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2do, The children had no title to plead their interest as minors, as long as the division was not made by the trustees, and the trustees were alive; seeing that, till the division was made, the children could never be certain of having a share or interest in the subject.

Pleaded for the children; Whatever may be the effect of a deed granted to trustees *ex facie* absolute, and qualified only by a separate back-bond, the present deed merits a different consideration, which *in gremio* bears to be granted for behoof of the children, in which the trustees are appointed tutors for them, and were declared liable only for their omissions, and which therefore must be looked upon only as a more extensive factory for the care of the children's affairs; in such a case, the prescription must be regulated by the state and action of the children, and not by the action of the trustees tutors.

"THE LORDS found that no action lay upon the bond in question after the lapse of 43 years and a half from the time of payment thereof."

Act. *A. Pringle, M'Queen.* Alt. *Miller.* Clerk, *Kirkpatrick.*

J. D. *Fol. Dic. v.* 4. *p.* 111. *Fac. Col. No* 207. *p.* 304.

1757. *December* 1.
WILLIAM GORDON, Writer to the Signet, *against* Major ARTHUR MAITLAND.

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Debts acquired by a husband affecting his wife's estate, do not prescribe during the marriage.

Prescription does not run during the minority of the person for whose behoof a right is acquired in trust.

Several other points were decided in this cause, which are referred to under their respective titles.

SIR CHARLES MAITLAND of Pittrichie, in the year 1700, executed an entail of his estate by procuratory, 'in favour of himself in liferent, and Charles his 'only son in fee, and the heirs-male of his body; which failing, to the other 'heirs-male of his own body; which failing, to the heirs-female of his son 'Charles's body, and the heirs-male of their bodies, the eldest daughter or heir-'female always succeeding without division; which failing, to Jean Maitland, 'his own eldest daughter, and the heirs-male of her body; which failing, to 'his other four daughters *seriatim*, and the heirs-male of their respective bodies.'

This deed contained no limitation upon Charles the fiar, or the heirs-male; but the daughters and heirs-female were restricted from selling or alienating the estate, or affecting it with debt above 20,000 merks Scots.

Sir Charles Maitland was succeeded by his son Sir Charles the younger, who died in the beginning of the year 1704, without issue, whereby the succession opened to his eldest sister Jean, who made up titles to the estate of Pittrichie, by service to her brother and infeftment, and soon after intermarried with Baron Maitland, of which marriage there was issue one son, Charles, and four daughters.

Sir Charles the younger, during his possession, as he was under no limitation by the tailzie, had contracted large debts, the principal sums amounting to L. 19,640 Scots, all due by moveable bonds. These debts were, by degrees,

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purchased in by the Baron, and assignations taken to them either in his own name or in that of a trustee; and in the year 1721, a short time before the Baron's death, they were all conveyed by him and his trustee to Dr John Gordon: Of the same date with which conveyance, Lady Pittrichie granted an heritable bond to Dr Gordon for the sum of 20,000 merks, with annualrents from the term of Whitsunday 1721, and bearing to be in exercise of the powers reserved to her by the tailzie of Pittrichie; Dr Gordon at the some time granted his back-bond, acknowledging himself to be only trustee for the Baron, and obliging himself to denude of the heritable bond, as well as of the whole other debts, in favour of the Baron, or any other person to be named by him.

Accordingly, by a deed executed in 1721, the Baron nominated his only son Charles Maitland, as the person in whose favour Dr Gordon was to denude, upon his attaining to the age of majority; but with and under the burden of certain provisions therein specified to his four daughters.

In 1728, Charles Maitland the son executed new bonds of provision in favour of his two only surviving sisters Katharine and Anne; whereby, in lieu of the provisions formerly settled upon them, which were 8000 merks to Katharine, and 6000 merks to Anne, he became bound to pay to his said two sisters, at their several ages of twenty-one, or marriage, to Katharine the sum of 10,000 merks, and to Anne 9000 merks, with penalty and annualrent after the term; and it was declared, that these should be in full satisfaction of the provisions contained in their father's settlements 1721, and of all bairns part of gear or portion-natural to which they might be entitled through the decease of their father.

