HIS MAJESTY'S ADVOCATE *v.* HAY.

Ordered and adjudged that the said two interlocutors of 13th July 1756, and 27th July 1757 be reversed, and that the respondent's claim be dismissed..

For Appellant *C. Pratt, Rob. Dundas, C. Yorke.*
For Respondents, *Edward Starkie, Ro. Mackintosh.*

His Majesty's Advocate, - - *Appellant;*
Jean Hay, Widow of John Cuthbert, *Respondent.*

House of Lords, 26*th April* 1758.

Adjudication and Infeftment—Prescription—Interruption.—A bond was granted by a party to his creditor, upon which adjudication, charter, and infeftment followed, this adjudication comprising several other separate debts; the bond debt lay over for 66 years, when the present claim was made, and the negative prescription pleaded against the adjudication: Held that a claim made before the Government Commissioners of Enquiry on forfeited estates and registration thereof, together with a submission, followed by decree-arbitral, entered into by the debtor with one of the creditors in the separate debts comprised in this adjudication, and assignation of that debt by him to the debtor within the 40 years, were sufficient to interrupt the negative prescription in regard to the debt, it being one of those comprised in the adjudication thus acknowledged by the debtor.

Nov. 6, 1690. Hugh, Lord Lovat, granted bond, of this date, for the sum of 1600 merks Scots, payable at the term of Martinmas then following, in the year 1691, to the Bishop of Murray, his heirs, executors, or assignees.

1703. In 1703, this bond was assigned to Robert Frazer, advocate, which appears to have been done in trust, and for the

Feb. 9, 1703. Bishop's behoof; as appears by letter, of this date, under Frazer's hand, declaring that this bond was "assigned in trust "to me for your behoof."

Nov. —— On 18th November 1703, the said Robert Frazer, upon the above bond, as well as upon other bond debts assigned to him in trust, and a bond debt due to himself by Lovat, obtained decree *cognitionis causa* against Lady Frazer of Lovat, eldest lawful daughter of Hugh Lord Lovat, the debtor then deceased. In this decree there was comprised a bond, granted by Hugh Lord Lovat, to James Frazer of Phopachy, dated 16th April 1694, for the sum of 1800 merks, which was afterwards assigned to Robert Frazer, in trust for Alex-

ander Frazer, for the purpose of doing diligence for his use and behoof.

Upon the above decree *cognitionis causa* adjudication followed, against the estate of Lovat for the several debts comprised therein; and charter of adjudication and infeftment duly recorded, of these dates. Jan. 26, 1704. May 9 and 26, 1704.

The Bishop of Murray, reciting the bond granted by Hugh Lord Lovat; and the assignation thereof in trust to Robert Frazer, did, of this date, assign the said bond to John Stewart, merchant in Inverness; and he, of same date, granted back bond, acknowledging that the same was granted and assigned to him by the Bishop, for behoof of Jean Hay the respondent, and her children, and binding himself to denude in her favour. Mar. 14, 1707.

In the meantime, titles had been made up in the name of Lord Prestonhall, whose eldest son, Alexander Mackenzie, had married the eldest daughter, and heir to the estates of Hugh Lord Lovat, against whom the decree of *cognitionis causa* was obtained.

After this, the title of Alexander Mackenzie was made up, after his father had purchased several of the debts and encumbrances on the estate. He himself also purchased in several other adjudications. Thereafter Alexander Mackenzie was attainted, for joining in the rebellion of 1715, and his estates forfeited. 1706.

In 1718, the executor of Robert Frazer, who had constituted the above debts against the estate of Lovat, lodged a claim before the Government Commissioners of Enquiry, setting forth several debts, and among the rest, the 1600 merk bond of 1690 in question. It was duly registered as a claim by the Government Commissioners on Lovat's estate, the life-rent interest which Alexander Mackenzie had therein being involved in his forfeiture.

In 1736, Stewart disponed this bond to the respondent, for behoof of her children. 1738.

In 1738, Simon Lord Lovat, who had succeeded to the estates, and Robert Frazer, grandson of James Frazer of Phopachy, the grantee in the bond of 1694 for 1800 merks, comprised, as before mentioned, in the adjudication, did enter into a submission to William Grant, and James Fergusons, Esqs., advocates, as arbiters, whereby these gentlemen, in terms of the submission to them, and after discussion had therein, decerned and adjudged the said Lord Lovat to pay to the said Robert Frazer the sum of £1000

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in satisfaction of his several claims, including that in the adjudication, and they thereby ordained him to grant Lord Lovat an assignation to the said bond of 1800 merks, contained in the said adjudication of 1704, and adjudication itself to that extent. This was done; Robert Frazer received his money, and discharged and assigned to him accordingly.

