

restrictions, may, even before the succession split, by the positive prescription work off these restrictions.

That the minority of the heir in possession could not be pleaded against himself, was also a clear point. And so far the Court was unanimous. But it was more doubtful, whether the minority of the remoter heirs, viz. of the defender Thomas and of his brother William, should not interrupt; for if not, then here would be a prescription incapable of interruption, if the minority of the heirs *in spe*, and whose interest it is to restrain the powers of the heir in possession, did not interrupt the prescription. On the other hand, it was thought no less inconsistent to suppose a prescription, and at the same time to destroy it by an hypothesis that would render it incapable ever to run; which must in great measure be the case, if the minority of an heir, however remote, other than the heir in possession, should interrupt it. Upon which point the Court, by plurality of voices, found as above.

Kilkerran, (PRESCRIPTION), No 5. p. 416.

1753. February 2.

WILLIAM DOUGLAS *against* Mrs ISOBEL DOUGLAS of Kirkness.

A LAND estate in possession of the heir of line, was claimed by the heir-male, upon this medium, that the former investitures were in favours of the heirs-male, with limitation sufficient to debar a gratuitous alteration. It was *answered*, *imo*, That there was no limitation which could bar a gratuitous alteration; *2do*, That the alteration was made above 40 years ago; during which time the investitures had stood in favours of the heirs of line. *Replied*, That, till lately, the same heirs who possessed the estate were heirs-male as well as heirs of line; and that the pursuer needed no action for supporting the right of the heirs-male till the succession divided, and the heir-male come to be different from the heir of line; *et contra non valentem agere non currit prescriptio*. *Duplied*, An action of declarator was always competent concluding against the heir in possession that he should be bound to make up his titles, and possess in his quality of heir-male: But, without regard to this, that it would be intolerable to keep up such old pretensions, without end, never to be sopited by prescription; for, at that rate, no man could be secure of land-property.

“THE LORDS were unanimous as to the defence of prescription; and that possession for 40 years of a predecessor’s estate must free the heirs of all limitations and fetters.”

Fol. Dic. v. 4. p. 97. Sel. Dec. No 37. p. 41.

Affirmed upon appeal.

* * See this case as reported in Faculty Collection, No 38. p. 4350. *voce*
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