In 1730, Dr Gordon, upon a narrative of the back-bond and deed of nomination above mentioned, denuded himself of the heritable bond, as well as of the whole other bonds already mentioned, by a conveyance in favour of Charles Maitland, his heirs and assignees.

Upon Lady Pittrichie's death, which happened in October 1746, the succession devolved upon her son Charles, who made up titles by special service and infeftment, as heir-male to his mother, without repeating any of the restrictions and limitations which, by the entail 1700, were imposed on the heirs-female; and soon after he executed a new settlement of the estate, whereby, failing issue of his own body, he called his sisters to the succession, in preference to the heirs appointed to succeed by the deed 1700.

Upon Charles's death, in the 1751, a competition arose between Katharine his eldest sister, who entered into possession of the lands, and Major Arthur Forbes *alias* Maitland, eldest son of Margaret Maitland, who was second daughter of old Sir Charles; the Major laying claim to the succession under the deed of settlement 1700, and Katharine claiming in virtue of the deed executed by her brother. In this competition the Major finally prevailed, the Lords having found, "that Charles could not gratuitously alter the destination of succession in prejudice of Major Maitland;" which decree was affirmed in the House of

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Peers; and the Major, in consequence thereof, made up titles to the estate of Pittrichie, in terms of his grandfather's entail.

The two sisters of Charles Maitland being thus excluded from the succession to the estate, and reduced to the provisions made for them by their father and brother, assigned these provisions in trust to William Gordon writer to the signet, who led an adjudication of the heritable bond of 20,000 merks, for payment of the original provisions, which, by Baron Maitland's deed of nomination, were ascertained to be paid out of that fund; and having likewise obtained himself confirmed executor-creditor to Charles Maitland for the 19,000 merks contained in Charles's bonds of provision to his sisters, he gave up in inventory the bonds above mentioned, granted by Sir Charles Maitland younger, the rights to which had been purchased by Baron Maitland, and afterwards conveyed to his son Charles. Upon this title Mr Gordon brought an action against Major Maitland, as representing the said deceased Sir Charles Maitland, concluding for payment of these debts, with annualrent from the time of Baron Maitland's death.

Pleaded for the defender; *1mo*, The whole of the said debts are lost by the negative prescription, as no action has been brought, or document taken on them, within forty years.

Answered for the pursuer, In the *first* place, Prescription could not run during the life of Baron Maitland, because from the time of his marriage with the heiress, to his death in the 1721, he was entitled *jure mariti* to the rents of the estate, and consequently was debtor in the current annualrents of the debts. Accordingly, these annualrents were extinguished in his person, by his intromission with the rents, which therefore was a proper interruption of the prescription, just as much as if the annualrents had been paid to any extraneous creditor. It would have been to no purpose in him to have brought a process against his wife; because, by his universal intromission with her estate, he himself was possessed of the rents, out of which the annualrents fell to be paid, and therefore he was *non valens agere cum effectu*;—*Secondly*, Neither could the prescription run during the period which intervened between the Baron's death and the majority of his son Charles, which was not till the year 1727; for tho' the right stood at the time in Dr Gordon's person, he was but a trustee for Charles, and prescription must be interrupted by the minority of that person for whose behoof the trust was created, and who has the substantial right in him;—*Lastly*, No prescription could run during the possession of Charles, after his mother's death; that is from the 1746, when he succeeded, to the 1751, when he died, because during that time he was both debtor and creditor in the debts, and it is impossible to figure any benefit that he could have reaped from bringing an action against himself.

Replied for the defender; It appears, that Baron Maitland did not apply his intromissions with the rents to the payment of these annualrents; for in the year 1721 he concurred with his trustee in assigning the principal sums, and

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whole bygone interest, to Dr Gordon; which plainly supposed, that these annualrents were still unpaid. And as to the six years of Charles Maitland's minority, from the year 1721 to the year 1727, the same could not operate any interruption of the prescription; because Dr Gordon stood at that time fully vested in the right to these debts, and had the sole *jus exigendi*; and therefore his minority alone was to be regarded.

