

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 Inverleith 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 whatsoever 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 disposed, 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 disposed, 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 whatsoever of his body; whom failzieing, to the other heirs of tailzie and provision

“ above specified, in terms of, and according to the order and rules of suc-  
 “ cession above mentioned, and with and under the several conditions,  
 “ provisions, declarations, clauses prohibitive, irritant and resolute,  
 “ powers, faculties and others, particularly expressed in this my disposi-  
 “ tion, of the just and equal half, or two-fourth parts of the said lands and  
 “ estate of Innerleith and Darnchester, with the pertinents thereof above  
 “ specified; and, to the effect, the whole conditions, provisions, declara-  
 “ tions, prohibitory, resolute and irritant clauses, contained in the dispo-  
 “ sitions, and procuratories of resignation before written, and hereby ap-  
 “ pointed to be contained in the dispositions, procuratories of resignation,  
 “ precepts of sasine, and other writs and conveyances, of the lands to be  
 “ purchased with the debts and sums of money hereby disposed by me,  
 “ may affect, and be equally binding upon the heir of tailzie, whether  
 “ institute or substitute, who may happen to purchase such lands, as well  
 “ as upon the other heirs of tailzie substitute to him by the destination of  
 “ heirs above mentioned, it is hereby specially provided and declared, that  
 “ the dispositions of such lands, so to be purchased with the aforesaid sums  
 “ of money, shall expressly bear, that the money laid out for making such  
 “ purchase, is part of the money left, destined, and appointed by me to  
 “ be employed for the purchase of land, the dispositions and conveyances  
 “ whereof were to be conceived in favours of the heirs, and with and under  
 “ the conditions, provisions, declarations, prohibitory, resolute and irritant  
 “ clauses, to be expressed in such dispositions and conveyances aforesaid;  
 “ by which clauses, the purchaser, as well as the succeeding heirs of  
 “ tailzie, are to be limited and restricted: And it is hereby further pro-  
 “ vided, that the said Alexander Kinloch, and the heirs whatsoever of  
 “ his body; whom failzieing, the other heirs of tailzie, and provision  
 “ above mentioned, according to the substitution aforesaid, shall have only  
 “ power to dispose of the annualrents of the principal sums above disposed,  
 “ and the other moveable subjects, including heirship-moveables, (ex-  
 “ cepting all principal sums bearing annualrent) after payment of the debts  
 “ and legacies, as aforesaid; but the said principal sums themselves are to  
 “ be carefully preserved entire, to the extent they shall happen to be the  
 “ time of my decease, after payment of the debts and legacies, as aforesaid,  
 “ until such time as the said principal sums shall be laid out and employed  
 “ for purchasing land in manner before exprest; and in case the said Alex-  
 “ ander Kinloch, or the heirs whatsoever of his body; whom failzieing,  
 “ any other of the heirs of tailzie and provision above named, shall, before  
 “ any purchase of land be made by them in manner before directed, happen  
 “ to uplift any of the principal sums hereby disposed for that purpose, they  
 “ shall be bound and obliged to lend and re-employ the same upon good  
 “ and sufficient security, either real or personal, and the bonds and securities

NO. 4.

this condi-  
 tion found  
 to be lost by  
 the negative  
 prescription,  
 as to those  
 funds which  
 the heir of  
 entail in  
 possession  
 had uplifted  
 forty years  
 prior to the  
 date of the  
 action  
 brought by  
 the substi-  
 tutes to en-  
 force the  
 obligation.  
 But their  
*jus crediti*  
 was found  
 to be pre-  
 served with  
 regard to  
 certain sub-  
 jects which  
 had, till  
 within forty  
 years, re-  
 mained on  
 the original  
 securities  
 whereby  
 they had  
 been vested  
 in the en-  
 tailed.  
 Prescrip-  
 tion found  
 to run in  
 this case  
 from the  
 testator's  
 death, and  
 not from the  
 time which  
 might rea-  
 sonably  
 have been  
 judged  
 necessary for  
 carrying her  
 settlement  
 into execu-  
 tion.  
 The sub-  
 stitutes  
 found not to

NO. 4.  
 be nt tled  
 to deduct  
 their mino-  
 rities in or-  
 der to save  
 their *jus*  
*crediti* from  
 prescription.

