any obligement. Clerk has not for many years officiated as a messenger, and in 1744 Wemyss sued him to deliver back the writings or pay the contents. Clerk could not remember what became of them, whether he returned them to Wemyss who lived at Aberdeen, whereas Clerk lived at Inverness, or if he gave them up to the debtors on payment, and sent the money to Wemyss, or if they were aasually lost or mislaid, but was positive that one of these was the case. Kilkerran found him liable for the contents of these writs; but on a reclaiming bill we thought it dangerous on such receipts to sustain action against officers of the law after so great a distance of time;—and therefore this day found that no action could be sustained.

No. 33. 1749, Nov. 10. HENRY ELLIOT *against* WILLIAM ELLIOT.

See Note of No. 22, *voce* FRAUD. The Notes written upon the Petition for Henry Elliot (drawn by Pitfour) to which Lord Elchies alludes, are as follow:

THIS is a reduction on the act 1621 of a disposition in 1692 by James Scott of Bristo, with consent of James his son, to William his second son, of the lands of Kirklands, Antram, and others, on the narrative of a certain sum of money paid; and again disponed by William, with consent of the said James his elder brother, to Thomas Porteous in 1695, on which he obtained charter and sasine in 1696, disponed by him to William Elliot in 1723, on which uninterrupted possession has followed from 1692, at least since 1696,—at the instance of Henry Elliot, as having right by progress from his grandfather John Elliot of Thorleshope, to the half of a debt of 3000 merks due by the said James Scott the father; the other half of which debt, which was conveyed by Thorleshope to John Elliot, his second son, is found prescribed *non utendo;* but the pursuer's half, which was conveyed to his father Henry the third son is saved from prescription by the petitioner's minority which lasted about 20 years;—and as the defender pleads the positive prescription, the question is, whether it bars this action of reduction notwithstanding the pursuer's said minority. In this same process there is a reduction of a disposition to Sir James Stuart in 1699 by the same William Elliot, of other parts of the lands disponed to him by his father in 1692. But as Sir James could not qualify the positive prescription in terms of the act 1617, the Lord Justice-Clerk repelled the negative prescription in respect of the pursuer's minority, but sustained the positive prescription for William Elliot, and assoilzied him notwithstanding the pursuer's minority;—and this is the only point now before us,—and the papers are filled with many circumstances not material to the point at issue. The interlocutor is long and fully recited in answers *in principio,* and for the fact I may read answers page 3 to page 9 *in fine.*—I own I think the pursuer can make little of this process. Whether the disposition 1662 was on death-bed does not signify, since James the heir consented; and I doubt much if the defender ought to be obliged at this distance to astruct the narrative of that disposition; for though the law is jealous of narratives among near relations unless they be otherwise astructed, yet it requires only such an astruction as may *fidem facere judici* but not a full legal proof; but to carry that jealousy so far, as to oblige them to astruct them at the distance of 50 or 60 years would be to require proofs that for the most part would be impossible, where there had been no challenge in that time. 2dly, Though Thomas Porteous who purchased from William