"The Lords found the debts acquired by Baron Maitland and his trustee not prescribed."

II. *A creditor in debts affecting an entailed estate, succeeding as heir of entail in that estate, the debts are not extinguished* confusione.

The defender *pleaded*, 2*do*, That the whole of these debts, principal and interest, were extinguished *confusione* by Charles Maitland's succession to the estate, by which he became both debtor and creditor in the debts. The extinction of debts *confusione*, where the creditor succeeds to the debtor, or the debtor to the creditor, is an acknowledged principle of the law of Scotland, as well as of the Roman law. In the present case, the debts acquired by Charles were his absolute property, descendible to his heirs and assignees whatsoever, without any limitation: And as Charles would have been personally liable for these, had they belonged to any third party, as heir in the estate of Pittrichie, and thereby representing his mother, who was in like manner universally liable to the debts of her brother Sir Charles the younger, there was an absolute extinction of these debts in the person of Charles *confusione*.

Answered for the pursuer; By the Roman law there was only one kind of heir who represented the defunct universally; and therefore all obligations were necessarily extinguished *confusione*, wherever the creditor or debtor succeeded as heir to each other. But it is quite otherwise by the law of Scotland. A service *qua* heir of tailzie in a particular subject is not an universal representation, so as to extinguish debts which were due by the defunct to the heir of tailzie before his succession. In like manner, where an heir of entail purchases in debts affecting a tailzied estate, and takes assignations, either in his own name, or that of a trustee, such purchase does not operate an extinction of the debt: On the contrary, the debts so purchased are considered as a separate estate, affectable by creditors, and in the absolute power of that heir by whom the purchase was made. In the present case, the debts conveyed to Charles Maitland belonged to him and his heirs whatsoever; whereas the estate of Pittrichie was limited to the particular heirs of entail; and as the defender has asserted his right to that estate as heir substitute under the entail, he must pay the debts affecting it.

"The Lords found, that the said debts were not extinguished *confusione* by Charles Maitland's succeeding to the estate of Pittrichie."

III. *An heir succeeding to an entailed estate, being sued by the executors of the former heir, may plead retention against them for debts, of which the defunct was bound to relieve the estate; but cannot plead it against his creditors.*

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3tio, The defender *objected* to the grounds of the pursuer's claim, and *alleged*, That the bonds of provision for 19,000 merks granted by Charles to his sisters were gratuitous, in so far as they exceeded the provisions already settled upon them by their father; and consequently were reducible by the defender, who was a creditor upon Charles's executry, for relief of the debts which he had wilfully brought upon the entailed estate, by neglecting to repeat the prohibitions and irritant clauses in the titles made up by him: That, besides, these bonds bore no clause dispensing with the not-delivery; and unless it were proved, that they were delivered by Charles during his lifetime, they must be good for nothing. And further, supposing them both to be onerous, and to have been properly delivered, the defender is nevertheless entitled, as a creditor, for relief of Charles's debts, to plead compensation and retention against any assignee or executor-creditor of Charles's, how onerous soever he be. The defender is entitled to plead retention of Sir Charles's debts against every person claiming under Charles Maitland's right, until he shall be relieved of the debts brought by Charles upon the entailed estate. And that such compensation and retention is good, not only against the creditor himself and his representatives, but likewise against his onerous creditors, is established by sundry decisions observed in the Dictionary, tit. COMPENSATION——RETENTION; where it has been found, that a debtor in a bond, having become cautioner for his creditor in a bond for the like sum, bearing a clause of relief, is entitled to retention against the creditor's assignee, till he be relieved of his cautionary obligations.

Answered for the pursuer; That the bonds of provisions granted by Charles, though exceeding those of the father by 5000 merks, were highly rational, and even onerous to their full extent: For the young ladies had a claim to their legitim upon their father's death, which was much more considerable than the additional provision thus given in lieu of it. And with regard to the delivery, as the bonds appear in the hands of the ladies, they must be presumed to have been properly delivered to them, unless the contrary is proved; the presumption in law being, that deeds appearing in the hands of the grantee were delivered of their dates, especially where they are onerous.

