1766. *November* 19. JOHN AITKIN of Thorntoun, Assignee of Michael Storar, *against* JAMES MALCOLM of Balbeadie.

PRESCRIPTION.

What circumstances sufficient to interrupt the Negative Prescription.

On the 8th May 1703, Michael Malcolm of Balbeadie granted bond for 500 merks to Michael Storar in Kilgour, payable at Whitsunday 1703. On the 15th November 1709, Michael Storar assigned this bond to John Storar, his son.

On the 13th March 1711, in consequence of a marriage-contract between Mr George M'Kenzie and Margaret, the daughter of Michael Malcolm, an inventary of Balbeadie's debts was made out, and signed by him. In this there occurs the following article:—To John Stow, £333 : 6 : 8 Scots, *i. e.* 500 merks. This Michael Malcolm executed an entail, by which he provides, that it shall not be in the power of his heirs of entail, to sell, nor to contract debts. The entail declares all such deeds void, and forfeits the right of the contravener. It reserves power to provide wives and younger children.

It declares that none of the heirs of entail shall suffer adjudication, or other legal diligence to be had and done against the said lands, or any part thereof, for debts *warrantably contracted.* At least, they shall be holden and obliged to purge and redeem the same, two full years before expiring of the legal reversion, under pain of forfeiture. Provided, nevertheless, that it shall be free and lawful to the said heirs of tailyie, or their foresaids, to sell, &c. as much of the lands as may, by the price thereof, sufficiently satisfy and pay the debts *warrantably contracted,* in manner foresaid, which shall be resting for the time, with annualrent, until the said heirs of tailyie can validly and legally dispose thereof to that effect.

In 1748, Michael Storar, assignee of John, insisted in an action on the passive titles before the Sheriff of Fife, against Michael Malcolm of Balbeadie, nephew and heir of old Michael, for payment of this bond, with interest from Whitsunday 1741.

Michael, the second, denied the passive titles; and, the 23d August 1748, Storar obtained decreet in terms of his libel.

On the 19th November 1751, Michael Malcolm granted a bond of corroboration to Storar. After having mentioned the original bond, decreet and assignation upon it, the bond of corroboration recites,—"That the principal and interest, from Martinmas 1748, were still unpaid, and that Storar, the creditor, was willing to supersede diligence until Whitsunday 1752, on Balbeadie's granting him the bond of corroboration." Balbeadie, therefore, without prejudice of the original bond, obliged himself, his heirs and assignees, to pay the said sum at that term.

Michael was succeeded by his son James Malcolm: Storar wrote a letter to him, demanding payment.

On the 24th November 1758, James Malcolm returned this answer:—" As for paying your annualrent, or principal, at present, is what I cannot do; but I shall write you the time you may expect it, which I hope will not be long. If you have an opportunity of going to Edinburgh, you would speak to Mr David Orme, writer there, he would let you know the time you would get your money."

Storar, upon a narrative of value, assigned his grounds of debt to John Aitken of Thorntoun, and he insisted in an action against James Malcolm for payment.

The Lord Barjarg, Ordinary, took the question to report.

The general defence was, That James Malcolm represented his father in no other way than as an heir under a strict entail, and that the bond had been lost by the negative prescription, before the decreet 1748, or the bond of corroboration 1751.

ARGUMENT FOR THE PURSUER:

First, The entail does not cut off the debt, supposing it to have been contracted by Michael, the second, of Balbeadie. By the entail there is an exception of debts *warrantably contracted;* which, not being explained particularly, may be construed to imply all such obligations as the heirs of entail may come under for causes truly just and onerous.

Secondly, Prescription did not run out prior to the corroboration. That the debt was due in 1711, appears from the inventary of debts. The slightest grounds are sufficient to bar the odious defence of negative prescription. A debtor's promise to pay annualrent has been found to interrupt the negative prescription of a bond; *Skene* against *Campbell*, *February* 1686, observed by Harcarse. If his promise to pay annualrent be sufficient, certainly his formal acknowledgment that the debt is due will be sufficient.

But further: Michael, the second, suffered decreet to go against him in 1748, when interest was only charged from 1741. This shows that the prior interest had been paid, and consequently the prescription could not begin to run till 1741. No law requires that the payment of interest shall not be proved otherways than by receipts which remain in the hands of the debtor. Michael, the second, had the same cause for proponing the defence of prescription which the defender now has. But he did not propone it. If more interest had been due at that time, the creditor would have demanded more.

