wakening till the eighth year; and that another ten years must run from that wakening.

Harcarse, (Prescription.) *No* 769. *p.* 218.

1687. *February*. Colonel Graham *against* Lin of Larg.

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A man's creditor becoming rebel, and the forfeiture being gifted, interruption by citation at the rebel's instance before forfeiture altho' not renewed every seven years by the donatar, was sustained.

Colonel Graham of Claverhouse having obtained a gift of Patrick M'Dougal's forfeiture, and having pursued Fergus Lin of Larg for the sum of 4000 merks, contained in a bond granted by him to M'Dougall of French, and assigned to Patrick M'Dougall, his brother; *alleged* for the defender, That the bond was prescribed, being dated in the year 1642, and the sum payable at Whitsunday 1683. *Answered*, That the prescription was interrupted by a citation at the rebel's instance against the defender long within the years of prescription. *Answered*, That the citation cannot be sustained as an interruption, because it has not been renewed every seven years, conform to the act of Parliament concerning interruptions. *Replied*, That the act of Parliament takes no place in the case of a donatar of a forfeiture; because it is not to be supposed, that a donatar can be master of the papers or the writs and evidents belonging to the rebel, or know his rights; and as prescription cannot take place in such cases in the general, much less in that particular case, seeing the summons of interruption at the rebel's instance against the defender was seen, and returned, and called, and a decreet marked by the clerk upon the back of the summons, which, as it kept the process from sleeping, so that there would be no necessity of a wakening, albeit the decreet should lie over unextracted the space of seven years, so by that same reason, it should hinder prescription, and was so found lately in the case of Innes of Lithuel against the Lord Duffus. The Lords repelled the allegeance proponed against the interruption produced, in regard of the answer, and sustained the interruption.

Fol. Dic. v. 2. *p.* 132. *Sir P. Home, MS. v.* 2. *No* 874.

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The act 10th, Parl. 1669, extends to all interruptions, as well of short as of long prescriptions.

1699. *July* 21. Earl of Forfar *against* The Marquis of Douglas.

By contract of marriage betwixt the Earl of Angus and Lady Jean Weemys, his second Lady, the baronies of Bothwell and Wandle are provided to the heirs of that marriage, which the Earl obliges himself to be worth 10,000 merks yearly.

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The Marquis of Douglas, the Earl's son, made an agreement with the friends of the Earl of Forfar, his brother, the heir of the second marriage, whereby the said baronies are provided and secured to the said Earl of Forfar; but the obligement, that the sum should be worth 10,000 merks, is discharged.

The Earl of Forfar ratified the said agreement in the year 1669, being still minor, and obliged himself, on fidelity and honour, never to come in the contrary. But, after his majority, he raised a reduction *in anno* 1674, *inter annos utiles*, and executed the same for the first diet, and proceeded no further, till the year 1683, and then raised another reduction; in which it was *alleged* for the Marquis, That the ratification 1669 could not be quarrelled; because, albeit he did execute a reduction *inter annos utiles*, yet that was become ineffectual and void; because the 10th act, Parl. 1669, anent interruptions, provides expressly, That all citations made use of for interruptions, whether for real or personal rights, be renewed every seven years, otherwise to prescribe; and the foresaid citation, *in anno* 1674, was not renewed till the 1683.

It was *answered*, That the act did only relate to long prescriptions; *2do*, The running of the *quadriennium utile* was never reckoned a prescription by any law; but minors lesed had a privilege, that they may be restored, if they revoke and raise reduction *intra annos utiles*; and then the benefit of that privilege is perpetual, till it be excluded by the long prescription.

It was *replied*, The act of Parliament relates to interruptions of all prescriptions; and there is more reason that the same should be extended to the shorter prescriptions, than that of 40 years; because, where the nature of the obligation was circumscribed to a short course of time, a citation ought not to prolong the action beyond the course of the longest prescription; *2do*, It is indeed a privilege, that minors lesed can be restored; but the benefit of restitution is circumscribed to four years; and, if these elapse, the party is for ever excluded by prescription; and the way that the law has afforded for obtaining restitution, being by citation, it is expressly provided, that all citations for interruptions shall prescribe, if not renewed in due time; and consequently the pursuer's right or privilege to reduce is prescribed, as is plainly stated by Viscount Stair, tit. Prescription, § 31.

'The Lords found, That the act of Parliament did extend to all prescriptions, and that it did comprehend the pursuer's case; and found the former process was fallen, and assoilzied.'

