NO. 2.

interruption of the negative prescription has always been considered as a most favourable plea in our law; thus it has repeatedly been found to be interrupted by a citation, even although informal; DIV. 15. PRESCRIPTION, Thus, also interruptions used by an apparent heir, although not the real creditor, have been found effectual against prescription, provided he were served heir within forty days after their date; 24th July 1672, Edington, No. 459, p. 11292. "But those interruptions also, which are made by one "who had only a putative or supposed title, (are effectual against prescrip-"tion), so that the true creditor afterwards pursuing, though he derived "no right from the supposed one, was found entitled to the benefit of the "interruption used by him;" Ersk. B. 3. Tit. 7. § 41. That according to the equity of this doctrine, although the respondent had not right to his sister's third, when he brought the action upon the putative title for the whole 1000 merks, yet it must have interrupted the prescription as to Grizel's share, and must therefore now render his claim effectual, having now acquired that right.

The Court (21st February 1776), adhered to the Ordinary's interlocutor, finding the pursuer entitled to two-thirds of the 1000 merks. But upon advising another reclaiming petition and answers, they altered that interlocutor, (July 1776,) and sustained the objection of prescription.

Lord Ordinary, *Alva*. For John Robertson, *Nairn*, *M'Cormick*. For Janet, *Elphinston*.

D. C.

1776. *December* 17. MACGHIE *against* TINKLER.

NO. 3.

The triennial prescription of accounts applied, altho' the pursuer alleged that he was *non valens agere*, because the sum being small, and the defender in England, the matter could not afford the expence of an action in a foreign country.

See No. 317. p. 11112.

TINKLER, who was a Quartermaster in the first regiment of dragoons, was charged by Macghie before the Bailies of Hamilton, for payment of L. 10 Scots, as the value of a boll of beans, and of one shilling and sixpence Sterling for drying and breaking another boll. These furnishings, and this work, had been performed, according to the charger, in the year 1764, at the desire of Mr Tinkler. In a declaration, however, emitted before the Bailies of Hamilton, Tinkler denied any recollection of either the furnishing or the work. A proof upon this was allowed to Macghie, in consequence of which, the Bailies pronounced decree in terms of the libel, and for the expence of extract. Of this judgment Tinkler brought a suspension before the Court of Session, which Lord Alva, Ordinary, (7th December 1774,) refused. A representation was given in for the suspender against this interlocutor, in which he had recourse to the plea of prescription. The Lord Ordinary, upon advising this representation, with an-

NO. 3. swers for the charger, pronounced (4th July 1776) the following judgment: "Having advised the representation for Joseph Tinkler, and answers "for the charger, recalls the interlocutor of the 7th December last, and "finds, that the triennial prescription takes place in this case; and in re-"gard that the charger has not offered to prove resting and owing by the "oath of the suspender, suspends the letters *simpliciter*, and decerns." And to this judgment his Lordship adhered by two consecutive interlocutors.

The charger having reclaimed to the whole Lords, contended, first, in point of fact, That however thetriennial prescription might apply to the small article of 1 s. 6 d. for drying and breaking a boll of beans, with regard to which the charger might perhaps appear in the character of a tradesman, yet it could not apply to the boll of beans which was purchased from him; for this being a bargain concerning moveables, is liable only to the quinquennial prescription; and it does not appear that the five years are yet elapsed.

But, supposing actions for debts of this kind to fall under the triennial prescription introduced by the act 1579, still it ought not to take place in the present instance. The short statutory prescriptions of the law of Scotland, were introduced upon a presumption that such debts would not be allowed to lie over for any length of time without being demanded. But, in the present case, the suspender had marched soon after the debt was contracted, with the regiment to England; and the charger had there no possible opportunity of bringing an action against him in this country, being informed that he had no *forum originis* here. Nor could a jurisdiction be founded against him by using a previous arrestment: The suspender left no effects in this country, consequently there was no person in whose hands an arrestment *jurisdictionis fundandæ causa* could be used. The charger was therefore *non valens agere;* and against persons in that predicament no prescription can run. And as to suing the suspender in England, this would have been madness on the part of the charger, as the expence of bringing a proof in that country would have cost at least twenty times the value of the sum in question. The laws of every country, besides, are in general enacted with a view to its own subjects alone. The statutes which introduced the short prescriptions, were designed to prevent natives having their ordinary residence here, from harassing each other with lawsuits for particular sorts of debts, unless they could establish the justice of their demands in a particular manner. But the Legislature could never mean to hurt its own subjects, by giving the benefit of these statutes to foreigners, who may leave the country immediately after contracting such debts, and not return for a number of years. In short, the situation of the inhabitants of Scotland would be hard indeed, were persons, who, after contracting debts in this country, march off to England, to

America, to the East Indies, or to the most distant corners of the earth, NO. 3. to be allowed to plead the triennial or quinquennial prescription in bar of payment. Common sense, common justice, must satisfy every person, that this never could be the intention of the Legislature.

