

No 359. The present case must be allowed to have been a very doubtful one ; and therefore *bona fides* must be sustained *usque ad sententiam*.

THE LORDS found, That the rents of the estate of Pittrichie, from Charles Maitland's death, to the 13th July 1753, being the date of the first interlocutor of this Court, in the defender's process for the estate, were *bona fide percepti et consumpti* by Mrs Katharine Maitland ; and that she is not accountable therefor : But found, That during her possession she is chargeable with the annual-rents on the bonds pursued for. See PRESUMPTION.—TAILZIE.—BONA FIDE CONSUMPTION.—CONFUSIO.

Act. *Müller, G. Brown, Ferguson.*

Alt. *Burnett, A. Pringle, Lockhart.*

W. S.

*Fol. Dic. v. 4. p. 111. Fac. Col. No 63. p. 101.*

1790. December 8.

ELISABETH CUMING *against* The YORK-BUILDINGS COMPANY.

No 360.

Minority of one of several nearest in kin, how far it prevents the currency of prescription.

THE father of Elisabeth Cuming was assignee in several petty debts due by the York-Buildings Company, for which, in the year 1734, he obtained a decree.

No further steps, however, were taken ; and Mr Cuming died in 1746, leaving two sons and four daughters, of whom Elisabeth, born in 1744, was the youngest.

It was not till 1787 that Elisabeth Cuming, having been confirmed sole executor *qua* nearest in kin to her father, obtained a decree of adjudication for these debts, against the York-Buildings Company's estates in Scotland.

In the ranking of the creditors, it was admitted, that, on account of the minority of Elisabeth Cuming, no prescription could be pleaded against her ; but as to the other children, it was maintained, that the debt was extinguished. In opposition to this argument Elisabeth Cuming

*Pleaded,* The statutes introducing the negative prescription seem to apply only to obligations and contracts, and not to decrees. With respect to them, the danger of forgery, which appears to have been chiefly in the view of the Legislature, is altogether precluded ; acts 1469, cap. 28. ; 1474, cap. 54. ; 1617, cap. 12.

But it would be of no importance, although these enactments were to be so extended as to reach judicial proceedings. In the case of rights descending to an heir, who, in the contemplation of law, is held to be *eadem persona cum defuncto*, every objection which is pleadable against the ancestor may be thought competent against him. But an executor, who is truly a trustee, appointed for collecting and distributing the moveable effects of a deceased person, stands in a different situation ; and if it can be shown that no improper delay is imputable to him, the objection of prescription must be wholly excluded.

So the point was determined, The Younger Children of Sir Samuel Maclellan, No 358. p. 11160. Indeed, where the executor confirmed is one of the nearest in kin, it cannot be said, until the rest enter their claim, that any right is vested in them. In case of their dying without issue, the whole succession would remain with the executor confirmed.

*Answered,* It is to the right of debt or obligation that the long prescription is applied, without any regard to the form in which it is constituted. A decree, therefore, on which no proceedings have been held for 40 years, becomes ineffectual, in the same manner as if the claim giving rise to it had never existed.

If, in the present case, the right of debt had been vested in the executor confirmed, before the years of prescription had been completed, there might have been room for arguing, on the authority of the decision quoted on the other side, that the claim was still unimpaired, the person having the *jus exigendi* being so long under a legal disability. But one of several nearest of kin cannot, by confirming, communicate to the rest the privilege of her minority.

But the principle of the decision quoted has been departed from in several instances; it being now more justly held, that it is not the minority of the trustee, but that of those who are to reap the benefit of the trust, by which every question of this kind ought to be regulated. And, as in virtue of even a partial confirmation obtained by one of many nearest in kin, the whole moveable estate is transmitted in succession, it does not seem to admit of dispute, that the shares belonging to every one of the nearest in kin having been previously divided by the operation of the law, must run a separate course of prescription, in the same manner as if the debtor had come under so many separate obligations.

THE LORD ORDINARY repelled the plea of prescription.

But after advising a reclaiming petition, with answers,

THE COURT altered that interlocutor, and found, ' That the minority of Elisabeth Cuming can only save from the negative prescription her own proper interest and share of the debt that is now claimed, and that of such of her brothers and sisters as could have pleaded their minorities when she produced her claim.'

Lord Ordinary, *Monboddo.* Act. *Wolfe Murray.* Alt. *Honyman.* Clerk, *Colquhoun.*  
C. *Fol. Dic. v. 4. p. 112.* *Fac. Col. No 158. p. 316.*

1798. November 23.

The Honourable MRS MARIANNA MACKAY, and COLONEL FULLARTON, her Husband, for his interest, *against* SIR HEW DALRYMPLE, and Others.

No 361.  
A charter and easine, followed by forty years possession.

IN 1688, John, Lord Bargany, in the marriage contract of his son John, Master of Bargany, resigned certain lands to him, and the heirs-male of the