8th December 1699, after a bill and answers, and hearing *in præsentia*, 'the Lords adhered, and found the act 1669 extended to all interruptions, as well of short as long prescriptions.'

Fol. Dic. v. 2. 1. *p.* 132. *Dalrymple, No* 15. *p.* 18.

*** Fountainhall reports this case :

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1699. *July* 21.—The Earl of Forfar pursues the Marquis of Douglas, his brother, for reduction of a contract entered into by him in his minority, accepting the lands of Wandle, &c. as paying 10,000 merks by year, whereas they will not exceed 6000 ; and though he obliged himself on his honour, (which is equivalent to a Peer's oath in England) not to revoke, yet as lesed he now quarrelled the same. *Alleged*, His process was prescribed, because, though he had intented his reduction *intra annos utiles*, and revoked, yet he had suffered it to lie over for seven years thereafter without insisting, or any document for interruption ; whereas by the 10th act of Parliament 1669, all citations used for interruption, whether of real or personal rights, must be renewed every seven years, otherwise they prescribe. *Answered*, 1*mo*, That must be only understood of the great prescription of 40 years ; 2*do*, If it includes also the shorter prescriptions, yet it cannot be extended to the *quadriennium utile*, which is not properly a prescription, but rather a privilege indulged to minors. Yet Stair, lib. 2. tit. 12. thinks that act of interruptions concerns the *quadriennium utile*, as well as any other prescriptions. This being the first time that this defence was proponed, the Lords, after reasoning, by plurality of votes, sustained the allegeance, and found the Earl's action prescribed, and assoilzied the Marquis, which was the first decision in this point.

This being reclaimed against, the Lords adhered twice to their interlocutor by a scrimp plurality, in December 1699.

1702. *February* 25.—The Lords advised that long depending reduction, at the instance of the Earl of Forfar against the Marquis of Douglas, mentioned 21st July 1699, the Earl not having informed, but by a petition craved a continuation of the advising till next session. *In anno* 1628, Archibald Earl of Angus, eldest son to the Marquis of Douglas, married Lady Anne Stewart, daughter to the Duke of Lennox ; and, in the contract of marriage, there is a prohibitory clause, that Angus shall neither sell, dispone, nor contract debt above the sum of 10,000 merks, unless to acquire in the rights of his teinds ; but there is no irritancy in case of contravention. The Lady dying, left James the late Marquis of Douglas, the only son of the marriage. The Earl of Angus, in 1649, enters into a second contract of marriage with Lady Jean Wemyss, daughter to the Earl of Wemyss, to whom he provides in liferent the lands of Preston and Buncle, worth more than 10,000 merks by year, and to the heir-male of the marriage the lands of Bothwell and Wandell, which he obliges himself shall be worth 10,000 merks of yearly rent. The Earl of Angus dies in 1655, and leaves Lord Archibald Douglas, now Earl of Forfar, his heir of that second marriage. The old Marquis the grandfather being yet on life, and considering that, by his son's cautionries for Abercorn, and his provi-

