1739. *November* 30.

M'DOWALL of Arncaple *against* M'DOWALL of Gallanach.

No. 19.

A SUMMONS executed, though not called within year and day, is a sufficient interruption; but the executing a blank summons is no interruption. (See DICT. No. 441. p. 11273.)

1739. *July* 10, *Nov.* 27, *December* 5.

THOMAS M'DOWALL *against* BARBARA M'DOWALL, and GEORGE HAY, HER HUSBAND.

No. 20.

THE estate of M'Kerston standing settled by the investitures to heirs-male without limitations, Henry M'Dowall in 1684, by virtue of a reserved power and faculty in his son Thomas's infeftment in the estate, made a strict entail with limitations and irritancies in favours of heirs-male; but thereon nothing followed, nor was it ever made public till the year 1738. Henry possessed by virtue of his reserved liferent till his death in 1692, when his son Thomas possessed in right of his infeftment of the estate that he got before that entail, and died in 1701, leaving three infant sons, Henry, Thomas, and William; and Henry made up his titles by serving heir of the investiture; and having only one daughter, granted a procuratory of resignation to himself and the heirs-male of his body, which failing in favours of the said daughter; and upon his death in 1722 the daughter served heir to the procuratory, obtained a charter of resignation, and was infeft; and in 1733, by contract of marriage with George Hay, settled the estate to him in liferent, and the heirs-male of the marriage in fee. And Thomas M'Dowall, the second son of Thomas, and brother of the last Henry, having made up a title to the entail 1684, pursued reduction of the Lady's and her husband's infeftment. And the Lords found, that the bond of tailzie 1684 having lain latent, and no document taken upon it for upwards of 40 years from the date thereof, and the estate having been possessed by Thomas and Henry M'Dowall, and Barbara M'Dowall, present possessor thereof for upwards of 40 years, in virtue of a disposition and infeftment in 1668, they have the benefit both of a positive and negative prescription, and that the tailzie 1684 cannot now be set up as a title of eviction of the estate from the said Barbara M'Dowall, notwithstanding that Henry and Thomas, her father and grandfather, were heirs by the tailzie 1684 as well as by the disposition and infeftment 1668; and found that the minority of Thomas

M'Dowall, pursuer, or William M'Dowall, his brother, could not interrupt the prescription, they being only substitutes by the tailzie 1684, and the right thereof not having devolved on them during their minority; and found that Thomas M'Dowall, pursuer, cannot found on the minority of Henry his brother, in order to prevent the running of the prescription in favours of the said Henry himself and Barbara M'Dowall, who derives right from him; and found, that George Hay having entered into marriage-contract with Barbara M'Dowall, who stood infeft by virtue of a progress of infeftments, containing no limitation upon her father, and having become bound to advance L.1500 sterling toward payment of the debts of the family, and upon the mutual agreement of the estates being settled upon him in liferent and the heirs-male of the marriage in fee; the contract was fully onerous, and therefore must be available to the said George Hay and the heirs-male of the marriage, notwithstanding of the latent tailzie 1684, the same having never been recorded, and no infeftment nor document taken thereon. No. 20.

*** *July* 10, 1739.—The Lords repelled the nullity objected to the tailzie 1684, and the objection to the maker's want of power, and the prescription of his reserved faculty; but they found, 1*st*, The tailzie itself prescriptible even during the possession of Thomas and his son Henry M'Dowall, the defenders father and grandfather, notwithstanding the decision in the case of Dundonald; and I own I was of the same opinion, because I thought the case quite different, that in Dundonald's, William Lord Cochrane's infeftment, as it was the only true right to the estate, so it was unlimited, and no burden upon the heirs succeeding, whereas here Thomas's infeftment was the only, at least most proper title of possession, being the only legal right, and the personal tailzie was a burden upon them, and in the question of prescription must be consdered as a debt due by them. But Arniston and others, who voted on the same side of the question, thought there was little or no difference betwixt the two cases, and that the decision in Dundonald's case was wrong. 2*dly*, They found it actually prescribed, notwithstanding the minoritiy of Henry during Thomas's possession. Indeed, I humbly differed in this. I thought the prescription could not begin to run till after the death of Henry the maker, and after his death I thought Thomas his son was debtor in the obligation, and his son was creditor, and when Henry the son succeeded, he became debtor and the pursuer creditor. And though I thought, where the first heir was major, the minority of remote substitutes might not perhaps be deducted, yet I thought the minority of the first heir behoved to be deducted from the prescription.

No. 20. Both these carried by the President's casting vote, but the other Lords voted differently in the two questions, and Strichen did not vote; *3tio*, We found unanimously, that this private latent deed could not prejudge or bar Mr M'Dowall's, (Hay's) the husband's liferent provided to him by his contract; *4to*, We found by majority, that neither could it prejudge or bar the succession of the heirs of the marriage. But in this I and some others humbly differed.