As to the claim of compensation and relief, the same cannot be pleaded against the pursuer, as executor-creditor to Charles Maitland, to the extent of the sisters' bonds of provision. It may be very true, that the residue of Charles's executry, after satisfying these provisions, is liable to the defender in relief of the debts contracted by Charles; but in so far as the ladies are creditors by their bonds of provision, the defender can no more claim retention against them, than against any other onerous creditor of Charles's. The case of a debtor becoming cautioner for his creditor, on the faith of the money he had in his

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"The Lords repelled the objection made to the delivery of the bonds of provision by Mr Charles Maitland to his sisters, being the title of the confirmation; and found, that the bonds being in satisfaction of former bonds of provision, and in full of their legitim, are presumed to have been delivered of the dates, unless the contrary is proved: Found, that the said bonds of provision were onerous to their full extent: Repelled the defence of retention and relief, in so far as regards the said bonds of provision; but found, that after payment of what is due to Mrs Katharine and Anne Maitlands on their bonds of provision, out of the sums confirmed, Major Maitland is entitled to retention and relief out of the remainder of the sums confirmed, for all the debts of Charles Maitland he has paid or shall pay."

IV. 1. *Heir of entail bound to keep down the current annualrents of debts affecting the estate during his possession.* 2. *A service as heir-male in special, upon a deed of entail, without reciting the prohibitory clauses, does it infer an universal passive title?*

4to, The defender *pleaded*; That no claim could lie against him for the annualrents of the debts contracted by young Sir Charles: For, as the pursuer had pleaded the extinction of these during the incumbency of Baron Maitland, by his intromission with the rents, while he was, at the same time, debtor in the annualrents; and as this would equally apply to the years of Charles's possession after his mother's death; so the pursuer could have as little claim to the annualrents of the intervening years between Baron Maitland's death in the 1721, and the Lady Pittrichie's death in the 1747; during which time the Lady Pittrichie, as possessor of the entailed estate, was bound to keep down the current annualrents: And as Charles her son, the creditor in these annualrents, did universally represent his mother, both by his service to her under the general character of heir-male, and by intromitting with her moveable effects;

therefore these annualrents were likewise extinguished *confusione* in the person of Charles, and could not again be reared up as a debt against the tailzied estate. The words of the retour of Charles's service to his mother shew, that he intended to represent her universally; for, after reciting the charter under which Jean Maitland, Lady Pittrichie, died last vest and seized in the lands, with the substitutions therein contained, but without any of the prohibitions or irritancies, the jury find, "Quod Magister Carolus Maitland est legitimus et propinquior hæres masculus dict. quond. Magistræ Jeanæ Maitland de Pittrichie, suæ matris, in integris terris, &c.; et quod est legitimæ ætatis," &c.

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The pursuer *contended*, That the annualrents incurred during Lady Pittrichie's possession, were still a subsisting debt against the defender. For, in the *first* place, as the tailzie in question contained no clause obliging the several heirs to keep down the current annualrents, it was doubted, how far the same could be supplied by implication. An heir of tailzie is not in the same case with a liferenter, who has only right to the free rents of the estate, and is under an implied obligation to transmit the estate to his successors in as good condition as he finds it: An heir of tailzie is to be considered in every respect as an absolute proprietor; unless in so far as he is expressly limited by the deed of entail. *Secondly*, Charles Maitland did not represent his mother, otherwise than *qua* heir of tailzie; and therefore, supposing it true, that she was under an implied obligation to keep down the annualrents during her possession, yet that will not affect Charles, nor his sisters, who do not represent her. Charles's service was intended for no other purpose but to vest in him the tailzied estate as heir of tailzie; and the form of the service was in every respect proper and habile for that purpose. It sets forth the tailzie under which Mrs Jean Maitland died last vest and seized in the lands; it sets forth the substitution of the tailzie by which the succession devolved upon her nearest heir-male; and the jury find, that Mr Charles Maitland the claimant was her nearest heir-male in the tailzied lands. If it had added, *virtute prædictæ cartæ*, there could not have been a question: But this adjection was absolutely unnecessary; because the answer of the jury cannot possibly refer to any other title of succession in Charles but the tailzie, under which alone he claimed to be served, which he produced before the jury to instruct that claim, and which they again narrate in the service, as the foundation of their verdict; therefore it was, to all intents and purposes, a proper service of Charles Maitland, as heir to his mother, under the tailzie; and must infer a representation of his mother in the tailzie, but cannot infer an universal passive title against him, as heir-male of his mother.