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sions for the second marriage, he had brought the estate to the brink of ruin, he, as a common impartial arbiter betwixt his grandchildren, dispones the estate of Douglas to James his eldest grandchild, with power to him to quarrel all the debts contrary to the provisions and limitations of the first contract of marriage. In 1659, the Lady Angus being to marry the Earl of Sutherland, there were letters obligatory passed betwixt James Marquis of Douglas and his tutors on the one part, and Archibald Earl of Forfar, his brother, and his tutors, on the other part, whereby the old Marquis dispones Bothwell and Wandell to Forfar, his younger chandchild, with this quality, that, by his acceptance of these lands, he should be bound not to claim the benefit of upholding the rental to be 10,000 merks of free rent; and for conveying the right, the Marquis of Douglas was to enter heir to the Earl of Angus his father; whereas he could have bruiked, by Mr William Douglas's apprising, without being heir. In 1669, James, the last Marquis of Douglas, being major, he grants a ratification of the letters obligatory entered into *in anno* 1659, and dispones to the Lord Forfar, his brother, these lands of Bothwell and Wandell, providing always, that if he rest not satisfied therewith at his majority, nor accept them in full satisfaction and implement of the obligements in his mother's contract of marriage, then this right should be void and null, and the Marquis' service as heir should be void, and he be in his own place. Of the same date, the Earl of Forfar, being yet minor, granted a bond narrating the former agreement in 1659, and that presently entered into, and that it would be burdensome to the family of Douglas if he insisted for his whole claim; therefore he accepted of the disposition of the foresaid lands in satisfaction, and obliged himself on his fidelity and honour never to come in the contrary, but to ratify the same at his majority. Forfar becoming major in 1674, and judging himself lesed by these settlements and transactions made in his minority, and that the lands he got for 10,000 merks were not worth 7000, he signed a revocation of all these deeds within his *quadriennium utile*, and raised reduction thereof in 1675; but not having wakened this process in terms of the 10th act of Parliament 1669, the Lords, by their interlocutor *supra*, found that reduction fallen. Then my Lord Forfar recurred to another reason beside his minority and lesion, that his bond of ratification was *ipso jure* null, being subscribed by him when he had curators, and they not consenting; and produced, for proving thereof, his act of curatory anterior to his bond of ratification in 1669. *Alleged* for the Marquis, That his act of curatory was under so many defects, that it was plainly null; for it wanted the solemnities required by the 35th act of Parliament 1555, it bearing no citation to the lieges, nor any interposition of authority by the Judge, and the nomination was vitiated and interlined. *Answered*, Many of the solemnities of that old act are in desuetude, and innovated by the act 1672; and such descanting would overturn most of the curatories in Scotland, being obnoxious to more informalities than any that this labours under. Some of the Lords thought, that, albeit this act of curatory was of a date prior to

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the bond of ratification, yet there appearing no act of administration till thereafter, therefore my Lord Forfar was to be reputed as wanting curators during that interval, and so the deed subsisted; but the plurality of the Lords, by a vote, sustained the curatory as valid *ab initio.* Then it was contended for the Marquis, that Forfar's curators were in effect consenters to his bond of ratification, in so far as they are subscribing witnesses, both to the Marquis' disposition to him, and to the Earl's bond of ratification, and their presence was a sufficient authorising without any formal acceptance *l.* 20. *D. De auctoritate tutorum.* And Paulus Montanus, *De tutelis, cap.* 30. *num.* 44. shew, that *nonunquam tacita tutorum auctoritas sufficit.* *Answered,* The interposition of the authority of a curator by our law, requires, not only presence, but also express consent in writing; neither does it infer that solemnity that they are nakedly witnesses to a subscription, which imports no more but the verity of the deed; and simple knowledge was never sustained as sufficient with us. *Replied,* It is acknowledged that the curator's authority requires consent, as well as presence; but this consent may be differently signified: If a horse be delivered to a minor before his curator, he will be liable in the price conform to the bargain, as fully as if the curator consented; and even so of a bond delivered to him in presence of his curators, this will make it a delivered evident: This point the Lords did not decide. Then the Marquis *contended,* That if the Earl had upon oath ratified the agreement, and sworn never to come in the contrary, he would never have been reponed, being before the act of Parliament in 1681, discharging the oaths of minors; but so it is, he has done the equivalent, engaging himself not to quarrel or impugn upon his honour, which in England is all the oath the nobility there give: Likeas, he has homologated the transaction, by possessing the lands after his majority, by virtue of the charter and sasine taken on that disposition, and by having entered vassals, and pursued processes upon that very right. *Answered,* There was no oath interposed in this case; and for the homologations, the deed being intrinsically null, it could not be homologated, a *non ens* having neither proprieties nor accidents: Likeas, he revoked it immediately after his majority; and homologation never takes place where it can be ascribed to another title; but here his possession is plainly ascribeable to the provisions in his mother's contract of marriage of these lands to him as heir of the marriage, and he might very well use the disposition thereof as an implement of the said contract *pro tanto,* without the hazard of homologation; and he might have completed his own rights on the obligements of the said contract of marriage. *Replied,* The revocation was a latent deed whereupon nothing ever followed; neither was his protestation any better, being *contraria facto;* and the very next minute's possession, or granting a charter to a vassal, or pursuing processes, without renewing his protestation, did take all that was before off the file, and was a new act of acceptance and homologation; neither did the Earl ever once attempt to make up a new title to possess by, which he might have easily done by entering heir of provision by