*** *November* 27, 1739.—This case appears to me a very difficult one. *1mo*, As to the negative prescription, cases may be figured where to me it should seem absurd that there could be no prescription, *e. g.* an estate possessed for a century by a line of heirs from father to son, without knowing of any destination to exclude the heirs of line, or any limitation upon them. If, when the succession opened to a female heir a tailzie should appear in a third party's hand never before heard of, limiting the succession to a different line, perhaps heirs-male, either with or without restrictions, and when no possibility remained even to improve it, suppose it were forged. On the other hand, there may be destinations of succession never completed, and I doubt not there are severals in Scotland that could not be found prescribed without altering the succession from the course that all that proprietors intended, *e. g.* where the succession is settled by contracts of marriage and other solemn deeds, and the parties neglect to expede any infeftment, but possess from father to son without making up their titles, I cannot think that such a settlement would be lost *non utendo;* no, not even in this case had Henry M'Dowall made no alteration, especially if he had died in the state of apparency, would not in that case the heir-male have been preferred, (though the question had occurred after the years of prescription) to this defender, albeit the former investitures had been to heirs whatsoever? And yet the negative prescription is founded on the bare neglect of the parties having interest to take document upon the deed, and not upon any contrary positive act of the party who pleads it. Therefore, the difficulty is to determine upon principles of law when such destinations may prescribe, and when they cannot. *2do*, As to the positive prescription, I can hardly see habile terms for it. The use of it is to ascertain and secure the right or property of those who have possessed 40 years, or, as the law calls it, *adjectio dominii.* (*Vide* the act 1617.) Now both parties acknowledge the property of all the preceding heirs, and each of their claims is founded upon it, and whatever of the contending parties prevail here will have the benefit of these their predecessors' possession, and therefore I see not how their possessing or not poossessing for 40 years can influence the question who shall succeed to them? *3tio*,

No. 20.

The difficulty to me appears no less with respect to deducting minorities. The negative prescription expressly supposes the negligence of the party interested in the right or obligation, and cannot therefore run during that party's minority, and the act 1617 enacts that the prescription shall not run against whom it is used, plainly supposing, that in every case of prescription there is some person against whom it runs, as well as in whose favours. Now who is this person? Is it the heir for the time in possession? Indeed, where there is only a simple destination of succession, he has, if not the only, at least the greatest interest, but then there is no use for prescription, for if he alters, that is effectual without prescription. If he does not alter, then I doubt the destination should not prescribe. But if there are limitations on the heir in possession, then surely these limitations are not in his favours, nor is it against him the prescription is used, as the act 1617 expresses it, whose minority is to be deducted, and therefore it must be the minority of some of the remoter heirs. But supposing it were the minority of the substitutes, then *quære*, whether it is only of the first substitute after the heir in possession, or of all of them? If it is this last, then it is scarcely possible there can ever be a prescription of such rights, and hardly even where the minority of only the first substitute is to be deducted. But as in the prescription of a bond or other obligation, only the minority of the creditor for the time falls to be deducted, however many substitutes he may have, so I should think that only the minority of the immediate first substitute for the time should in this case be deducted. The last part of the interlocutor is upon the supposition there were no prescription, and the tailzie 1684 was still binding, and in so far as concerns the husband I do agree with the interlocutor. But as to the heirs of the marriage I doubt much. Is not the Lady on that supposition bound? Must not the heirs of the marriage be her heirs, and liable for her debts? If any great debt for a large sum of money should emerge, would not the estate be still affectable for it? or, would the husband's *bona fides* be a defence to the heirs of the marriage against such creditors? I believe not, for the husband only pactioned a *spes successionis* to the heirs of the marriage, and took his hazard of all the Lady's and her predecessors' debts and deeds, and therefore I moved for a hearing, which was seconded by Dun and Roystoun, and was appointed for this day se'nnight.

*** *December 5, 1739.*—This case was well argued by the Dean of Faculty and Mr Craigie for Mr Thomas M'Dowall, and likewise by the Solicitor for the Lady; but the two first differed. Mr Graham

No. 20. argued against the positive prescription; but Mr Craigie gave it up that there might be a positive prescription, of which I own I doubted for the reasons formerly mentioned. As to the prescription negative, as here there was no evidence that ever the tailzie was known to or in possession of Thomas or Henry M'Dowall, I thought there might be a negative prescription if there were no minorities, as to which Mr Craigie gave up the minority of the last Henry during his father's life, because he afterwards made up his titles upon the old infeftment. But he insisted upon the pursuer Thomas his minority as sufficient, counting the commencement of the prescription from 1692, when the first Henry died. I own I inclined to think that both minorities should be deducted, and I thought that Henry endeavouring to defeat the tailzie, or complete the prescription after he became in some sort debtor, that is, heir of the former investiture, cannot prejudge the next heir, or make that the prescription run during his former minority, where it did not run in law. But as to the last point in the interlocutor, I was satisfied of the justice of it by the pleading, *1st*, upon the act 1685, tailzies not recorded, or when the limitations are not repeated in the heir's titles, are ineffectual against creditors, and I thought the heirs of the marriage are creditors in the sense of that act, as much as they are in the sense of the act 1695, anent fraud of apparent-heirs, as the Lords justly found in the case of Drumpark (for Henry's settlement in favour of himself and the heirs-male, which failing his daughter, cannot in my opinion be reduced on the act 1621, which would equally cut down the husband as the heirs of the marriage.) *2dly*, Heirs of a marriage are so far creditors as not only to reduce subsequent deeds *in fraudem tabularum*, but even prior latent deeds concealed either through fraud or supreme neglect, which must have the same effect in law. However, at last it carried by majority of votes to adhere to the interlocutor as it was conceived. But the question was stated separately on the different points in it. (See DICT. No. 172. p. 10947.)

1740. *July* 16.

EARL of BREADALBANE *against* MENZIES of Culdares and M'DONALD.

No. 21.

A SERVITUDE of pasturage on a royal forest may be acquired, and actually found acquired by prescription, notwithstanding the acts of Parliament in favours of them. *Vide* SERVITUDE.