the same manner as if the right to his lands were under reduction, that would be no reason for not enrolling him in the mean time; and if it were otherwise, it would give occasion to such tricks as would altogether elude the Act.

1765. *December* 19. CAMPBELL of OTTER *against* WILSON.

IN this case many curious questions occurred concerning prescription. The first was, What the effect of forfeiture was?—For the fact was, that both the predecessor of the person who pleaded the prescription, and of him against whom it was pleaded, were forfeited in the reign of Charles II. but these forfeitures were rescinded after the Revolution. The question was, Whether the years of the forfeiture were to be deduced from the prescription?—And with respect to the forfeiture of the predecessor who was in the course of acquiring by the prescription, all the Lords were of opinion, that the prescription must run in favour of the Crown or its donatar, as well as in favour of any other singular successor, so as that the forfeited person, upon his restoration, would have the benefit of the Crown's possession; but whether the prescription ran against the forfeited person was more doubtful.

Lord Pitfour said that prescription was the great security of our most valuable property, our land rights; that it was very difficult to say who had the best right to lands 80 or 100 years ago; and that to involve men in questions of that kind, was to render property very uncertain. It was therefore his opinion, that the plea of *non valentia agere* did not belong to the positive but to the negative prescription; and for this he might have quoted a decision from Fountainhall, 31*st December* 1695, *Innes* against *Innes*. And indeed it appears to be certain, that at least one *non valentia agere*, which takes place in the negative prescription, would not take place in the positive: Suppose a bond granted to A in liferent and to B in fee, the prescription would not run against B during the life of A; but supposing a land estate given to A in liferent and to B in fee, it could not be pleaded but that the prescription of that estate would run against B even during the life of A. Pitfour further said, that minority ought not to be excepted, if it had not been particularly mentioned in the statute; and, in general, the rule of our law was, that minority was never deduced unless when particularly excepted; and therefore it was not deduced from the triennial prescription of accounts, and the septennial prescription of cautionry, and there was much less reason for deducing it from the 40 years' prescription, if it had not been particularly excepted: That from this long prescription was not deduced the time at the Revolution when there was a total surcease of justice, but only from the short prescriptions by Act 40, 1690; and surely there was much more reason for making that deduction, which might be compared to a public calamity, such as the invasions of Goths and Vandals, which was deduced even from the 40 years' prescription among the Romans, than for this deduction on account of forfeiture: That every man who happened to be fugitated for a crime, or only denounced for a civil debt, and who had thereby no *persona standi*, might claim the same privilege, which would make so many exceptions to this prescription as would make it a very insecure title of property: That as to the

decision in the case of the *Duke of Lauderdale*, in 1678, by which it was found that the prescription did not run against him during his forfeiture, in the time of the troubles, it did not move him much; *first*, Because it was a single decision, in favour of the Duke of Lauderdale, when he was the governor of Scotland; and *2dly*, Because there was no regular government in the country when he was attainted; which could not be said of the time of Charles II. when the attainder in question happened. And as to my Lord Stair seeming to approve of this decision, the fact is, that my Lord endeavoured, from the decisions of the Court, to form a system of law, and therefore, in his Institutes, he sets down as law whatever he found to be decided. And with Pitfour agreed all the Court except Lord Coalston, who respected the decision and the authority of Lord Stair.

For my own part, I think there is no difficulty on the point; because *foris-facere est alienare:* and if I alienate my lands upon which another is in possession upon a title of prescription, and the disponee shall do nothing to interrupt the prescription, and then the alienation shall be reduced upon any ground in law, the time which the alienation subsisted will certainly be imputed into the prescription against me; I think therefore that there is no *non valentia agere* here, because the Crown, which came in place of the attainted person, was certainly *valens agere*, and therefore prescription ran against the Crown just as it would have run against the attainted person.

Another question was, Whether a superior infeft in the lands, possessing the lands 40 years, not upon any right from the vassal, but without any challenge from him, acquired the property by prescription?—And the Lords unanimously found that he did; for otherwise a man, that ever at any time had granted a subfeu of his lands, could never acquire them by prescription.

The next question was akin to this: Suppose the superior had taken a disposition from the vassal, and had made that the title of his possession, but without infefting himself, the question is, Whether he thereby had a title of prescription of the property? And Pitfour thought he had not, because he said the personal right to the lands never could incorporate with the real right, being rights of different kinds, nor could the right of property and superiority be otherwise joined together than by a resignation *ad remanentiam* or by an infeftment upon a disposition of the property; in which case the superiority, being the *jus nobilius*, would draw to it the right of property.

See, upon this subject, what passed in a case of tailyies, *Captain Livingston* against *Lord Napier*. *Supra*, 20th November 1761.

A fourth question was concerning the possession of a liferentrix, not deriving right from the person who had the title of prescription, but from another, Whether it could be deemed the possession of the prescriber? Lord Pitfour was clearly of opinion that it could not; but if the liferentrix renounced her right in favour of the prescriber, he thought that there was as little doubt but that his possession, by virtue of that renunciation, might be ascribed to his title of prescription. But, *quæritur*, If the liferentrix should not renounce, but assign her liferent to the prescriber, *quid juris?* I should think, in that case, the prescriber, having two titles of possession in his person, might ascribe his possession to one of them, viz. the title of prescription; for it is in this way that a person having two rights to an estate, one limited and the other unlimited, by ascribing his possession to the unlimited title, works off the limitations of the other title, and acquires by prescription an

absolute right of property; and in the same manner a man purchasing in collateral rights to secure his property, by ascribing his possession to them, preserves them from prescription.

Pitfour, in this case, likewise said, that where the possession was immemorial, it was to be ascribed to any title however ancient; and he quoted a case in Edgar's Decisions, where the Lords ascribed an immemorial possession to a title as old as the year 1638.

In this case interruption of the prescription by minority was pleaded; and it so happened that one of the minors was a posthumous child, and was not born till seven months after his father's death.

Pitfour was of opinion that these seven months likewise were to be deduced from the prescription, because he was proprietor of the estate during that time, and if the prescription could not run against him after he was born, *multo minus* while he was *in utero*. And this opinion of Pitfour's is confirmed by *L.* 45, *Pand. de Minoribus.* (See *infra*, 26th June 1766.)

1766. *January* 13. M'NEIL *against* CAMPBELL.

[*Fac. Coll. No. IV. p.* 246.]

In this case Lord Pitfour gave it as his opinion, that if a man should adjudge upon a trust-bond, in order to entitle him to carry on an action, and should possess the estate, although he had another title in his person, viz. a liferent, yet he thought he incurred an universal passive title, because of the express words of the Act of Parliament 1695, which made possession upon any other right than a public sale a passive title; and he thought all that equity could do, was to restrict the passive title to the value of the subject.

2do, He thought also, and it was so decided by the Court, that a father, in his son's contract of marriage, having disponed his estate to himself in liferent, and after him to his son in liferent, and after both their deceases to the heir-male of the marriage in fee, and both the father and the son being in the sasine, he thought they were both fiars,—the father first, and after his death the son; although it was the opinion of the Court, in the case of *Lord Napier* against *Captain Livingston*, to reject an anomalous settlement of that sort.

3tio, Lord Gardenston gave his opinion that the father, in this contract of marriage, having reserved to himself expressly a power of providing the younger children, had thereby greater latitude than if there had been no such reservation and the matter had rested entirely upon the power given the father by law; insomuch that, if there appeared no fraud in the intention to disappoint the heir, he might give provisions to the whole extent of the subject.