and behoved to see his right that it was derived from his father might be burdened (had the process been timeously brought) with astructing the narrative because by so purchasing he was in some sort *particeps fraudis*, yet I doubt if that would equally apply to William Elliot, who purchased in 1723 on the faith of this Porteous's infeftment, and perhaps never saw William Scott's or knew that it was derived from his father. But this last would require to be further considered. But the Ordinary's interlocutor does not put it on either of these footings: But suppose it were *certo certius* that William Scott's right were absolutely gratuitous, and that the father was notourly bankrupt, and the creditors, particularly Thorleshope, grossly defrauded, and though the creditor had been constantly minor from that time to this, and even though William Scott remained still proprietor and were the party defender in this process, yet his right could not now be challenged, because he has possessed 40 years without interruption upon a charter and sasine, —and that the minority is expressly an exception from the act of prescription 1617;—so the question is whether that exception is only intended from the negative prescription or from both? As to which, first, It seems no contemptible argument in such a question that the act is borrowed from the civil law, and looks rather declaratory than statutory, and is made to retrospect, and therefore that as in the civil law, so here, minority was meant to be excepted from both. The argument from the civil law is much the stronger on comparing the act 1496, 28th act, 5th Parl. James III. anent prescription of obligations, and 1474, 34th act, 7th Parl. James III. where minority is not excepted, yet it is *triti juris* that our law has always excepted it, which is not founded on this act 1617, which only concerns heritable rights, and hence arises properly the argument to be afterwards mentioned from the decision 1678, Duke of Lauderdale, (Dict. No. 374. p. 11,193.) 2dly, I can hardly understand how positive prescription can run while the actions for evicting the property are unprescribed; I do not say, while the ground of debt is unprescribed, for from the same cause different actions may arise; as in this case there lay a personal action against the debtor Scott and his heirs, and there lay a reduction of this disposition on the act 1621, and the bond may be kept entire either by diligence or by payment of annualrent, and yet the reduction might prescribe; but minority has in this case saved both from prescription; and so the interlocutor finds in this case as to Sir James Stuart. But I can hardly conceive how a reduction of any right can remain unprescribed, and yet the right itself be safe by the positive prescription. Thus by the clause anent the negative prescriptions, action upon reversions may be pursued in 40 years, but with the exception of reversions incorporate and *in gremio juris*, or registrate in the clerk-register's books, which are declared not to prescribe; and this is plainly an exception from the negative prescription. Now suppose a debtor should produce charters and sasines for 100 years together, but containing a reversion *in gremio*, or the reversion were registrate as the act directs, it is plain he could plead the positive prescription in defence of his wadset,—but would that cut out the reversion, though it is only excepted from the negative prescription? The case is the same of actions of warrandice which prescribe not from the date of the infeftment, but from the distress: Now suppose, after successor of the granter of the infeftment should produce infeftments connected with possession for 80 or 100 years, whereby double the positive prescription would be run, would that defend him from the action of warrandice, if it was not prescribed?—and yet

this is an exception from the prescription of actions; and even as to heritable bonds or infeftments of annualrent, the case may and has happened, that the negative prescription of them has been interrupted, and yet the positive prescription run of part of the subjects burdened with the annualrent. This was the case 22d June 1671, Lord Balmerino against Hamilton of Little Preston, (Dict. No. 413. p. 11234.) Two tenements were burdened with an annualrent; the one came by progress to Balmerino and the other to Hamilton. A poinding of the ground had been taken against Balmerino's tenement, and the annualrent uplifted out of it, and Balmerino sued Hamilton for relief of his part; whose defence was, that he had possessed much more than 40 years free of any annualrent, and therefore had prescribed freedom; but the Lords found that payment out of any of them saved from prescription as to both; so that here the positive prescription was repelled, because the negative prescription of the annualrent was interrupted; and therefore if minority is only an exception from the negative and not from the positive prescription, it seems to be the only exception in the act that is not an exception from both.

3dly, When I consider the act I think it is plain that minority is extended to both. There are only three exceptions in this part of the act, besides falsehood that was mentioned in the beginning. The first is reversions engrossed or registrate, that they shall not prescribe, and these are admitted to be exceptions from both prescriptions. The second are actions of warrandice, that they shall only prescribe from the distress, and these also are admitted in the answers p. 15 to respect both. And the third is non-entry. Therefore by what rule of construction can that exception be limited to the negative only?

4thly, Compare that clause, which says that in the course of the 40 years prescription "the years of minority shall no ways be counted," with the immediate following clause, providing "that no persons be prejudged of their actions by the prescription of 40 years already run and expired," and therefore allowing them to intent their actions within 13 years. If the clause anent minorities not being counted in the 40 years prescription means only the negative ptescription, *multo magis* must this clause of persons prejudged of their actions by the prescription of 40 years already run, be limited in the same manner; and if on the other hand this last clause be also meant of the positive prescription and 13 years allowed to interrupt it, much more must I understand the clause anent minority to be so too. But that this last clause was so meant we have no worse authority than an express act of Parliament, viz. the act of interruption, 12 act 1633, where it is in so many words declared, that by this act 1617, 13 years were allowed for preventing or interrupting the positive prescription.

