

modum probandi by the 83d act 1579, not being pursued within three years after the furnishing. *Answered*, This Braid was minor all the time, and it is an uncontroverted principle, that prescription runs not against minors. *Replied*, That minority can take no place here, not being excepted in the act, and seems to be *de industria* omitted, being expressly mentioned in the preceding acts of that same Parliament anent prescription of spuilzie; and Sir George M'Kenzie in his Observations on these acts, tells us, that in merchant-accounts, minority is not considered, for it is not a prescription of the debt, but only of the manner, that it shall not be proved by witnesses, but only *scripto vel juramento*, seeing it is presumable, that such accounts are not suffered to lie over above three years; and it was so found in a parallel case betwixt the Marquis of Douglas and the Earl of Forfar, (*see APPENDIX.*) *Duplied*, Minority needs not be excepted, because it is a defence arising from the common law, and so *inest de jure*, unless it be expressly discharged. THE LORDS found minority took not place here, and so the account was prescribed *quoad modum probandi*, and could now be only proved by his writ or oath.

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Fountainhall, v. 2. p. 485.

1712. December 10.

JAMES STEWART and his FACTOR *against* ARCHIBALD DOUGLAS of Cavers.

JAMES STEWART charges Cavers, who suspends on this reason, that he was cautioner in the bond, and no diligence done within seven years, and consequently he was free, conform to the 5th act, Parl. 1695, whereby it is provided, that no cautioner, though bound conjunctly and severally, shall be bound after seven years.

It was *answered*; The charger was minor, and therefore the years of his minority are to be subduced, and so there will not be seven years from the date of the bond to the charge for payment.

It was *replied*; That the years of minority are not to be subduced from any prescription except where it is so specially provided, as will appear more clearly from the several acts concerning prescription, in which minority is always excepted, when it is so designed by the Parliament, and where there is no exception inserted, there is no privilege by law or practice allowed to minors, as in the case of merchants accompts and actions of removing; and it is to be observed, that in the same Parliament there is a prescription of three years in actions of spuilzie, in which there is an exception of minority, but no exception in the case of house mails, merchant accompts or removings; and therefore minors were never held to have any privilege in the other cases wherein there was no exception, nor in any other prescription where the law did not provide specially in their favours; and even in comprisings, which are penal diligences,

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The septennial prescription of cautionary obligations runs against minors.

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there was anciently no privilege of minority, till by a later statute it was provided that legals should not run against minors ; and the act of Parliament providing all comprisings within year and day to come in *pari passu*, provides no special privilege to minors not doing diligence within the year ; likewise the three years allowed for the diligence of creditors of defuncts preferable to the diligence of apparent heirs, affords no privilege to minors, and there is no example distinguishing minors from majors in point of prescription, where they are not specially mentioned in the law.

2do, There is in this case no proper prescription, for here the law provides that a cautioner shall not be bound after seven years ; so that the case is the same by the provision of law as if by paction the bond had borne that quality, in which case the cautioner would have been free not by prescription, but by the nature and quality of his obligation, and the law operates as much as paction would have done ; and even diligence done within seven years, does not preserve the right after the course of seven years, but only secures the principal and annual-rent falling due the time of that diligence, which is otherwise in the case of all interruptions of prescriptions.

It was *duplied* ; That, by the common law, prescription did not run against minors, and by the first act of Parliament that relates unto prescription of obligations if not pursued within forty years, there was no exception of minority ; nevertheless, minors were understood to be excepted, as is observed by Spottiswood, decided *anno 1590*, The Duke of Lennox *contra* The Laird of Balfour, No 344. p. 11147. The case was this ; Cardinal Beton granted a bond to the Treasurer, which was assigned by the King to the Duke, who thereupon pursued the Cardinal's heir, and he *alleged* prescription. It was *answered*, The years of minority were to be deducted, and since the obligation, the Princes, his authors, were almost ever minors.

It was *replied* ; That *præscriptio introducta ex lege* did take effect *contra ipsos minores* ; which the LORDS repelled.

2do, Although in many cases of prescription minors have no privilege, yet particular reasons can be given in all these cases which will difference them from the present question ; and in general, where any benefit is introduced by a statute to such as did diligence in the way and during the time prescribed, there the privilege is equally competent to all, and if minors do not observe the rules and conditions, the statute takes no place, as in the case of the creditors of a defunct competing with the creditors of an apparent heir, or creditors comprising within year and day ; but here there being an obligation competent to minors by paction, and the effect of it restricted to a period of time by law, that law being penal upon such as neglect diligence within seven years, minors ought to be exeemed from that penalty, and the years of minority subdued, at the least they ought to have the benefit of restitution *intra quadriennium utile*, *ad hunc effectum*, to restore them to the benefit that a person being major would have had by doing diligence within seven years, that is, that the ob-

ligation may stand good for the principal sum and seven years annualrent, seeing this charger did diligence within the *quadriennium utile*.

3tio, The prescription of merchant-accompts is not simple but *quoad modum probandi*; and the prescription in removings is of no prejudice to minors, because they can always warn anew.

It was *triplied*; As to the practise observed by Spottiswood, it was upon a very slender debate, and is marked to be *præsente rege*, who was the Duke of Lennox' cedent, and is a single decision, since which many acts of Parliament have been made concerning prescription, which have cleared that the Parliament intended not minors to be farther favoured than was specially expressed in these acts; neither is this a case of prescription, as has been already observed.

2do, Neither can the minor have the benefit of restitution *intra quadriennium utile* in this case, more than the same would have been competent if the bond had been qualified in the same way as if the effect of it is restricted by law, and if restitution were allowed in this case, it would on the same ground be competent for restoring minors in the case of not coming in *pari passu* with other adjudgers, or of not doing diligence within three years against the defunct's estate to obtain preference against the creditors of the heir, and in all other prescriptions which run against minors.

“ THE LORDS sustained the defence, and repelled the reply of minority, and found the charger had not the benefit of restitution *intra quadriennium utile*.

February 14. 1713, There was a reclaiming bill against the Lords' interlocutor, and answers made thereto, but the parties have not since insisted for a decision.

Fol. Dic. v. 2. p. 123. Dalrymple, No 94. p. 132.

* * * Forbes reports this case :

ARCHIBALD DOUGLAS of Cavers charged at the instance of James Stewart and his factor for payment of L. 1000 Scots principal, annualrents and penalty contained in a bond granted by the deceased Thomas Scot of Whitslead as principal, and the said Archibald Douglas and others as cautioners to the said James Stewart, dated in the year 1700; Cavers suspended upon this reason, That his obligation as cautioner is prescribed by the act 5. Parl. 1695, seven years being elapsed since the granting of the bond without any diligence done thereon.

Alleged for the charger; Prescription runs not against minors, and deducting the charger's minority, the obligation is not as yet prescribed.

Answered for the suspender; Albeit a minor may be restored against the long prescription of forty years, the shorter prescriptions (such as this of cautionary obligations is) run against him, unless he be exempted expressly by statute.

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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.

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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