negative prescription, the right which they would have had to take the estate as heirs to his predecessor, and to set aside his gratuitous deeds; and they were *valentes agere* by a process of declarator. Thus George Muirhead gained, by prescription, a feudal right to the estate, and consequently the power of disponing it gratuitously: the heirs of his predecessors lost, by prescription, the right of taking up the estate as *in hæreditate jacente* of George's predecessors, of passing George by, and of disowning his gratuitous deeds. The case, *Gray* against *Smith*, is not in point. *There* the heirs who possessed had two rights in their person, one by service as heirs of line, the other by disposition. And when a man has two rights in his person, there seems no reason for setting up the one as a title of prescription to overthrow the other. If the disposition could overthrow the service, the service might overthrow the disposition, and *vice versa*. But, here, George Muirhead had but one right to the parson's lands, his infeftment upon the precept 1711.

On the 6th August 1765, "The Lords repelled the defence of prescription, and decerned."

On the 7th February 1766, "The Lords found the precept of *clare constat*, with infeftment thereon, in favour of George Muirhead, is a habile title for prescription: found it competent for the defender, in this case, to found upon her own and George Muirhead's possession, in order to make out her plea of prescription; and repelled the pursuers' objection thereto, founded on the precept of *clare* being granted by a wrong superior, in respect prescription is sufficient to sopite that defect."

On the 8th march 1766, upon advising a reclaiming petition with answers, "The Lords adhered."

Act. G. Wallace. A. Lockhart. *Alt.* J. Burnet. *Rep.* Elliock.

The Judges had given their opinions at full length when this case was formerly under their consideration: they did not resume their opinions at the last advising, only the President declared that he differed from the judgment of the 7th February, and was for returning to the judgment of the 6th August 1765.

1766. *March* 8. CAPTAIN ROBERT CAMPBELL of Monzie, and OTHERS, *against* MAJOR ALLAN MACLEAN, late Commandant of the 114th Regiment.

JURISDICTION.

The Court of Session competent to try a question among the officers of a disbanded Regiment, involving pecuniary interests, although arising out of military transactions.

IN 1761, Captain Allan Maclean was appointed major commandant of a corps then to be raised. His instructions from the secretary of war, bore, "That "the proposed major and captains should sell their present commissions: That "the captain-lieutenancy should be sold: That the money arising from such "sales should be thrown into a fund: and that no other levy money was to be

" allowed." The corps was raised. It was disbanded at the peace. The officers were put upon the half-pay list. Captain Robert Campbell, and others, officers in this corps, insisted in an action against Major Maclean, calling him to account for that proportion of the aggregated fund arising from the sale of commissions, which they contended did belong to them, in consequence of the instructions from the secretary at war, for defraying the expense of their respective levies.

ARGUMENT FOR THE DEFENDER,—Major Maclean contended, for certain reasons by him urged, That the pursuers had not right to any proportion of this aggregate fund. But he separately objected to the jurisdiction of the ordinary courts of justice, and he pleaded, that, although the law has in general subjected soldiers to the ordinary courts of justice in questions as well criminal as civil, yet, with respect to the various military questions which necessarily arise in the army, the law has provided that they shall be tried by military courts, or be determined by those whose province it is to direct the affairs of the army. Thus the Act for punishing mutiny and desertion, at the same time that it empowers the King to issue other regulations for the better government of his forces, provides, section 17, That every commissioned officer, &c., that shall embezzle, &c., any provisions, &c., shall be tried before a general court-martial, and, upon conviction, shall be dismissed the service, and forfeit £100 sterling. And such offender to make good the loss thereby sustained, " to be ascertained by the court-martial; " which shall have power to seize the goods of the person so offending, and sell " them for the payment of the £100 and the damage. If sufficient goods can- " not be seized, he shall be committed to prison, to remain there until he pay " such deficiency." Thus also, by the articles of war, drawn up in consequence of parliamentary authority, sec. 12, " Of redressing Wrongs;"—" If any officer " shall think himself wronged by the commanding officer of the regiment, and " shall, upon due application made to him, be refused to be redressed, he may " complain to the general-in-chief, in order to obtain justice, who is hereby " required to examine into the said complaint, and, either by himself or our " secretary at war, to make report to us thereon, in order to receive our far- " ther direction." Every officer, who apprehends himself wronged by his commander, has two different remedies competent to him by the Mutiny Act and the articles of war. 1*st*, A court-martial, either general or regimental. 2*d*, An application to the commander-in-chief, or secretary of war: and, in either of those cases, the person offending will be obliged to make reparation out of his effects; and, if they are not sufficient, by the sale of his commission.

But farther, The question between the parties depends upon the construction of certain orders, issued by the secretary at war, concerning the application of money in such manner as should be directed by the King. If there be any ambiguity in those orders, they must be explained either by the King or his secretary at war.

ARGUMENT FOR THE PURSUERS,—Although the claim of the pursuers arises from a military question,—the raising of a regiment,—yet it is a civil claim. Thus many civil actions arise from the commission of crimes, although the crimes themselves can only be prosecuted before a court having a proper criminal jurisdiction. An officer may be liable to trial in a Court-martial for malversation in his military character: but a claim of damages, arising to a third

party from such malversation, is actionable in the ordinary courts of law. A court-martial cannot execute its own sentence *quoad civilem effectum ;* the civil magistrate is not bound, and indeed dares not interpose his authority to the execution of such sentence. It follows, that redress can only be obtained by a legal action before the ordinary courts of law. It may be doubted, and it has been doubted, whether a court-martial can grant even military redress against an officer after his regiment is disbanded, and himself put upon half-pay. If he should refuse to acknowledge such jurisdiction, the only consequence will be, the striking him out of the half-pay list; but this would afford no satisfaction to the complainer. The effects mentioned in sec. 17 of the mutiny Act, are military effects and no other. The sec. 11, of the mutiny Act, is conclusive in favour of the pursuers, " That nothing in this Act contained shall extend, or " be construed to exeme any officer or soldier whatsoever, from being proceeded " against by the ordinary course of law." Hence also, in sec. 49, a fine of £100 imposed, is made payable, upon a suit, " in any court of record." And, in sec. 38, a penalty of £5, for the use of the poor, is appointed to be levied by distress, in consequence of " a warrant under the hand and seal of a justice of " peace." The sec. 12 of the Articles of War is a salutary regulation for obtaining justice, in so far as it can be awarded by a court-martial. But, supposing that the pursuers had sought for and obtained a court-martial against Major Maclean, and the sentence of that court had cashiered him, all this would not have forced him to refund the money in question. With respect to the ambiguity in the orders which, it is contended, ought to be explained by the King, or his secretary at war, like ambiguities daily occur in Acts of Parliament; and yet the courts of law determine thereon, instead of leaving them to be explained by the legislature.

30th July 1765, The Lord Stonefield, Ordinary, " sustained the defence " founded on the incompetency."

21st November 1765, Upon advising a representation with answers, " he ad- " hered."

8th March 1766, " The Lords, upon advising a petition and answers, remitted " to the Ordinary to find the action competent."

Act. A. Lockhart. *Alt.* Ilay Campbell.

1766. *March* 8. CHRISTIANA CHALMERS *against* INNES and HOPE, Merchants in London.

[*Faculty Collection, v. IV, p.* 58, *Dictionary* 3489.]

MANDATE.

Mandatory is directly liable to the mandant, and is not entitled to place a sum recovered for him to his own credit in account with a third party, at whose desire he accepted the mandate.

CHRISTIANA CHALMERS had right to L.24 sterling of prize money and wages due to her deceased son, a sailor. In consequence of the advice and recommend-