In 1747, Lord Lovat was attainted of high treason, and his estates forfeited; and the present claim on the 1600 merk bond was made by the respondent in 1749, in pursuance of the vesting act thereanent, saving the right of lawful and just creditors.

It was objected to the claim by the appellant, on behalf of the Crown, that no document having been taken on the debt, from the date of Robert Frazer's adjudication in 1704, until the entry of the present claim, the same was prescribed and barred by the negative prescription. To this objection it was answered, that the adjudication obtained by Robert Frazer in 1704, having been completed by charter and sasine, became a right of property, against which the negative prescription could not run; that the lodging this claim against the Lovat estate, in pursuance of the vesting act in 1715, before the Government Commissioners of Enquiry, and the registration thereof by them, was equivalent to pursuing the debt; and that the foresaid submission entered into between Lord Lovat and Robert Frazer in the year 1738, and the decret arbitral pronounced therein in 1739, were documents taken upon the adjudication, and which must preserve the whole adjudication, though comprised of distinct and separate debts, as to the right of every person therein, as well as the particular claims thereby submitted and adjudicated on. And further, that it appeared from the disposition and translation by John Stewart to the respondent Jean Hay in the year 1736, that he, Stewart, held this bond in trust for the behoof of *her children*, who being all minors, and the years of minority being deducted, the negative prescription could not apply to them.

July 27, 1757. The Lords found, on report of Lord Prestongrange, unanimously, " that the bond for 1600 merks, with the adjudi-
" cation, charter and infeftment thereon, are not cut off by
" the negative prescription."

Against this interlocutor the present appeal was brought.

Pleaded by the Appellant.—The act of parliament 1469, establishing the negative prescription, declares, " That the
" party to whom the obligation is made, and who has inte-

" rest therein, shall follow the said obligation within the " space of forty years, and take document thereupon, and if " he does not, it shall prescribe, and be of none avail." In the present case, the bond was granted in 1690, and adjudication in 1704, and from that time till the present claim, the obligation was not followed, nor document taken thereupon; the negative prescription, therefore, strikes against the adjudication of 1704, as well as the bond, and this claim ought to be dismissed. Because the several circumstances which are now pleaded as interruptions of the prescription, are not only out of the words and established construction of the act of parliament, but are also contrary to the reason, spirit, and evident intention of that act: for, admitting them to be true, yet all, except the pretended minority, were the acts of third parties, who had no concern with, and were strangers to the debt in question; the preserving of this debt was not the end of the acts done, nor so much as thought of by the parties; and, under these circumstances, it would be straining the act of parliament to extend them by implication to the cases of creditors *following the debt*, or *taking document thereon*, more especially as the respondent could not be prejudiced by the act of the other creditors. Besides, the several debts in the adjudication 1704, must stand or fall on their own merits, without communicating any additional strength or weakness to each other. They were due to different parties, and for different considerations, the interest of these parties being distinct, the adjudication, in respect to them, came to be considered in the same light as if each party had taken out a separate adjudication. Robert Frazer had no interest in the debt claimed, nor any power from the creditor; besides, it does not appear that his claim was entered within the time limited by law. The plea of interruption founded on minority of the respondent's children, came too late, after she had entered her claim under the assignation of 1737. It does not appear that they have any interest, for the assignation of 1707, wherein the right to them is alleged, has not been adduced, and the recital thereof in the assignation of 1736 is not sufficient, so that the conveyance appears only to herself, and for her own behoof.

Pleaded for the Respondent.—That this bond originally was assigned to Robert Frazer, for the purpose of suing diligence thereon, and taking adjudication for the same against the estate of Lovat, with the view to make the same

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a permanent and real security thereupon; and ever since then the estate of Lovat has been in such a situation as to preclude the possibility of creditors obtaining payment of their debt; the plea of prescription, therefore, cannot apply to this debt, because, 1st, It is barred by the infancy of the respondent's children, in whose favour and for whose behoof Stewart held the bond in question, which minority being deducted from the period of prescription calculated from the date of the adjudication in 1704, totally excludes the plea. 2d. It is also excluded by the several acts done by Lord Prestonhall, and by Lord Lovat in purchasing and taking conveyances of the several debts included in the same adjudication with the debt in question, which is an acknowledgment of the adjudication to the effect of avoiding the plea of prescription as to the whole; and, 3d. It is further interrupted by the lodging of the claim before the Government Commissioners of Enquiry for the forfeited estates; this being, with the registration of that claim, equivalent to an action or process raised on the debt.