'THE LORDS found, That the deceased Lady Pittrichie, the heir of tailzie, was bound, during her possession of the estate, to have kept down the growing interest on these bonds incurred during her possession: But as she failed to keep down these growing annualrents, found, That her son Charles Maitland, his having served himself heir-male in special to her in the said estate of Pittrichie, by virtue of the destination contained in the tailzie, does not subject him in

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payment of annualrents that became due on these bonds during his mother's possession, in respect it is not alleged, that he took any other estate besides the tailzied estate, by virtue of the said service: But found it relevant to the defender to prove, that Charles intromitted with the effects of his mother after her death, other than the tailzied estate; and found such intromission relevant to restrict the claim to the extent of such intromissions; and allowed the defender a proof thereof, &c. Found no annualrents due on these bonds during the time that Mr Charles Maitland, as heir-male and of tailzie, possessed the estate of Pittrichie, being from October 1746 to February 1751 years; and found annualrents due on the said bonds from the month of February 1751, during the not-payment.'

V. *A brother alimenting his sisters, entitled to retention out of the annualrents of their provisions.*

5*to*, The defender *pleaded*, That no annualrent was due to the ladies upon their bond of provision during the time that they lived in family with their brother, and were alimented by him; *nam debitor non præsumitur donare.*

Answered, They were of great use to their brother in the management of his family; and as they were both of age during this period, and no bargain was made concerning their aliment, nor any evidence that their brother ever intended to demand any allowance for their aliment, these circumstances, together with the nearness of their relation, afford a presumption in law, that no aliment was ever intended to be demanded by their brother; 6th June 1676, Rigg, *voce* PRESUMPTION; February 1731, Creditors of Kimmerghame, IBIDEM.

'Found, That after the Lady Pittrichie's death, and during the time the young ladies staid in family with Mr Charles Maitland, their brother, which was from October 1746 years to February 1751 years, their aliment in Charles Maitland's family, and any furnishings for clothes, &c. during that time, fall to be deducted from the annualrents of their bond; and they modify the said aliment and furnishings, during that time, to two-thirds of the current annualrents of their respective provisions during the period of Charles Maitland's life after his mother's decease.'

VI. Bona fide *possession.*

6*to*, The defender *pleaded* an abatement of the pursuer's claim upon account of the intromission of Mrs Katharine Maitland with the rents of the estate of Pittrichie for two years and a half after her brother's death, in prejudice of the defender, the heir of the investiture; and which intromission ought to be imputed *pro tanto* in payment of her bond of provision.

Answered for the pursuer, Mrs Katharine's title to the estate, founded upon the disposition by her brother Charles in her favour, though in the event found

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ineffectual, must be admitted to have been such a colourable title, as to found her in a *bona fide* possession of the estate, till her title was set aside; and therefore the rents were *bona fide percepti et consumpti.* She admits, that during her possession, she is chargeable with the annualrents of her own and her sister's bond of provision, as a natural burden upon her possession; but her intromission with the rents, which she uplifted and spent, as the yearly income of her estate, ought not to impute in extinction of the principal sum due by her bond of provision; otherwise her case will be much worse than if she had never had any pretensions to her brother's succession; and this *bona fides* of her's must, as in all other doubtful cases, remain till she is interpelled by a definitive sentence against her.