“ to be taken for the same, shall always bear in express terms, that the sum  
 “ for which the same is granted, was part of the money disposed by me to  
 “ the person lending the same, and his or her heirs of tailzie, to be employed  
 “ for the purchase of land when the same could be conveniently made ;  
 “ and the sum shall always be made payable to the heir of tailzie for the  
 “ time, who shall lend the same, and to his heirs of tailzie herein named,  
 “ according to the substitution and order of succession contained in this my  
 “ right and disposition, to which particular reference shall always be made  
 “ in such bonds and securities : Likeas, it is hereby expressly provided and  
 “ declared, that action and execution may and shall lie and be competent  
 “ at the instance of any heir of tailzie, nearer or remoter, who shall or can  
 “ have the least hope, or most distant prospect of succession against the heir  
 “ in possession of my said personal estate, for compelling such heir in pos-  
 “ session to apply the foresaid principal sums for purchasing lands in manner  
 “ before expressed, and lending out and re-employing the same in the mean  
 “ time, in manner before mentioned, and also for obliging such heir in  
 “ possession to repay the expence of such action and execution to the heir  
 “ prosecuting the same ; but I do hereby declare, that the person or per-  
 “ sons either acquiring right to, or making payment of the debts and sums  
 “ of money, heritable and moveable, above disposed, shall not be affected  
 “ by, or any ways concerned with, the several conditions and provisions  
 “ above specified, relating to the manner of management and disposal of the  
 “ said debts and sums of money ; but the dispositions or discharges to be  
 “ granted by the heir having right for the time, shall be good and effectual  
 “ to the disponee or debtor acquiring or paying the said debts, to all intents  
 “ and purposes, as if no such conditions and provisions had been adjected  
 “ to this my disposition of the said debts : And I oblige me, and my heirs,  
 “ executors and successors, to grant procuratories of resignation, precepts of  
 “ sasine, and all such other writs and deeds as shall be judged necessary, by  
 “ law or practice, for the particular transmission of my estate, real and  
 “ personal, in general, before disposed, to and in favours of my said heirs  
 “ of tailzie and provision, according to the order and rules of succession be-  
 “ fore mentioned, and for establishing the complete right thereto in their  
 “ persons, with and under the conditions and provisions before specified.”

Elizabeth Rocheid died 8th December 1753.

Among the subjects then belonging to her, were a debt of L. 125, due to her by the Earl of Home, constituted by heritable bond ; a debt of L. 3021 : 19 : 4, which Baird of Newbyth owed her by a personal bond, and one-half of a house in Merlin's Wynd.

She was succeeded by Alexander Kinloch, the institute in her entail, who, in conformity to one of its conditions, assumed the name and arms of Rocheid of Inverleith.

To the entailed estate he made up a feudal title under the tailzie.

To the moveable subjects he made up a title by confirmation, as Elizabeth's executor-dative.

The house in Merlin's Wynd was specially conveyed to him, under the conditions above mentioned. He never made up any title to the other heritable subjects.

Alexander died 11th May 1755. He left a settlement in the form of a general disposition, by which he conveyed to James his eldest son, then an infant, his whole heritable and moveable property, and appointed him his sole executor.

James's tutors made up a title in his person to his father's moveable property, by getting him confirmed his executor-nominate. In the inventory subjoined to the confirmed testament, a variety of debts were specified, which had belonged to Elizabeth Rocheid, and with regard to these, the inventory expressly bore, that "Alexander Kinloch the defunct had right to them as executor-dative, *qua* creditor decerned and confirmed to the said Elizabeth Rocheid."

James's tutors also expedite a special service in his favour as heir of entail of Elizabeth's half of the estates of Inverleith and Darnchester.

With regard, again, to the heritable unentailed property left by Elizabeth, James's tutors vested it in his person, by leading in his name, and in the character of general disponee of his father, against the heirs-at-law of Elizabeth Rocheid, an adjudication in implement of her general conveyance in favour of Alexander Rocheid, and her other heirs of tailzie, "under the conditions and provisions mentioned in the deed," and which are particularly specified in the decree of adjudication, dated 14th July 1756.

James's tutors afterwards completed his titles to the bond due by the Earl of Home, by a charter of adjudication and infestment; and in 1771 they obtained payment of the debt.

James attained majority in 1772; and in that year he received payment of the bond granted to Elizabeth Rocheid by Baird of Newbyth.

In 1787, James sold Elizabeth Rocheid's half of the house in Merlin's Wynd.

Alexander and James Rocheids paid Elizabeth's debts and legacies, but having failed to apply the surplus of her fortune, in terms of her settlement, by purchasing lands, and entailing them, as thereby directed, Alexander Kinloch, (a nephew of Alexander the institute,) and others, the next substitutes in Elizabeth's entail, on the 25th November 1796, brought an action against James Rocheid, concluding that he should account for the surplus of Elizabeth's fortune, and be ordained to apply it in terms of the above-recited clause in her settlement.

NO. 4. All of the pursuers had been in minority for a considerable part of the time which had intervened between Elizabeth Rocheid's death, and the citation in the action.