5thly, The positive prescription is not only competent in rights of property when there are express infeftments, but also in servitudes, in possession of lands as part and pertinent, and all other heritable rights. A man may claim lands as part and pertinent, and though his neighbour be infeft *per expressum*, if he prove 40 years uninterrupted possession he will prevail; but I never heard it disputed that the years of the other party's minority must be deducted; and if it were not, unhappy would be the case of minors, where there are many or frequent minorities, and their possessions and marches are not commonly well cared for; and the same is the case of servitudes, though it could be proved that it was originally by tolerance, yet a proof of 40 years possession as part and pertinent without deducting minority would make it perpetual.

6thly, As to the opinion of our Courts and lawyers, besides the decision of Lord Balmerino, (already mentioned) I must mention the famous case betwixt the Duke of Lauderdale and the Earl of Tweddale, 25th January 1678, (Dict. No. 374. p. 11,193.) anent the teinds of Pinkie, that the Duke had right to as early as 1584. The defence was the positive prescription on the Queen's infeftment in 1593, to which the defender had right by progress, or at least to tacks from her, and had possessed 70 years. The reply was *non valens agere*, first because of a separate right of liferent the Queen had, to which Thirlestane had consented, and next by his forfeiture. The Court, because of that reply, *non valens agere*, though not at all mentioned in the act of Parliament, repelled the positive prescription. I do not give any opinion of that decision, whether *non valens agere* be a good defence for either positive or negative prescription, or whether the Duke was in a legal sense *non valens*. Lawyers have been divided on that point. But I mention it for two reasons, first, if *non valens agere*, though not at all mentioned in the act, was sustained, how much more must minority have been sustained? Secondly, because of the Earl's reply, who for certain was assisted by the ablest counsel, viz. that though our act was introduced in imitation of the Roman law, yet it does not admit of all the exceptions contained in the Roman law, but only the exceptions expressed in the act, viz. falsehood, minority, interruptions, and reversions; so that as Lord Stair collects the pleadings, it was there admitted that minority was an exception from the positive prescription. *Vide* the case from Fountainhall, quoted by Lord Stair, 29th December 1691, (B. II. T. 12. § 18.) and 17th December 1695, Herriot's Hospital against Hepburn, (Dict. No. 82, p. 10,786,) whether that was the positive or only the negative prescription?

7thly, There is a later decision in point, 5th December 1740, Ged against Baker, (No. 22 *supra*,) where an adjudger getting charter and sasine, and possessing thereon 40 years from the sasine, it was found that after 40 years uninterrupted possession, the right could not be quarrelled upon nullities, but that minorities behoved to be deducted in counting the 40 years. *Vide* 9th December 1707, Magistrates of Aberdeen against Irvine of Kincausie, (Dict. No. 351, p. 11,149.)

8thly, Stair seems to be plainly of this opinion in the very place quoted in the answers, Title PRESCRIPTIONS, § 18. He had been speaking of the positive prescription in § 17, and then says, "From the prescription there are excepted the rights of vassals and minors, &c.;" and M'Kenzie begins with defining positive prescription; and § 15th says, that minority is deducted out of most prescriptions.

No. 34. 1751, July 27. MR FULLERTON'S CASE.

MR FULLERTON having in 1727 borrowed up from the clerk his client's writs in a process (but whether decreet had been pronounced in it did not appear) which were not again enquired for till 1749, that I think a process was raised for them, and after diligence granted, they could not be found;—and Lord Milton, Ordinary, reported to us without informations, Whether Mr Fullerton was after so many years bound by an office receipt to produce the papers or pay damages? and we found him no further liable than to depone as in an exhibition.