

6thly, As to the opinion of our Courts and lawyers, besides the decision of Lord Balmerino, (already mentioned) I must mention the famous case betwixt the Duke of Lauderdale and the Earl of Tweddale, 25th January 1678, (Dict. No. 374. p. 11,193.) anent the teinds of Pinkie, that the Duke had right to as early as 1584. The defence was the positive prescription on the Queen's infestment in 1593, to which the defender had right by progress, or at least to tacks from her, and had possessed 70 years. The reply was *non valens agere*, first because of a separate right of liferent the Queen had, to which Thirlestane had consented, and next by his forfeiture. The Court, because of that reply, *non valens agere*, though not at all mentioned in the act of Parliament, repelled the positive prescription. I do not give any opinion of that decision, whether *non valens agere* be a good defence for either positive or negative prescription, or whether the Duke was in a legal sense *non valens*. Lawyers have been divided on that point. But I mention it for two reasons, first, if *non valens agere*, though not at all mentioned in the act, was sustained, how much more must minority have been sustained? Secondly, because of the Earl's reply, who for certain was assisted by the ablest counsel, viz. that though our act was introduced in imitation of the Roman law, yet it does not admit of all the exceptions contained in the Roman law, but only the exceptions expressed in the act, viz. falsehood, minority, interruptions, and reversions; so that as Lord Stair collects the pleadings, it was there admitted that minority was an exception from the positive prescription. *Vide* the case from Fountainhall, quoted by Lord Stair, 29th December 1691, (B. II. T. 12. § 18.) and 17th December 1695, Herriot's Hospital against Hepburn, (Dict. No. 82, p. 10,786,) whether that was the positive or only the negative prescription?

7thly, There is a later decision in point, 5th December 1740, Ged against Baker, (No. 22 *supra*.) where an adjudger getting charter and sasine, and possessing thereon 40 years from the sasine, it was found that after 40 years uninterrupted possession, the right could not be quarrelled upon nullities, but that minorities behoved to be deducted in counting the 40 years. *Vide* 9th December 1707, Magistrates of Aberdeen against Irvine of Kincausie, (Dict. No. 351, p. 11,149.)

8thly, Stair seems to be plainly of this opinion in the very place quoted in the answers, Title PRESCRIPTIONS, § 18. He had been speaking of the positive prescription in § 17, and then says, "From the prescription there are excepted the rights of vassals and minors, &c.;" and M'Kenzie begins with defining positive prescription; and § 15th says, that minority is deducted out of most prescriptions.

No. 34. 1751, July 27. MR FULLERTON'S CASE.

MR FULLERTON having in 1727 borrowed up from the clerk his client's writs in a process (but whether decret had been pronounced in it did not appear) which were not again enquired for till 1749, that I think a process was raised for them, and after diligence granted, they could not be found;—and Lord Milton, Ordinary, reported to us without informations, Whether Mr Fullerton was after so many years bound by an office receipt to produce the papers or pay damages? and we found him no further liable than to depone as in an exhibition.