After hearing counsel, it was
Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *C. Pratt, Ro. Dundas, C. Yorke.*
For Respondent, *Edward Starkie, R. Mackintosh.*

Note.—These two cases derive importance from various considerations. The *first* seems to authorize the inference, that nothing will be sufficient to interrupt the negative prescription, except some proceeding, in a question *with the proper debtor in the obligation*, within the years of prescription. In that case, certain proceedings had taken place in a process of reduction and declarator of extinction of the debt, as between a *co-creditor* of the common debtor, but to which that debtor himself was no party, and these were held not to interrupt the running of the prescription, so far as he was concerned. But, in the *second* case, (which is not reported in the Court of Session reports,) the recognition of a debt as subsisting, was inferred from the parties acquiring right to a decree of adjudication and other documents, in which that debt was contained, though they obtained no right to this debt itself. Such recognition of the debt, though merely inferred, in the manner now noticed, by the proper debtor, was held to interrupt the negative prescription. And this seems to give a latitude to the express words of the statute as to *following furth*, or *taking document* upon the debt.

But these cases now reported, derive considerable additional im-

(M. 13,132.)

1772.

PATRICK CAMPBELL of Knapp, and Others, Burgesses and Inhabitants of the Burgh of Campbelton, - - - } *Appellants:*

JOHN HASTIE, Rector or Head-Master of the Grammar School of Campbelton, - } *Respondent.*

CAMPBELL, &c. *v.* HASTIE.

House of Lords, 14*th April* 1772.

PUBLIC OFFICE—SCHOOLMASTER IN BURGH—APPOINTMENT.—A schoolmaster, appointed by the Magistrates and Town Council of Campbelton, without any mention being made as to whether his office was for life or at pleasure: Held that it was a public office, and that he was liable to be dismissed for a just and reasonable cause, and that acts of cruel chastisement of the boys were a justifiable cause for his dismissal; reversing the judgment of the Court of Session.

The respondent was engaged as rector and head-master of the grammar school of Campbelton, which, belonging to

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portance, from a discussion regarding them, which has recently occurred, in a case now depending before the Second Division of the Court of Session, upon a report by Lord Wood. In the printed pleadings in that case, which has not yet been decided, the cases now referred to, havé undergone very ample discussion. This is the case of *M'Neill* or *Morison* v. *Yorston*, the printed pleadings of which bear date November 1849,* and one of which is drawn by Professor More: The circumstances are these:—In 1748, Neil M'Neill obtained a wadset over lands in the island of Gigha for £410 sterling. The wadsetter had four sons, Donald, John, Hector, and Malcolm, and two daughters, Janet and Mary. Heritable securities, which were followed by infeftment, were granted in favour of those sons and daughters, so as to create a subordinate security over the wadset right, to the full extent of £410 covered by it. Neil M'Neill, the original wadsetter, died in 1749, and was succeeded by his eldest son Donald M'Neill, who made up a title, as his father's heir, to the original wadset, and in 1775 he disposed this wadset to John Cowan. The lands of Gigha, over which this wadset extended, were sold to Sir Archibald Campbell, who also purchased the wadset from Cowan, and obtained right thereto in 1779. In the meantime the subordinate heritable securities which had been constituted in favour of Neil M'Neill's children, and which exhausted the £410 contained in the wadset, had been entirely overlooked by all parties; but, having been discovered upon a search of the records, Sir Archibald Campbell applied to Cowan to produce discharges of these heritable securities. An action of reduction and declarator of extinction of

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* It is understood that the death of one of the parties has prevented the Court from deciding this case.

1772.

CAMPBELL, &c. *v.* HASTIE. June 4, 1760.

the corporation, was under the management and direction of the magistrates and town-council. He was admitted, of this date, and was to receive a salary over and above fees, these heritable securities was then brought against the children and representatives of Neill M'Neill, the original wadsetter, in which it was maintained, 1st, That the original wadset having been dissolved by a regular order of redemption, the subordinate heritable securities grafted on this wadset, fell to the ground, and ought to be set aside. 2dly, It was contended that the sums in these heritable securities had been paid and extinguished. This action was raised in 1791.

