1754. *December* 10. CAPTAIN HAMILTON BLAIR *against* THE FEUARS of KERSELAND.

[Kaimes, No. 70; *Fac. Col.* No. 118.]

IN this case the Lords found, after a full hearing of two days of the lawyers, and a third day's hearing of one another, that the positive prescription did not run against minors; *dissent.* President and Kaimes, Woodhall and Shualton.

The President said that he had been very much perplexed about this question since he first began to study law; that Justinian, and the interpreters of the Roman law who have written since his time, have made a confusion betwixt usucapion and prescription that is inextricable. By Justinian's constitution, a thing was usucapt in ten or twenty years, *tit. Cod. De Transformando Usucapione,* yet the action *rei vindicatio* was not lost to the former proprietor but by the prescription of thirty years. The same confusion, he said, was in our law betwixt the positive and negative prescription, which are confounded in the Act 1617, and by our authors who treat of them: That what determined his judgment in the matter was the decision, 24th December 1728, *Presbytery of Perth* against *Magistrates of Perth, Dict.* tit. *Prescription,* p. 98, where it was found that the action *rei vindicatio* is not cut off by the negative prescription of forty years, if another has not acquired the property by possession on a good title: That this decision showed him that the foundation of our prescription was not the negligence of the proprietor, in which case it might be interrupted by minority, but some other foundation, which he thought, in the case of the positive prescription, was, that a man who had possessed forty years upon charter and sasine had anterior rights, which were destroyed by fire or any other accident. Now, from a prescription of this kind, founded not upon negligence, but upon such a presumption, there is no reason why minority should be deduced.

Upon this it may be observed, that there is no contradiction betwixt the property being transferred by usucapion in ten or twenty years, and the general rule of personal actions lasting thirty years; because the *rei vindicatio* must, by the nature of the thing, be an exception to that rule, since it can last no longer than the right of property in which it is founded. The case is different with respect to the hypothecary action, which, by the Roman law, lasts after the debt is prescribed; *L.* 2, *Cod. de Evictione Pignoris*; vide *Decis. Frisic. Zach. Huber. Observat.* 28: but the reason is also different: That it is indeed better, when, as in our law, the right of property and the right of action prescribe in the same time; and it would be introducing a kind of dissonance and absurdity to make the prescription of the action to be interrupted by minority, and yet not the prescription of the thing; so that a man may have lost his estate by prescription, and yet not have lost the right of action for recovering of that estate: That all that was decided in the case of *The Town of Perth* is, that the *præscriptio longissimi temporis* does not take place with us, and that nothing can be acquired by possession, according to the law of Scotland, without a just title; that is, in other words, that we have no prescription

of rights of property except usucapion; so that nobody can lose his right of property except somebody else acquire it. And this decision was according to good principles; for while I retain my right of property, it is impossible that the action *rei vindicatio* can ever prescribe; or, *vice versa*, the property being lost, the action must also be lost. It does not therefore follow, from this decision, that our prescription is not founded on negligence, but that we have no prescription at all of this kind. Supposing that positive prescription were to be founded upon the presumption mentioned, yet it would not follow that this presumption ought to take place against minors: our positive prescription would still be an *adjectio dominii* by continuance of possession. Now, why should that possession run against minors, or why should not they be saved against prescription of their lands as well as of their obligations?

1754. *December* 13. ARCHIBALD ANGUS *against* DRUMMOND.

THE question here was concerning a sale of lands by an apparent heir, upon the Act 1695:—at what time the sums due to the creditors were to be accumulated, principal and interests, into one principal sum,—whether from the time of the sale, so as from that time they would be entitled to annualrents of their accumulate sum, or only from the time of the demand, so that they would only draw then the share of the price belonging to them, in the same manner as if the lands had been voluntarily sold by the heir, and the bond granted by the purchaser payable to him, and not to the creditors? And the Lords found that the *first* rule was to be followed: *dissent. Præside et Kaimes*, upon account that this was the rule followed in the sales of bankrupt estates, from which the plan of these sales upon the Act 1695 has been copied.

1754. *December* 17. STIRLINGSHIRE ELECTION PROCESS.

[Kaimes, No. 79; *Fac. Col.* No. 129.]

IN this case the Lords found that a man, year and day infeft after the registration of his seasine, might be enrolled at a meeting for election, in terms of the 16th Act of his present Majesty, notwithstanding he was not year and day infeft, and his seasine registrated a year before the testing of the writ upon which that election was made, in terms of the Act of the 12th of the Queen. The President endeavoured to reconcile the two acts by saying that the Act of the 12th of the Queen only regarded the right of voting at an election, and the Act of the 16th of the King only the right of being enrolled; so that a man might be entitled to be enrolled without being entitled to vote at an election till year and day was passed before the teste of the writ; and therefore, as in this