

cause the pursuer's grandsire being then a man of great age, and long before infest in his estate, did serve himself heir, and infest himself in these lands *in anno* 1630, the last year allowed for interruptions, and did raise this summons of reduction, bearing himself to be pursuer, and the Earl of Morton defender in this very cause; and immediately after the date of the summons, there are three executions against the Earl, one at Dalkeith, one at the cross of Edinburgh, another at the pier and shore of Leith, he being then out of the country; and *in anno* 1632, the pursuer's grandfather did assign the summons of interruption and executions to the pursuer's father; and that he did not insist, imports nothing, seeing he insisted within 40 years; and there is nothing more odious than prescription, or more favourable than interruption thereof, which is frequently sustained, though the process be null, and can have no other effect but interruption.

THE LORDS sustained the executions to infer interruption, the pursuer deponing that he received the executions from his father, or found them amongst his writs, with the summons, and that he knows them not to belong to any other summons.

*Stair, v. 2. p. 179.*

1675. January 9.

M'INTOSH *against* FRAZER.

ALEXANDER M'INTOSH having pursued the Laird of Strichen for payment of a sum of money, he proponed two defences, prescription and payment.— Against prescription, the pursuer replied upon interruption, whereupon liti-con- testation being made, and the cause being called to be advised, the pursuer produced a summons executed for instructing the interruption, and the defender produced a discharge of the sum, granted by M'Intosh his curators. It was *objected* against the interruption, That the citation was not sufficient, unless it had been called *in judicio*, otherwise it might be easy for messengers or others, by forging citations, to make interruptions, which if called in judgment, and so made known to the party, they would have improved. It was *alleged* against the discharge, That it could not prove payment to the creditor, because it is not subscribed by him, neither could his curators lift the sum, or discharge the same, without their minor; for though tutors act for their pupils, curators act but with their minors. It was *answered*, That *curatores dantur rebus*, and so by their office they may lift the minor's rents and sums, and they are ordinarily their factors, and in a matter so ancient 40 years since, it were hard to put them to produce factories in writ; for if the matter had been recent, it would have been a good allegiance that the curators were factors, or at least holden and reputed factors, which must be presumed after so long a time, especially seeing the discharge was registered while the minor lived, and if

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Interruption  
of prescrip-  
tion sustained  
by citation  
without any  
judicial act  
thereon,  
see Butler  
against Gray,  
No 363. p.  
11183.

No 418.

need be, it is offered to be proved, that the minor had discharged the curators of all their intromissions. It was *replied*, That curators, by their office, are not factors, even as to the lifting of rents, albeit they may hinder the minor to uplift without their consent, and necessitate him to name factors by their consent, much less as to lifting principal sums, as to which a double presumption is of no moment, for holden and reputed factors is but a presumption, and by the length of time to presume that they were then holden and reputed, is of no importance. And as to the minor's discharge to the curators, *imo*, It is not relevant, except in the account this sum had been deducted ; for a general discharge will not import the minor knew that his creditors had lifted this sum, which warrantably they could not, nor is it presumed that a minor knew what was registered in that shire.

THE LORDS found the interruption sufficiently instructed by the citation, without production in judgment, and that the discharge of the curators was not sufficient without the minor's subscription, or that a factory were proved ; and found, that a general discharge would not extend to this sum, especially seeing the minor's knowledge of his curators' intromission could not now be instructed by his oath, he being dead. See TUTOR and PUPIL.

*Fol. Dic. v. 2. p. 127. Stair, v. 2. p. 303.*

\* \* \* Dalrymple reports this case :

M<sup>C</sup>INTOSH pursued Frazer of Strichen for payment of a sum due upon bond, in which pursuit two defences being proponed, viz. prescription and payment, and a reply to the first, viz. interruption by a pursuit ; and litiscontestation being made upon the defence of payment and the said reply ; it was *alleged*, when the cause was to be advised *contra producta*, viz. That the summons and execution thereupon produced, for proving interruption, did not prove the same, in respect the summons was never called, nor any document taken in judgment thereupon. And as to the discharge produced, it was *alleged*, That it was granted by the persons therein mentioned as curators to the pursuer, and was not subscribed by the pursuer himself, as it ought to have been, there being a great difference betwixt tutors and curators, in respect tutors must act for the minor, and are authors as to all deeds done by them, but curators do only concur, and ought to advise and consent to the deeds of their minor, which otherwise are not valid.

THE LORDS did find the discharge did not prove, and it could not be obtruded to the pursuer, who had not subscribed the same ; and did also find the summons and execution did sufficiently interrupt. . Concluded cause.

Act. Falconer.

Alt. Seaton.

Clerk, Monro.

*Dirleton, No 216. p. 100.*