1712. *July* 22. STEWART *against* DOUGLAS.

THOMAS Scot of Whitsled as principal, and Archibald Douglas of Cavers as cautioner, grant bond to Mr John Stewart of Ascog, advocate, and James Stewart his son, for £1000 Scots, in 1700. James having gone abroad, he leaves a factory with Mr William Weir, advocate, his brother-in-law, who charges Cavers for payment in 1709. He suspends on thir reasons,—That, by the 5th Act, 1695, his obligation is prescribed, not being pursued nor insisted on within the seven years.

ANSWERED,—No prescription: 1*mo*, Because you are bound, not only as a cautioner, but as curator to Whitsled. 2*do*, Since the prescription ran out, you, Cavers, have taken a real security on Whitsled's estate for your relief of this and other sums, which homologates and redintegrates the obligation, and shows that neither of you looked upon it as extinct. 3*tio*, I was minor a part of the seven years, and no prescription runs against minors; but they are always excepted *jure communi* where the law does not declare the contrary.

ANSWERED to the first,—His obligation as curator can import no more but his authorising the minor; so his obligation resolves only into his being cautioner. To the 2*d*, His taking security from Whitsled, the principal, was only *pro majore cautione*; and, being a deed betwixt a principal and his cautioner, can never be pled as a homologation in favours of the charger, that not being designed. To the 3*d*, It is plain the short prescriptions run against minors, as well as majors, unless they be especially excepted. Thus the septennial prescription of the legal of apprisings, introduced by 37th Act 1469, did run against minors, till it was altered by the 6th Act 1621. And, by the same analogy, the septennial prescription, freeing cautioners after seven years, by the Act 1695, must also militate against minors, till it be remedied by a contrary statute. 2*do*, That Act 1695 makes only a single exception of diligence by horning, arrestment, inhibition, &c. within the seven years, that they shall interrupt the prescription; but not a syllable of minority: *ergo*, this exception *firmat regulam in casibus non exceptis*. 3*tio*, If minority stopped prescription *ipso jure*, why was the 5th Act, 1698, framed to secure minors from the prescription of summonses, and instruments of interruption of real rights introduced by the 19th Act 1696? How inconsistent were that with the prudence of such a judicatory, to enact a law in vain, if minority was excepted without it. 4*to*, In the case, *Brody* against *Brown and his Curator*, 26*th January*, 1709, they found the 83d Act, 1579, ordaining tradesmen's accounts to prescribe in three years militated against minors, as well as others; and, by the same very rule, removings and house maills prescribe even against minors; and so the three years of preference given to the defunct's creditors before those of the apparent heir, by the 24th Act 1661. And, to add no more examples, the *annus deliberandi* runs against minors, that they cannot enter *cum beneficio inventarii* after year and day is expired: and the six months for executors-creditors coming in *pari passu* excludes minors, if neglected. From all which it is evident that this septennial prescription of cautionry runs against minors, they not being specially excepted.

REPLIED,—That the wisdom of our legislators can never be supposed to strike off the privilege by the laws of all nations given to minors; the law of

nature, by most excellent reasons, providing against the lubricity of that tender age. For, though prescription be introduced *in odium ejus qui jus suum prosequi negligit,* yet negligence can never hurt a minor, who is reputed *non valens agere.* And the arguing, that if the Parliament had designed to except minors, they would have expressed it, is fallacious and inconclusive; for the Act 1474, introducing prescription, where personal rights are not prosecuted within the 40 years, does not except minors; and yet the Lords, by their constant tract of decisions, have always excepted them. And the Act 1617, establishing the 40 years' prescription in heritable rights of lands, gives a period of 13 years to interrupt, where minority is not excepted, as it is in the first part of that Act; yet the Lords, on the *5th July* 1666, *The Earl of Hume* against *his Wadsetters,* found minority behoved to be deduced from these 13 years, though not expressed: and Sir George Mackenzie, in his Observes on these Acts of Parliament, introducing short prescriptions in 1579, remarks, that some of our Acts notice minority, and others do not, yet it is virtually included in them all; and, being founded on common law, *inest de jure.*

The Lords thought the Act, freeing cautioners after seven years, an innovation of our ancient law, and unfavourable, and deserving no extension; yet, being a new law, they resolved to hear the point in November, ere they fixed what should be the rule for minors in time coming in such dubious cases.

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1712. *June* 24 *and July* 26. STEWART of FINTALLOCH *against* MACWHIRTER of GARRIEHORN.

June 24.—THOMAS Stewart of Fintalloch being debtor to John Macwhirter of Garriehorn in 1100 merks, by bond; and, being charged, he suspended on compensation and other grounds. And, during the dependance, before it was fully discussed, Fintalloch having gone to Norwich with a drove of cattle, he is arrested by young Garriehorn, likewise there, for the debt suspended, upon a letter of attorney or commission, given him by his father, and put in prison, till Kennedy of Daljaroch, Heron of that ilk, and some other Scots gentlemen accidentally there, bailed him, under the penalty of no less than £800 sterling. Fintalloch, on his return, gave in a complaint to the Lords of this outrageous affront, and the manifest contempt of the Lords' authority, to incarcerate him during a standing suspension. And, during the trial of this riot, he denying that he ever gave such commission to his son, and Fintalloch, wanting the same, refers it to his oath; who compears, and denies he ever gave such commission; which he thought would liberate himself, though it left his son in the guilt of wrongous imprisonment; but he, to shun it, had retired abroad: yet, afterwards, Fintalloch recovers the principal letter of attorney, and gets the writer and witnesses, who saw it produced at Norwich, examined, and they clearly deponed anent the verity of it. Which probation coming this day to be advised, Fintalloch craved that Garriehorn, elder, might be condemned to refund his damages, which were very considerable.

ALLEGED,—All that was before the Lords was allenarly the contempt for proceeding during the depending suspension; for the commission, now pro-