No 176.

executed by him in favour of the said Mr William Ramsay Maule, and his administrator-in-law: That the said Mr William Ramsay Maule was entitled to be served heir of tailzie and provision to the said deceased William Earl Panmure, his grand-uncle, in virtue of the foresaid deed of tailzie in his favour; and remitted to the Macers to proceed in his service accordingly, on the brieve brought before them by him and his administrator-in-law: They farther found, that the said Lieutenant Thomas Maule had right to take up the leases of the house and parks of Panmure, and house and parks of Brechin; and remitted to the Macers to proceed in his service, in so far as regards these two leases; but that he was not entitled to be served heir-male of tailzie and provision to the said William Earl Panmure, in virtue of the deed of tailzie of the estate of Kelly, executed by the said Mr Harry Maule, nor in virtue of the deed of tailzie of the estate of Ballumbie, executed by the said William Earl Panmure; and that his service on the brieve taken out by him could not proceed with regard to the said estates of Kelly and Ballumbie; and remitted to the Macers to dismiss the same accordingly, in so far as concerned these two estates."

For the Earl of Dalhousie, *Solicitor-General, Ilay Campbell, Elphinston.*
For Lieutenant Maule, *Wight, Crosbie, Al. Ferguson.* Clerk, *Robertson.*

*S.* *Fol. Dic. v.* 4. *p.* 98. *Fac. Col. No* 40. *p.* 62.

---

1784. *December* 21.
GEORGE-ALEXANDER GORDON *against* JANET GORDON.

No 177.
How far prescription is interrupted by the minority of substitute heirs.

MR GORDON of Whitelay, in 1730, executed an entail of that estate in favour of Alexander his son, and his heirs-male; of Charles Gordon his nephew, and his heirs-male; and of other more remote relations, to the exclusion of Janet his daughter.

In 1737, however, Alexander, who did not make up titles under the entail, took infeftment in the lands, in virtue of a precept of *clare constat*, which he obtained from the superior.

He lived until 1783; at which period, on his dying without issue, the next heir of entail was George-Alexander, the son of Charles Gordon, who had died in 1775, when, it is to be remarked, George-Alexander was only two years of age.

Alexander having thus possessed the estate for more than 40 years, under unlimited titles, his sister and heiress of line, Janet Gordon, on the ground of his having by prescription acquired immunity from the fetters of the entail, claimed the property in preference to the heir of tailzie; while he, on the other hand, *contended*, That, as in 1775, four years preceding the expiration of the statutory period, he became the immediate substitute to Alexander, his minority had

No 177.

interrupted the further course of prescription. The question then which came to be agitated was, how far the minority of a substitute heir of entail could effect an interruption of the positive prescription.

*Pleaded* for the heiress of line; As the positive prescription chiefly respects landed property, the absolute security of which is so essential to public welfare, its course ought not to be interrupted by minority, concerning which the records can afford no information. It is on this principle that idiots, lunatics, and those persons who, from forfeiture, are rendered *non valentes agere*, though the situation of them all is as favourable as the state of minority, have not been excepted in the statute 1617. Nor indeed does the exception of minors contained in that enactment, refer to the positive prescription; being confined to that part of it which extends the negative to rights affecting land.

But though, in other cases, the course of positive prescription were to be interrupted in behalf of minority, this privilege ought not to be extended to substitute heirs of entail; because, among them, minors might always be found, so as to create a perpetual interruption, and exclude prescription where it is undoubtedly applicable, Bankton, v. 2. p. 163. On this ground, the privilege was denied to an hospital for persons under age; 17th December 1695, Fisher *contra* Hepburn, Div. 12. *h. t.* Nor would the evil be prevented even by limiting the deduction of minority to the nearest heir in substitution; for though not by the co-existence, yet by the succession of minors, the interruption might be continued without end. After all, this reasoning truly tends not to infringe the rights of minority, which can hardly belong to a series of heirs of entail. Under such a settlement, two distinct interests only arise, the interest of the heir in possession, and that of the substitutes in expectation. To each of these last, indiscriminately, whether nearer or more remote, an action is competent for the protection of a right, which is thus evidently common to all of them. As holding then one individul common right, those substitutes are to be viewed in the light of a collective body, or *unum quid*, the existence of which depends not on any specific number of component parts; and, consequently, unless this body consist entirely of minors, it can have no claim to any of the privileges of minority. For further illustration, suppose a private proprietor to inclose in his grounds a part of a public road, and so to possess it unchallenged for the years of prescription. Now, though every one of the people had a title to challenge his proceeding, it is clear the prescription would not be interrupted by the minority of individuals among them.