For the suspender, it was answered on the first point: That it was totally immaterial whether the triennial or quinquennial prescription be most applicable to the nature of the charger's claim. For that actions for trifling furnishings, such as the present, have again and again been barred in every court of this country by the triennial prescription.

As to the argument, that this prescription cannot apply, upon account of the absence of this suspender from Scotland;—the removing from Scotland to England, or from England to Scotland, can never put it out of the debtor's power to operate payment, or at least to bring an action against his debtor to save prescription. The charger's plea, therefore of being *non valens agere*, is no bar to the plea of prescription; for he might have commenced action when he chose. The maxim, besides, *Contra non valentem agere, non currit præscriptio*, can only afford a defence against prescription when the act establishing such prescription expressly makes it an exception. This the suspender endeavoured to illustrate from the case of *minors*, from the case of a person under *forfeiture*, from the case where courts *of justice do not sit*, in time of war or pestilence, &c. In all these cases, the parties are evidently *non valentes agere*, and yet in all of them, statutes have intervened to save the prescription by an express exception. But in the act 1579, establishing the triennial prescription, there is no such exception. The charger's plea, therefore, would fall to be set aside, though he had been truly what he was not, *non valens agere*.

With regard to the inconveniencies figured by the charger, from the prescriprion being allowed to be pleaded by foreigners, it was answered, that these were nothing to the ill consequences which must arise, by hanging up actions over the heads of our neighbours in England, from which no length of time could secure them. Fictitious debts might be reared up against any gentleman who has resided in Scotland but for a few weeks, and witnesses might be brought to support those debts, whose false evidence, at such a distance, it would be impossible to detect.

Natives of England might even be harassed by prosecutions on penal statutes, after the means of defending themselves were lost.

The Court seemed to think this a question of some difficulty, and one of the Judges inclined for a hearing. It was observed, that the point upon which the cause hinged was, that Tinkler left the country, and did not return till the prescription had elapsed. But it was remarked upon this head, that the brocard, *contra non valentem agere, non currit præscriptio*, does not arise from the *situation* of the party, but where, from the nature of the

NO. 3. right, the action cannot be brought. The charger might have followed the suspender to the Eaſt Indies. He was all the time *valens agere*. This question, besides, involves all the short prescriptions. If exceptions be introduced, it is impossible to know where to stop.

The Court accordingly (17th December 1776) "adhered" to the Lord Ordinary's interlocutor, "and found expences due to neither party."

Lord Ordinary, *Alva*. Act. *Wright*. Alt. *H. Erskine*.

J. W.

1800. *May* 27.

ALEXANDER KINLOCH and Others, *against* JAMES ROCHEID.

NO. 4.

A lady having executed a strict entail of her landed property, and by a separate branch of the same deed, conveyed her other funds to the institute and succeeding heirs of entail, under an express condition that they should turn them into money, and apply them in the purchase of lands, to be entailed on the same series of heirs with those in the deed of entail; the *jus crediti* created in the substitutes to enforce

ELIZABETH ROCHEID, in 1749, executed a strict entail of her half of the lands of Inverlieth and Darnchester, in favour of her nephew Alexander Kinloch, third son of Sir Francis Kinloch, and of certain other substitutes.

By another branch of the same deed, she conveyed some other heritable subjects, and her whole moveable property, to Alexander Kinloch, and the same series of heirs to whom her entailed estate was destined, qualified with the following clause:

"But provided, as it is hereby expressly provided and declared, that the "said Alexander Kinloch, and the heirs whatsomever of his body; whom "failzieing, the other heirs of tailzie and provision above specified, succeeding, by virtue hereof, to the heritable and moveable debts, and sums "of money above disponed, shall be bound and obliged to pay all the "debts, legacies, and other donations which shall be due, and bequeathed "by me at the time of my death; and after payment thereof, shall be "bound and obliged to bestow and employ the superplus of the said heritable and moveable debts before disponed, and the price of the said "house, so far as belongs to them, WHEN SOLD, for purchasing and acquiring the remainder of the said lands of Innerleith and Darnchester, with "the pertinents above specified, from those who shall have right thereto "for the time, in case they should incline to dispose of the same, and that, "to the value and extent of such superplus, after payment of my debts and "legacies as aforesaid; or for purchasing and acquiring other lands holding feu or blench, where the same can be most conveniently had; and "to take the rights and securities of the lands so to be purchased by them, "to and in favour of the said Alexander Kinloch, and the heirs whatsomever "of his body; whom failzieing, to the other heirs of tailzie and provision