In defence against it, Mr Rocheid contended, That as Elizabeth had died more than forty years before his citation, the right of the pursuers to call him to account was cut off by the negative prescription.

Answered: *1st*, It is an invariable rule, that a party cannot plead prescription in the face of his own titles. Now, both Alexander the institute in the entail, and the present defender, have all along possessed Elizabeth Rocheid's funds, in virtue of her general disposition, and must therefore have held them under the conditions with which it was qualified.

*2dly*, Even if the defender's and his father's possession had been such as to have enabled them to have pleaded prescription, the plea would have been unavailing. A considerable portion of time was requisite, in order to enable the defender and his father to carry Elizabeth Rocheid's settlement into execution by paying her debts, converting her funds into money, and employing them in the purchase of lands. Three years cannot be regarded as too long a period for these purposes; but, as during its currency, Alexander Kinloch and the defender could not be considered as *in mora*, so any action brought by the institutes for calling them to account would have been nugatory and fruitless. The substitutes, therefore, were *non valentes agere*, till the expiration of these three years; and if they are deducted from the time which elapsed between Elizabeth's death, and the citation in this action, the forty years necessary for prescription are not yet run.

*3dly*, At all events, prescription has not run as to those funds which the defenders have actually possessed within these forty years, under the original rights and securities conceived in favour of Elizabeth Rocheid. As to these, therefore, there can have been no change or inversion of the defender's title of possession. His father and he can have held them only in virtue of Elizabeth's disposition; and their doing so, necessarily inferred an uninterrupted acknowledgment, that they were liable to the obligations under which it was granted.

Replied: *1st*, Even if possession under the settlement would have interrupted prescription, there has been no such possession either by the defender or his father. It is true, Alexander Kinloch executed a confirmation as executor-creditor under the settlement; but it is a fixed point, that the mere renewal of a title under a settlement by a party pleading prescription against it, is of itself, and unconnected with other circumstances, no interruption of prescription; 14th December 1742, Scott against Lord Napier, APPENDIX, PART II. h. t. And, at any rate, the defender has possessed the funds during a period of more than forty years, in virtue of his father's general disposition, independently altogether of Elizabeth's settle-

ment. For, although the defender led an adjudication in implement against Elizabeth's heirs-at-law, in order to get possession of her heritable funds, that step was not the foundation of his title, but merely a step necessary for its completion. NO. 4.

Besides, the doctrine that a person cannot prescribe in the face of his own title of possession, applies only to acquisitions by the *positive* prescription. But Elizabeth's settlement gave the subject to Alexander Kinloch in fee-simple, creating merely a personal obligation against him and his representatives, to employ it in a particular manner; and the *jus crediti* in the pursuers to enforce this obligation has been lost by the *negative* prescription.

The branch of the act 1617, which relates to the negative prescription, specially provides, that "All actions competent of the law upon heritable bonds, reversions, contracts, or *others whatsoever*," except reversions incorporated in the body of an infertment, shall be lost, if not pursued within forty years. In terms, therefore, both of this, and of the earlier statutes, introducing the negative prescription, the right created by Elizabeth's settlement in the pursuers has been lost by the negative prescription, just as much as if their *jus crediti* had arisen in virtue of a direct obligation granted to them by the defender's father, or by the defender himself; 7th February 1735, Graham against Douglas, No. 52. p. 10745.; 27th November 1630, Lawder against Colmslie, No. 1. p. 10655.; 1st March 1782, Earl of Dalhousie against Maule, No. 176. p. 10963.

2dly, The *terminus a quo* for the commencement of prescription, must necessarily be the period of Elizabeth's death. In all cases where the plea of *non valentia agere* is admitted, its endurance is definite, as where a person is prevented by forfeiture from prosecuting his right, or a woman, in consequence of being *vestita viro*. In the one, the *non valentia* ceases whenever the forfeiture is removed; in the other, by the death of the husband. But here, if the plea of *non valentia* were well founded, its endurance would be quite indefinite. The pursuers have fixed on *three* years, because, in this case, that period would have answered their purpose; but if it had happened that a larger deduction from the period which has elapsed from Elizabeth's death had been necessary, in order to have saved their claim from prescription, they would have maintained, that such a period was requisite for the execution of her settlement.

3dly, The plea of prescription is equally available as to those parts of Elizabeth's funds which have been uplifted within forty years of this action, as it is to those which were uplifted before that period; for the uplifting the bonds due by the Earl of Home and Baird of Newbyth, and the sale of the house in Merlin's Wynd, were at most only acts of possession under the settlement; and it has been shewn, that even possession by the

NO. 4. defender and his father, while no document was taken by the pursuers, in virtue of their *jus crediti*, could not save it from the negative prescription.

