1765. *November* 14. STEVEN *against* ——.

[*Faculty Collection*, IV. p. 225.]

In this case the Lords were all unanimous, that action lay at the instance of a foreign factor, though a Scotsman, against a Scotsman residing here, for the price of smuggled goods commissioned by him; reserving to themselves to consider what the law would be betwixt two residenters here suing for implement of a smuggling contract.

1765. *December* 5. CRAWFORD *against* BOYD.

In this case the Lords unanimously found, that a Scotchman who was a merchant in the Island of Man, having furnished goods to a smuggler here, though he knew very well that the goods were to be smuggled, yet as he had no concern in the smuggling, and as the goods were entirely at the risk of the smuggler, an action lay for payment of the price.

Lord Pitfour put it upon this general principle, that smuggling was not *malum in se*, but only by particular statute, and that statute did not annul the smuggling contracts, but only imposed penalties upon smuggling.

Others of the Lords thought this reason too general, because it went the length of giving action for implement of a smuggling contract, by delivery of the goods, which it was twice found was not competent.

In this case sundry other points were determined, confirming the doctrine laid down by my Lord Pitfour, concerning extrinsic and intrinsic in a case which lately occurred; particularly, it was the opinion of all the Lords, that payment made not only *de recenti* but *ex intervallo*, was intrinsic, but that compensation was *aliud negotium*, and therefore was extrinsic.

1765. *December* 17. SIR JOHN GORDON *against* ——.

A FREEHOLDER in this county (Cromarty) claimed to be enrolled upon a divided valuation. Sir John raised a reduction of the division of valuation, which was brought into Court, and upon this ground the Michaelmas meeting of freeholders delayed to enrol the claimant. Of this judgment he complained, and this day the Lords reversed the judgment, and ordained him to be enrolled, but found no expenses due.

They went upon this ground,—that a person whose valuation is divided, is entitled to be put upon the roll, and to remain on it till that division is reduced; in

the same manner as if the right to his lands were under reduction, that would be no reason for not enrolling him in the mean time; and if it were otherwise, it would give occasion to such tricks as would altogether elude the Act.

1765. *December* 19. CAMPBELL of OTTER *against* WILSON.

IN this case many curious questions occurred concerning prescription. The first was, What the effect of forfeiture was?—For the fact was, that both the predecessor of the person who pleaded the prescription, and of him against whom it was pleaded, were forfeited in the reign of Charles II. but these forfeitures were rescinded after the Revolution. The question was, Whether the years of the forfeiture were to be deduced from the prescription?—And with respect to the forfeiture of the predecessor who was in the course of acquiring by the prescription, all the Lords were of opinion, that the prescription must run in favour of the Crown or its donatar, as well as in favour of any other singular successor, so as that the forfeited person, upon his restoration, would have the benefit of the Crown's possession; but whether the prescription ran against the forfeited person was more doubtful.

Lord Pitfour said that prescription was the great security of our most valuable property, our land rights; that it was very difficult to say who had the best right to lands 80 or 100 years ago; and that to involve men in questions of that kind, was to render property very uncertain. It was therefore his opinion, that the plea of *non valentia agere* did not belong to the positive but to the negative prescription; and for this he might have quoted a decision from Fountainhall, 31*st December* 1695, *Innes* against *Innes*. And indeed it appears to be certain, that at least one *non valentia agere*, which takes place in the negative prescription, would not take place in the positive: Suppose a bond granted to A in liferent and to B in fee, the prescription would not run against B during the life of A; but supposing a land estate given to A in liferent and to B in fee, it could not be pleaded but that the prescription of that estate would run against B even during the life of A. Pitfour further said, that minority ought not to be excepted, if it had not been particularly mentioned in the statute; and, in general, the rule of our law was, that minority was never deduced unless when particularly excepted; and therefore it was not deduced from the triennial prescription of accounts, and the septennial prescription of cautionry, and there was much less reason for deducing it from the 40 years' prescription, if it had not been particularly excepted: That from this long prescription was not deduced the time at the Revolution when there was a total surcease of justice, but only from the short prescriptions by Act 40, 1690; and surely there was much more reason for making that deduction, which might be compared to a public calamity, such as the invasions of Goths and Vandals, which was deduced even from the 40 years' prescription among the Romans, than for this deduction on account of forfeiture: That every man who happened to be fugitated for a crime, or only denounced for a civil debt, and who had thereby no *persona standi*, might claim the same privilege, which would make so many exceptions to this prescription as would make it a very insecure title of property: That as to the