1776. *December* 14. ROBERT M'GHIE *against* JOSEPH TINKLER.

PRESCRIPTION.

The Triennial Prescription of Accounts applied, although the pursuer alleged that he was *non valens agere*, because, the sum being small, and the defender in England, the master could not afford the expense of an action in a foreign country.

[*Fac. Coll., VII.* 331 ; *Dict., App. No. I, Prescription, No.* 3.]

BRAXFIELD. There is no necessity for inquiring whether this case falls under the triennial or the quinquennial prescription: the maxim, *contra non valentem agere non currit præscriptio*, does not arise from the state of the debtor and creditor; but it relates solely to the state of the debt: as, for example, where the debt is not payable. In the case of *Campbell of Ottar*, the objection of *non valens agere*, by reason of forfeiture, was not held good, because there was another person, the king or his donatar, who was *valens agere*.

HAILES. The Act of Parliament distinguishes not between persons *in* the country or *out* of the country, nor between foreigners and natives. How then can we distinguish? [The only consequence of not making the distinction is, that people in Scotland, if they are prudent, will deal with strangers for ready money, and this surely will not produce any political evil.] It is said that the case would be different in England: True; because the English statute of limitations has introduced a particular exception, which our statute has not. With the law of England we have no concern. If the pursuer liked that law better than the law of his own country, Why did he not institute his action in England?

KAIMES. When payment is not demanded for a certain time, there arises a presumption of payment, which is the ground of prescription, unless resting owing be proved by oath of the party. Is it possible to suppose that a man has paid, who left the country immediately after contracting the debt?—his absence is a demonstration against the presumption of payment.

GARDENSTON. It would be a doctrine rather dangerous, were we to introduce an exception, which is not in the law. Where will this stop? All short prescriptions will fall under the same exception. We may interpret statutes, but we cannot mend them.

PRESIDENT. These prescriptions were introduced in order to quiet the minds of the subjects: if this is not the rule, officers of the army may be pursued at any time under 40 years. The maxim, *contra non valentem*, &c. is a maxim in law, but a dangerous one, and not to be extended. The question here is as to a single boll of beans, but it might have been as to the clothing of a regiment: The same rule would apply to both.

MONBODDO. The exception of *non valens agere* has nothing to do with the present case, for the creditor had always an interest to pursue. The other question is, Whether there is a different prescription *inter absentes et inter*

præsentes? It was so in the Roman law by a particular ordinance; but there is no such ordinance with us.

On the 14th December 1776, "The Lords sustained the defence of prescription;" adhering to Lord Alva's interlocutor.

Act. A. Wight. *Alt.* H. Erskine.

Diss. Kaimes.

1776. *December* 14. JOHN CHRISTIE of Sheriffmuirlands *against* The TRUSTEES of the EARL of DUNMORE.

SUPERIOR AND VASSAL.

Construction of the Act 1474, c. 57.

[*Supp. V.* 608.]

PRESIDENT. I thought that the Act of Parliament related to the heirs of superiors. Mr Erskine says the contrary, but Sir Thomas Hope, in his Minor Practicks, understood the statute as I do.

BRAXFIELD. I am surprised that, in this case, the party did not proceed against Lord Elphinstone: he was the proper person, as being the apparent heir of the investiture. Lord Dunmore's trustees were infeft base on the superiority. This carries nothing: there ought to have been a procuratory of resignation instead of a precept in a declarator of nonentry. Lord Elphinstone ought to have been called, not Lord Dunmore's trustees, for action must always lie against the apparent heir of investiture. Inconveniencies are objected; but the only inconveniency arises from the method chosen of attacking one who has only a personal right: If the party had come against Lord Elphinstone, a proper right would have been established, and it would have been no excuse for Lord Elphinstone to have pleaded, that he had given away the personal right: he was still bound to make up titles, and if he did not, a declarator of tinsel of superiority would have followed. If Lord Elphinstone should, at this day, make up titles, and dispone, and if the disponee should be infeft, the right of the trustees would be totally excluded. Suppose the late Lord Elphinstone to have been alive, he could have been charged on the statute 20th Geo. II. The trustees saw Lord Elphinstone in the right, and they did not see him denuded on record: therefore, they should have supposed that the right was *in hæreditate jacente* of the late Lord Elphinstone, and have conducted themselves accordingly.

MONBODDO. I prefer the authority of Sir Thomas Hope to that of Mr Erskine: this base infeftment on a precept would signify nothing against a procuratory of resignation. The apparent heir is the person to be charged; for he is certain. There may be twenty disponees, but there can be but one apparent heir.

KAIMES. My difficulty is from the terms of the statute. In it the penalty is, that the superior shall lose his vassal for life. What is that to Lord Elphin-