The pursuers pleaded hypothetically, in the event of the Court being of opinion, that Elizabeth Rocheid's settlement imported only a personal obligation against the defender, and vested merely a common *jus crediti* in the pursuers, that they were entitled to deduct their minorities, in order to save their *jus crediti* from prescription; for in that view of the case, the decisions, 10th July 1739, Macdougall, No. 172. p. 10947; 21st December 1784, Gordon, No. 177. p. 10968, and 23d November 1798, Mackay, No. 361., p. 11171, by which it had been found, that substitute heirs of entail, as having only an aggregate right, were not entitled to deduct their individual minorities, were not applicable. The pursuers, according to this view, being regarded, not as substitutes under an entail, but simply as creditors in a common personal obligation, have each a separate and disjunctive interest therein, and, like all such creditors, must have the privilege of deducting their minorities when the negative prescription is pleaded against them.

To which the defender answered, That the principle of the decisions mentioned by the pursuers applied, not only to the case of substitute heirs of entail, but to that of every set of persons who have a common interest, in which an action brought for enforcing it by any one of them, would save the interest of the whole; 24th June 1756, Maclellan's Children, No. 358. p. 11160.

The Lord Ordinary took the case to report on informations, and the Court afterwards ordered a hearing in presence.

The Bench were unanimously of opinion, that prescription began to run from the death of Elizabeth Rocheid, and (with the exception of one Judge) that the pursuers were not entitled to deduct their minorities.

A majority were also of opinion, that the general defence of the negative prescription was well founded with regard to all the debts and subjects belonging to Elizabeth Rocheid, which the defender had recovered more than forty years before he was cited in the action. But, on the other hand, a majority thought, that prescription had not run against the pursuers with regard to those subjects which the defender still might possess on the original securities, or which had been uplifted by him within forty years; because, so long as the defender possessed any part of the funds on these securities, as he had done no act inconsistent with the terms of Elizabeth Rocheid's deed, so he could not prescribe an immunity from its conditions.

The Lords "sustained the defence of prescription pleaded by the defender against a general accounting, but repelled the defence of prescription, so far as concerns the debts originally due by Mr Baird of Newbyth and the Earl of Home, and the price received for the house in Merlin's Wynd, and found the defender bound to account for, and to apply these sums, in terms of Mrs Elizabeth Rocheid's settlement."

And on advising mutual reclaiming petitions, the Court "adhered."

\* \* On appeal, the House of Lords affirmed the interlocutors, in so far as they repelled the defence of prescription; but remitted "to the Court of Session to reconsider so much of their interlocutor of 18th December, as sustains the defence of prescription, pleaded by the defender against a general accounting; and so much of their interlocutor of the 27th May 1800, as adheres to their interlocutor reclaimed against, so far as such adherence sustains such defence against a general accounting." The judgment likewise contained findings on other points, of no general importance, and not mentioned in the report.

Lord Ordinary, *Stonfield.*

Act. Solicitor-General *Blair, Hope, Monypenny.*

Alt. *H. Erskine, Mat. Ross, Ar. Campbell.*

Clerk, *Home.*

R. D.

*Fac. Coll. No. 180. p. 408.*

1800. December 11.

JOHN BOOG and Attorney, *against* The COMMON AGENT in the Ranking of  
MARGARET WATT'S CREDITORS.

NO. 5.

DANIEL MORGAN was by birth a Scotsman, and resided mostly in Scotland till the end of the year 1790, when his affairs having gone into disorder, he went to London with the view of bettering his fortune; got the appointment of steward to an East India ship; but died on his passage to India.

The triennial prescription found not to apply to a debt contracted in England, by a Scotsman who never returned to Scotland, but who left his wife, and had heritable property there, at his death.

On the 14th December 1790, while Morgan was in London, he purchased, on credit, from John Boog, goods to the value of L. 41, 14 s. Morgan never returned to Scotland after making this purchase.

Before leaving Scotland, he had executed a settlement of some heritable property in favour of his wife Margaret Watt, burdened with the payment of all his debts.

On the 13th January 1795, Boog obtained a decree in absence, before the Court of Session, against Margaret Watt, as representing her husband, for payment of the L. 41, 14 s. More than three years had elapsed from the date of the furnishings before the date of citation in this action.

Margaret Watt's affairs having also become embarrassed, a ranking and sale of her heritable property was brought, in which Boog having produced the decree in absence as his interest, the common agent objected, that the claim on which the decree proceeded had fallen under the triennial prescription established by 1579, c. 83. And further,