At first Lord Swinton, as Ordinary, pronounced an interlocutor finding that it was incompetent for a wadsetter to create a subordinate heritable security upon the wadset right; but he afterwards altered this interlocutor, and found that the wadsetter "had full "power to burden the said lands to the full amount of the principal "wadset;" and the Court adhered to the Ordinary's interlocutor, upon advising a reclaiming petition, with answers. It was thus decided, that such subordinate heritable securities were, like feu-rights, separate heritable burdens, ingrafted on the principal right. This case, so far as this point is concerned, is reported in the Dictionary, p. 16,555.

The case then turned upon the question, as to whether these heritable securities had been extinguished *by payment*, and after various proceedings before the Lord Ordinary, it fell asleep subsequent to 1799. But it ultimately turned out that there had been no payment of these securities, and in 1818 Mr. M'Neill, then the proprietor of Gigha, granted a precept of *clare constat* in favour of Neil M'Neill, the son of Malcolm M'Neill, who was the youngest son of the original wadsetter, as the *heir of line* of his said deceased father, and also of his deceased uncles, John and Hector, and of his aunt Janet, to the respective heritable securities held by them. And Neil M'Neill received payment of their shares of the heritable bonds. By the precept of *clare constat* Mr. M'Niell of Gigha admitted the subsistence of the debts, but it was overlooked that these heritable debts were payable, not to the *heir of line* of the creditors, but to the *heir of conquest*.

Consequently, Janet M'Neill or Morison, the daughter of Donald M'Neill, the eldest son of Neil M'Neill, the original wadsetter, being, in right of the father, the *heir of conquest* of these deceased creditors, and not having heard of the proceedings above mentioned till 1836, then wakened the process of reduction and declarator, and also, after serving herself *heiress of conquest* to her deceased uncles and aunt, raised an action for payment of the heritable debts due to them.

In defence against this action it is pleaded that any claim at her instance was cut off by prescription, in respect no proceedings had

of £30—£20 of which was to be paid out of the common good of the burgh, and the other £10 to be paid by the allowance made by the Commissioners of Supply for a parochial school. In consequence of neglecting his school, and the proper education of his pupils, and entering into occupations incompatible with its efficient management, and particularly, in consequence of severe chastisement and maltreatment of the pupils, to the great danger of their lives, the magistrates, after a due investigation and proof led of the facts, dismissed him, of this date. The proof led before his dismission went to show that he resorted to cruel methods to correct his scholars—that scarce a day passed without some of the scholars coming home to their parents with their heads cut, and their bodies discoloured. Instead of employing a taws

Aug. 18, 1767.

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been taken by her for greatly more than 40 years after the date of the securities. This raised the question, Whether the proceedings, in the reduction and declarator, to which she had been called as a defender, did not interrupt the prescription? and also, Whether the acknowledgment of the proper debtor in the heritable securities, as to their subsistence, (by the precept of *clare constat* alluded to,) though made to a wrong heir, did not also bar the prescription? Various other pleas were also stated, to which it is here unnecessary to advert. But it was pleaded, on the authority of *Robertson*, 27th November 1751, that Donald M'Neill, the father of Mrs. M'Neill or Morison, having acquired the original wadset, in right of his father, and being also the heir-apparent of the creditors in the heritable bonds above mentioned, the latter were extinguished *confusione*. It turned out, however, on a careful examination of the pleadings in the case of *Robertson*, that this case must have been erroneously reported, as the pleadings shew, that the decision must have turned not on the doctrine of *confusio*, but on the ground of the wadset in that case having been radically null, and so neither requiring, nor admitting of any title being made up to it.

Lord Wood, in reporting the case now referred to, says that "both "the plea of prescription and the other pleas of the parties, present "points of considerable importance, apparently not free from difficulty, and which deserve the consideration of the Court." He further says: "The Lord Ordinary is inclined to be of opinion that "prescription was interrupted. At the same time, the case of *Hay*, "9th March 1756, (M. 11,276,) and House of Lords, 24th April "1758, and of *Wright*, 11th December 1717, (M. 11,269,) may be "thought to be adverse to this decision. It, however, occurs to the "Lord Ordinary that there is room for soundly distinguishing be-"tween them and the present case."