a general service, or by pursuing the Marquis to implement the contract. 2do, He can never ascribe his possession to his mother's contract of marriage, that being only a personal obligement, and no title for possession at all; and it is plain that deeds of far less consequence than these condescended on have been found to import an homologation, and make deeds subsist, as valid, which otherwise were questionable, as appears from the tit. Cod. Si major factus ratum habuerit, where the lawyers say, minor non restituitur, sive expresse ratum habuerit verbis, seu scriptis, vel tacite, l. 3. § 1. D. De minoribus; and the following decisions are conform, 24th January 1624, Macmorran *contra* Black, *voce* WRIT; 12th July 1625, Henrison *contra* E. of Lithgow, No 36. p. 6433.; 30th July 1630, Johnston *contra* Hope, No 175. p. 9041.; 20th March 1633, Cow *contra* Craig, *voce* WRIT; 14th November 1665, Skene against Ramsay, No 20. p. 5634. And farther, if the Earl seek to be reponed against that transaction, then the Marquis must be likewise restored to all he gave, and all that was competent to him before that agreement; and so the Earl must not only quit the possession of the lands, but restore all he has intromitted with by virtue of that right. The LORDS found the homologations sufficient to cut off the Earl's reduction, and to exclude and debar him from seeking the rental of his lands to be made up 10,000 merks by year. Some of the Lords urged to have that defence of the Marquis' likewise considered, which was founded on the prohibitory clause contained in the first contract of marriage; for if *verba non debent esse otiosa et elusoria*, then that interdiction behoved to operate something; and though it could not militate against the creditors wanting an irritancy, yet it might be valid against a son of a subsequent marriage to reduce or moderate extravagant provisions; but the case being gained on the homologations, the Lords saw no great need of deciding the import of this prohibitory clause. The Lords thought, if the Earl of Forfar had had in his person any other real right to the lands than what flowed from the transaction he now quarrelled, it would elide the homologations founded on; but he had no other. Though the lands given him were but 7000 merks by year, instead of 10,000 merks, yet a considerable part of them consisting in superiorities and feu-duties, they are much more worth than the like rent elsewhere; for, in buying and selling, he would get 30 years purchase for these superiorities, whereas property lands seldom exceed 20.

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On the 28th of February, the Earl gave in a petition reclaiming against the foresaid interlocutor: 1mo, That the deeds founded on as an acceptance exclusive of his reduction, did not extend to a homologation, and his possessing by virtue of that charter and sasine was no ground, for he could have possessed by the obligement in his mother's contract of marriage; neither did he quarrel that disposition, but only the clause restricting the warrandice, that the Marquis should not be obliged to uphold the lands disponed to be worth 10,000 merks by year. 2do, *Esto* these deeds were relevant to infer his acceptance, and to exclude him from quarrelling the transaction made in his minority, yet

No 474. the interlocutor has gone too far in finding them proved, seeing the charter and sasine are but dropt in lately, and were never produced *in modum probationis*; and though they were argued upon as lying in process, yet that was only hypothetically, *esto* they were there, yet they did not infer the conclusion drawn from them, and therefore the most that the Marquis can demand, is an act to prove these deeds of acceptance. *Answered*, The Earl's mother's contract could never be a title of possession, it not being made a real right, but standing *in nudis terminis* of a personal obligement. And as to his dividing the disposition, that contradicts all the principles of law; for he cannot approbate a writ in part, and repudiate the same writ *quoad* another part of it. To the *second*, it is wondered, how the Earl comes to deny what he never controverted in the whole debate, his being infeft, and in possession, since ever his minority. The Lords adhered to the interlocutor *quoad* the relevancy; but as to the writs produced for proving the same, they continued the advising till June next. The Earl of Forfar protested for remedy of law to the Parliament.

Fountainhall, v. 2. *p*. 63. & 150.

1704. *February* 17. Johnston *against* Kennedy.

No 475.

Interruption by executing an inhibibtion upon the ground of debt, falls not under act 10th, Parl. 1669.

Fol. Dic. v. 2. *p*. 131. *Fountainhall.*

*** This case is No 429. p. 11259.

1705. *February* 2. Wilson *against* Innes of Auchluncart.

No 476.

The acts 1669 and 1685, requiring interruptions to be renewed, relate only to the case of citations; but where processes are further prosecuted to compearance and judicial acts, the same will make a sufficient interruption for 40 years, without necessity of being renewed.

Fol. Dic. v. 2. *p*. 132. *Dalrymple.*

*** This case is No 181. p. 10974.

1706. *January* 23.
Earl of Sutherland *against* Earls of Crawford, Errol, and Marischal.

No 477.

In a declarator of precedency betwixt two Peers, the one founding on prescription, and the other opponing interruption by a citation; the Lords found, that