Molloy, *De Jure Maritimo*, *p.* 276; and Voet. *ad tit. De Nautico Fœnore, sec.* 5 *et* 7; Stair's Institute, *p.* 106; and *7th February* 1681, *Ewing* against *Burnet.*

DUPLIED,—All thir holds only in bills drawn at usance, which is not the present case; and that, in *June* 1676, *Wallace* against *Simpson*, though a bill was kept up four months, yet the drawer was found liable.

The Lords thought this a general point, and deserved to be well considered, seeing merchants differed thereon; therefore they, before answer, allowed trial to be taken how soon the bill came to Mr Robert Scot's hands at Paris, why he kept it up, and what condition Foulis was then in, and when he broke, and if they would have got their money if they had presented it on its first arrival; to see if there was any culpable negligence in the creditor of the bill.

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1702. *December* 18. The EARL of ERROL *against* GEORGE SETON of BARNS.

SIR John Seton, father to the said George, being married to Lady Margaret Hay, and provided her to a liferent-annuity of 2400 merks; and she having assigned the bygones of it to the Earl of Errol, he pursues a poinding of the ground; against which Barns craved compensation on a bond of 10,000 merks, due by Errol's predecessors, as her tocher; and Errol alleging that Sir John had assigned his lady to that sum, and from whom he derived right thereto:

ANSWERED by Barns,—That the assignation was given to her by his father when *in lecto*, only five days before his decease, and that he had raised reduction thereof upon that head.

Errol CONTENDED,—His action of reduction was prescribed by the negative prescription; the assignation being in February 1659, and not quarrelled till the forty years were run.

ALLEGED for Barns, 1*mo*, His action would not prescribe, because he was *non valens agere* during the lady's lifetime, in regard she was liferenter of the sum, and it was wholly unnecessary for him to quarrel her right of fee till the liferent expired; as was found, the last of *February* 1666, *Earl of Lauderdale* against *the Viscount of Oxford*; and *5th February* 1680, *Brown* against *Hepburn*. 2*do*, This assignation was a latent deed, so Barns, morally speaking, could not quarrel it till he knew it; which is of the nature of an exception, *quæ non nascitur* till the right be some way made use of or produced. And what if a deed done *in lecto*, or posterior to an inhibition, be kept quiet for forty years, and then insisted in; will it be a good defence to say, Your action of reduction, *ex capite inhibitionis*, or that it was on death-bed, is prescribed, because not intented within forty years of the date of the bond? I think it would not; and as little here. 3*tio*, The bond given by Barns to Lady Margaret, for her annuity in 1683, reserves, *per expressum*, Barns's reduction of her fee of the said 10,000 merks, which is a clear and plain interruption within the forty years; and as this prescription is odious, so the Lords have found interruptions favourable, *26th July*, 1637, *L. of Lawers* against *Dunbar*; and *25th November* 1665, *White* against *Horn.*

ANSWERED for Errol to the *first*,—That Barns was *valens agere*, even *cum effectu*, from the very moment of his father's death; and though she liferented

the sum, yet *nihil impediebat* but he might, in a reduction and declarator, have annulled her right to the fee; and the decisions cited are only in the case of a positive prescription, and so are misapplied here. To the *second*, Latency is no defence against the long prescription of forty years; neither does law presume an heir to be ignorant of his father's debts, but on the contrary to know them. *3tio*, Barns's obligation in 1683 favours Lady Margaret as much as him; for, as it reserves his power of quarrelling, so all the lady's legal defences are as fully, and with the same breath, reserved; which makes it as broad as long.

The Lords thought her being liferenter did not make him *non valens agere* in this case; but found his proponing compensation against the Earl in that 10,000 merks' bond, with his reservation in 1683, &c. were sufficient interruptions; and therefore his action of reduction, *ex capite lecti*, was not prescribed.

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1702. *December* 23. MARGARET WALLACE *against* WALLACE of CRAIGIE'S HEIRS of LINE and TAILYIE.

MRS Margaret Wallace, daughter to Sir William Wallace of Craigie, by Niddery's daughter, pursues an aliment against her father's Heirs of Line and Tailyie; and the modification being remitted to the Lords, they first considered her portion, which is £1000 sterling, and not to bear annualrent till her age of twelve; and then her age, that is, only about three or four; and so they modified 500 merks to her yearly, till her age of seven complete; and then 700 merks till her age of twelve. And it being craved that she might have a decreet for this, against the factor of the estate of Craigie; but the creditors opposed, CONTENDING,—That the decreet of aliment could only be the ground of an adjudication against her father's estate; and in the ranking of the creditors she may compear, but in all probability may be ranked behind most of them, so little reason there is to give her a present preference upon a personal bond not yet made real; though it may be contended she ought not to starve *medio tempore;* but her mother's jointure may allow her something of it.

The Lords declined to determine the preference *hoc loco*, or to grant warrant to the factor for making present payment, but left her to her course in law.

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1702. *July* 22 *and December* 29. ELIZABETH CUNNINGHAM and JOHN MIDDLETON *against* CUNNINGHAM of ENTERKIN.

July 22.—ELIZABETH Cunningham, daughter to Enterkin, showing some purpose to marry one Mr John Middleton, son to Dr Middleton in Aberdeen; and her friends being dissatisfied with the match, she is prevailed with to grant an assignation to her brother of her bond of provision containing the sum of 10,000 merks, in case she shall marry the said Mr Middleton, reserving her the liferent of the said portion for an aliment. And the said Enterkin, her brother, by his