A similar case was decided in conformity to these observations in the case of Macdougal *contra* Macdougal, 10th July 1739, No 172. p. 10947.

*Answered*; The above criticism on the arrangement of the clauses in the statute is far too frivolous to warrant the supposition that the exception of minority was not intended to apply to prescription in general, whether positive or negative; terms, indeed, which do not occur in the statute, and expressing a distinction which seems to have little foundation. That fancied limitation was

No 177.

unknown to Lord Stair, b. 2. tit. 12. § 18. or to Sir George M'Kenzie, Observ. 2. 7.; and it is contradicted by the decisions of the Court; Ged *contra* Baker, 5th December 1740, Kilkerran, No 83. p. 10789.; Hamilton-Blair *contra* Sheddan, 6th December 1754, Div. 12. *h. t.* As little reason is there for exempting from this interruption, prescription against heirs of ential, each of whom has a *jus crediti*, which gives such an interest in the entailed estate as the law recognises, and its diligence will protect. The statutory words comprehend that case as much as any other; nor do the objections of the opposite party prove that it ought to have been omitted. If, as has been said, such a prescription were indeed to become subject to perpetual interruption, that consequence would not be more anomalous than the alternative equally unavoidable on the other side, of an absolute exemption from interruption. Indeed, the possibility of perpetual interruption is inherent in the nature of the case, and it is acknowledged in regard to the negative prescription. But in the present instance, the circumstances are such as to obviate it. For this claimant pleads upon his own minority alone; and perhaps there would be some impropriety in an heir of entail founding any claim on the right of a predecessor with whom he is not connected as such. It is clear, then, that while with respect to a fee-simple, the extent of this interruption may be indefinite, it never can, in such a case as the present, exceed the statutory period by more than 21 years. Nor is it a better founded argument, that heirs of entail should be considered as a collective body, unsusceptible in consequence of the privilege in question. So far from there being a common right to constitute such a community, no succession of one heir can take place without the exclusion of the rest; and though several heirs may have at the same time a *spes successionis*, it is in each of them as distinct a right as the object of it is different. And thus the supposed example of prescription respecting a high-road appears quite foreign to the present argument, because there a common right would truly have existed in the public. The decision in the case of Macdougal is indeed contrary to the argument now maintained; but having been passed by a narrow majority, it may on that account have less authority as a precedent.

This question, which arose upon a competition of brieves, was reported to the Court by the Lords Ordinary, who sat assessors to the macers of Court. And

The Lords found, 'That the years of George-Alexander Gordon's minority, from 1775, when his father died, fell to be deducted from the years of prescription.'

On advising, however, a reclaiming petition against that interlocutor, the Court appointed a hearing in presence; after which it was

*Observed* on the Bench; As prescription operates in favour of that person only who holds a possession, so the privilege of minority to interrupt is competent to none who have not the right of claiming possession, not contingent but present. On this principle proceeded the judgment in the case of Macdougal;

as did also the decisions in that of Leslie Johnston of Knockhill, and in that of Sir Samuel Maclellan's children. (See Div. 12. *h. t.*) Accordingly,

No 177.

THE LORDS altered their former interlocutor, and found, That the years of George-Alexander Gordon's minority were not to be deducted from the years of prescription.

Reporters, *Lords Alva* and *Henderland*. For the Heir of Entail, *Solicitor-General Blair*.
Alt. *Lord Advocate*, *Maclaurin*, *Honyman*. Clerk, *Robertson*.

*S.* *Fol. Dic. v.* 4. *p.* 99. *Fac. Col. No* 187. *p.* 293.

---

1792. *January* 31. CREDITORS of AUCHINDACHY *against* ISAAC GRANT.

No 178.
Years of minority of substitutes not to be deducted.

ALEXANDER AUCHINDACHY was first heir of entail under a deed executed by his father, and his sister was the next.

He made up titles, however, as unlimited fiar, on which he possessed the estate for the period of prescription.

During a part of this time, his sister, the person in immediate substitution, was minor; and it came to be objected to his prescriptive right, That the years of her minority ought to be deducted. But the Court, as in the case of Gordon *contra* Gordon, *supra*, and in other prior ones there quoted, considering, that in this way prescription could scarcely ever have effect against entails, as some of the substitutes would probably be always in minority,

Found that the years of the minority of the substitute were not to be deducted.

Act. *Wolfe-Murray*. Alt. *G. Fergusson*. Clerk, *Menzies*.

*S.* *Fol. Dic. v.* 4. *p.* 99. *Fac. Col. No* 201. *p.* 423.

*** This case was appealed:

THE HOUSE of LORDS ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.