

No. 20. argued against the positive prescription; but Mr Craigie gave it up that there might be a positive prescription, of which I own I doubted for the reasons formerly mentioned. As to the prescription negative, as here there was no evidence that ever the tailzie was known to or in possession of Thomas or Henry M'Dowall, I thought there might be a negative prescription if there were no minorities, as to which Mr Craigie gave up the minority of the last Henry during his father's life, because he afterwards made up his titles upon the old infestment. But he insisted upon the pursuer Thomas his minority as sufficient, counting the commencement of the prescription from 1692, when the first Henry died. I own I inclined to think that both minorities should be deducted, and I thought that Henry endeavouring to defeat the tailzie, or complete the prescription after he became in some sort debtor, that is, heir of the former investiture, cannot prejudice the next heir, or make that the prescription run during his former minority, where it did not run in law. But as to the last point in the interlocutor, I was satisfied of the justice of it by the pleading, *1st*, upon the act 1685, tailzies not recorded, or when the limitations are not repeated in the heir's titles, are ineffectual against creditors, and I thought the heirs of the marriage are creditors in the sense of that act, as much as they are in the sense of the act 1695, anent fraud of apparent-heirs, as the Lords justly found in the case of Drumpark (for Henry's settlement in favour of himself and the heirs-male, which failing his daughter, cannot in my opinion be reduced on the act 1621, which would equally cut down the husband as the heirs of the marriage.) *2dly*, Heirs of a marriage are so far creditors as not only to reduce subsequent deeds *in fraudem tabularum*, but even prior latent deeds concealed either through fraud or supreme neglect, which must have the same effect in law. However, at last it carried by majority of votes to adhere to the interlocutor as it was conceived. But the question was stated separately on the different points in it. (See Dict. No. 172: p. 10947.)

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1740. July 16.

EARL of BREADALBANE *against* MENZIES of Culdares and M'DONALD.

No. 21.

A SERVITUDE of pasturage on a royal forest may be acquired, and actually found acquired by prescription, notwithstanding the acts of Parliament in favours of them. *Vide* SERVITUDE.