

No 351. side of the Water Dee, mortified by Katharine Rolland, relict of Dr William Guild, to certain bursars and scholars, pursued an action of molestation and declarator against John Irvine of Kincaussie; for declaring the property, and that Kincaussie might be decerned to desist from molesting them therein, or drawing or drying his nets on a place called the Hollens.

*Alleged* for Kincaussie; That he had prescribed a right by 40 years possession of fishing along the Hollens, and drying his nets thereon.

*Replied* for the Magistrates; That prescription could not run against the right of mortification to pious uses; as was decided betwixt Heriot's Hospital and Hepburn of Beirfoord. Stair's Instit. lib. 2. tit. 12. § 18.

*Duplied* for Kincaussie; The interlocutor in favours of Heriot's Hospital, was recalled upon a hearing in presence, and the decreet went out in the 1695, in favours of Beirfoord, finding that prescription might run against the Hospital, the administrators and trustees being majors, (No 349.) But then, the pursuers are not in the case of Heriot's Hospital, which is founded in favours of minors; for, the bursars of their foundation may be, and often are majors; and the patrons being infeft in the fishing mortified, prescription runs against them, without regard to the design of the mortification; and June 30th 1671, the Beadmen of Magdalen's Chapel against Drysdale, No 347. p. 11148., prescription was found to run against pious mortifications.

THE LORDS repelled the objection against prescription, viz. that the fishing belonging to the pursuers is mortified for maintaining of bursars.

*Fol. Dic. v. 2. p. 122. Forbes, p. 206.*

1709. January 26.

ANDREW BROWN of Braid, and his Curators, *against* JOHN BRODIE Coachman.

No 352.

Prescription of a brewers accmpt of ale, as to the manner of proof by witnesses, found to run against minors as well as others.

IN the action at the instance of Braid, and his Curators, against John Brodie, for payment of an accmpt of ale furnished to the defender, by the pursuer's father, extending to L. 360 Scots; the said accmpt was found prescribed *quoad modum probandi*, by the act 83d Parliament 6th James VI. notwithstanding the pursuer's minority; in respect, the said law doth not except minors, as they are excepted from some other short prescriptions; and minors have not that prejudice by the short prescription, which cuts off the manner of probation only, as by the long prescription which *funditus* extinguisheth the debt.

*Fol. Dic. v. 2. p. 123. Forbes, p. 311.*

\*.\* Fountainhall reports this case:

1709. January 27.—JOHN BRODIE is pursued by Brown of Braid, for an account of ale furnished to him many years ago. *Alleged*, It is prescribed, *quoad*

*modum probandi* by the 83d act 1579, not being pursued within three years after the furnishing. *Answered*, This Braid was minor all the time, and it is an uncontroverted principle, that prescription runs not against minors. *Replied*, That minority can take no place here, not being excepted in the act, and seems to be *de industria* omitted, being expressly mentioned in the preceding acts of that same Parliament anent prescription of spuilzie; and Sir George M'Kenzie in his Observations on these acts, tells us, that in merchant-accounts, minority is not considered, for it is not a prescription of the debt, but only of the manner, that it shall not be proved by witnesses, but only *scripto vel juramento*, seeing it is presumable, that such accounts are not suffered to lie over above three years; and it was so found in a parallel case betwixt the Marquis of Douglas and the Earl of Forfar, (*see APPENDIX.*) *Duplied*, Minority needs not be excepted, because it is a defence arising from the common law, and so *inest de jure*, unless it be expressly discharged. THE LORDS found minority took not place here, and so the account was prescribed *quoad modum probandi*, and could now be only proved by his writ or oath.

No 352.

*Fountainhall, v. 2. p. 485.*

1712. December 10.

JAMES STEWART and his FACTOR *against* ARCHIBALD DOUGLAS of Cavers.

JAMES STEWART charges Cavers, who suspends on this reason, that he was cautioner in the bond, and no diligence done within seven years, and consequently he was free, conform to the 5th act, Parl. 1695, whereby it is provided, that no cautioner, though bound conjunctly and severally, shall be bound after seven years.

It was *answered*; The charger was minor, and therefore the years of his minority are to be subduced, and so there will not be seven years from the date of the bond to the charge for payment.

It was *replied*; That the years of minority are not to be subduced from any prescription except where it is so specially provided, as will appear more clearly from the several acts concerning prescription, in which minority is always excepted, when it is so designed by the Parliament, and where there is no exception inserted, there is no privilege by law or practice allowed to minors, as in the case of merchants accompts and actions of removing; and it is to be observed, that in the same Parliament there is a prescription of three years in actions of spuilzie, in which there is an exception of minority, but no exception in the case of house mails, merchant accompts or removings; and therefore minors were never held to have any privilege in the other cases wherein there was no exception, nor in any other prescription where the law did not provide specially in their favours; and even in comprisings, which are penal diligences,

No 353.

The septennial prescription of cautionary obligations runs against minors.