Replied for the defender, That as Katharine's possession was in virtue of no singular title made directly to herself, she could take it up no otherwise than as heir to her brother, being only called by the settlement, failing Charles, and the issue of his body. This required a service to him; and if, without such, she intermeddled, that was behaving as heir to him, and must subject her to his debts; at least her intromissions must go to the extinction of any claims she had against him to the extent thereof; and no *bona fides* can be pleaded, in these circumstances, to protect her from accounting for the same. At least, in the next place, her *bona fides* can protect her no longer than to the commencement of the process. The rule of law is, That a possessor, upon whatever title, is liable to account for the fruits, and restore them to the true owner from the time the controversy is begun; for after that time all possessors are equal. Nor will it make any difference, that the point is more or less disputable, provided the competitor does not prevail upon some new fact or writ that was not known in the beginning of the suit.

Triplied for the pursuer, A service was only necessary to vest the feudal right of the estate in Katharine: But as she attained the possession upon a title clearly in her favour, and which she could have completed at pleasure, this was sufficient to found her in a *bona fide* possession; otherwise no apparent heir who continues the possession of his predecessor's estate, would be entitled to plead a *bona fide* possession. Nor can her possession under her brother's deed be construed into a behaviour as heir. If indeed that disposition had stood, she would have been her brother's heir, and as such liable for his debts; but as the disposition was set aside, consequently her behaviour as heir under that deed did also cease, and can no longer be a passive title against her. With regard to the duration of *bona fides*, the only general rule laid down by lawyers, is, That it must depend upon the nature and circumstances, both of the possessor's title, and of the title of his competitor. Lord Stair, b. 2. tit. 1. § 24. says, 'In 'some cases a citation and production of another, evidently preferable title, is 'sufficient when the possessor hath no preferable title; but where he hath a 'doubtful title, *mala fides* is only induced by litiscontestation, or by sentence.'

No 359. The present case must be allowed to have been a very doubtful one; and therefore *bona fides* must be sustained *usque ad sententiam*.

'The Lords found, That the rents of the estate of Pittrichie, from Charles Maitland's death, to the 13th July 1753, being the date of the first interlocutor of this Court, in the defender's process for the estate, were *bona fide percepti et consumpti* by Mrs Katharine Maitland; and that she is not accountable therefor: But found, That during her possession she is chargeable with the annualrents on the bonds pursued for. See Presumption.—Tailzie.—Bona Fide Consumption.—Confusio.

Act. *Miller, G. Brown, Ferguson.* Alt. *Burnett, A. Pringle, Lockhart.*

W. S. *Fol. Dic. v.* 4. *p.* 111. *Fac. Col. No* 63. *p.* 101.

1790. *December* 8.

Elisabeth Cuming *against* The York-Buildings Company.

No 360. Minority of one of several nearset in kin, how far it prevents the currency of prescription.

The father of Elisabeth Cuming was assignee in several petty debts due by the York-Buildings Company, for which, in the year 1734, he obtained a decree.

No further steps, however, were taken; and Mr Cuming died in 1746, leaving two sons and four daughters, of whom Elisabeth, born in 1744, was the youngest.

It was not till 1787 that Elisabeth Cuming, having been confirmed sole executor *qua* nearest in kin to her father, obtained a decree of adjudication for these debts, against the York Buildings Company's estates in Scotland.

In the ranking of the creditors, it was admitted, that, on account of the minority of Elisabeth Cuming, no prescription could be pleaded against her; but as to the other children, it was maintained, that the debt was extinguished. In opposition to this argument Elisabeth Cuming

Pleaded, The statutes introducing the negative prescription seem to apply only to obligations and contracts, and not to decrees. With respect to them, the danger of forgery, which appears to have been chiefly in the view of the Legislature, is altogether precluded; acts 1469, cap. 28.; 1474, cap. 54.; 1617, cap. 12.

But it would be of no importance, although these enactments were to be so extended as to reach judicial proceedings. In the case of rights descending to an heir, who, in the contemplation of law, is held to be *eadem persona cum defuncto*, every objection which is pleadable against the ancestor may be thought competent against him. But an executor, who is truly a trustee, appointed for collecting and distributing the moveable effects of a deceased person, stands in a different situation; and if it can be shown that no improper delay is imputable to him, the objection of prescription must be wholly excluded.