This argument cannot be eluded unless the defender will prove his father to be guilty of fraud.

Thirdly, If the negative prescription be founded on dereliction, as the defender pleads, then he must admit the consequence, that it does not extinguish the debts, but only affords an extrinsic exception against the creditor, on account of his neglect. The debt therefore is unextinguished, and is still due by Michael the first: it is not a new debt created by Michael the second. And this leads to another consideration.

Fourthly, That the granting the bond, 1751, was not a deed of contravention. It was a debt warrantably contracted by the entailer, and the heir was bound to pay it, and the bond of corroboration therefore was no diminution of the entailed subject.

Fifthly, Whatever may have been the case originally, the defender, by his letter 1758, promised to pay the debt, and has departed from his defences.

ARGUMENT FOR THE DEFENDER:

First, The pursuer's plea renders the entail elusory. By debts *warrantably contracted*, he meant debts effectual in law, as those of the entailer, or effectual in virtue of the deed itself, as provisions to wives and children.

Secondly, Prescription had run before the decreet 1748: no document had been taken upon it in terms of the Act 1469. The inventary 1711 could not create a right in favour of Storar, for it was no document taken by the creditor. Besides, the plea of negative prescription supposes that the debt existed during the currency of the years of prescription. The inventary can only show, that in 1711 the debts existed, which is not denied.

Payment of annualrent is a document taken by the debtor; but of such payment no evidence is here offered. The decreet 1748 could not revive a debt already extinguished.

Thirdly, If the debt was extinguished in 1748, whether *ipso jure* or *ope exceptionis*, it could not be revived in 1751 by Michael, the second, an heir of entail.

Fourthly, The letter 1758 was wrote by the defender, while a stranger to his own affairs. He had heard of a decreet obtained for a debt of his grand-uncle, the entailer. He supposed that he himself was liable in that debt. But at any rate, if prescription had already run, his writing the letter would not revive the debt.

On the 19th November 1766, "the Lords found the defender liable for the original bond, but not for interest preceding Whitsunday 1748; in respect that the pursuer restricted his libel as to interest before that period."

Act. A. Rolland. *Alt.* D. Græme. *Rep.* Barjarg.

OPINIONS.

KAIMES. I will presume that there were receipts for annualrent, and these receipts would interrupt prescription.

PITFOUR. The heir of tailyie could not contract debts. *Warrantably contracted* means debts either contracted by the tailyier or for provision of wives and children. The bond of no effect, but the action good, because the debt was acknowledged by the debtor in the signed inventary. This was a *document*.

KENNET. *Warrantably contracted* does not permit the heir of entail. The creditor pursuing, and saying that interest was paid, is an interruption. And this the debtor acknowledges, which implies a subsisting debt. The creditor could not have the receipts in his possession, and therefore implicitly refers to them as in possession of the debtor.

GARDENSTON. The acknowledgment in the inventary implies no more than what the existence of the bond implies. But the process in 1748 is enough. Had there been a decreet, *in foro*, for expenses, there would have been no doubt. Here the debtor did equivalent, by granting a bond of corroboration.

AFFLECK. From the whole circumstances of the case it appears that there is a debt subsisting.

BARJARG. The debtor must allege dereliction before the creditor can be heard to prove interruptions.

1766. *November* 19. JANET ANDERSON *against* ALEXANDER DONALDSON and OTHERS.

HERITABLE AND MOVEABLE.

A Debt being secured by Adjudication, and the subject adjudged being sold; *found*, that the interest due upon the creditor's share of the price was heritable.

On the 13th June 1766, the Lords found that the pursuer, Janet Anderson, in virtue of the decreet of this Court in 1729, is entitled to the sum of L.1000 Scots, as a part of the portion of 10,000 merks provided to her sister Elizabeth, by their father's contract of marriage, for which Elizabeth had adjudged his estate in the year 1726; and that the pursuer is entitled, in virtue of said adjudication, to insist for a decreet of maills and duties against the said tenements, for such part of the accumulated sums contained in the adjudication as shall appear to arise from the said L.1000 Scots, and interest thereof, adjudged for; and decerned in the maills and duties accordingly.

In applying this interlocutor before the Lord Pitfour, Ordinary, a new question occurred between the parties. Nicol, the husband of Janet, lived for many years after the sale of Anderson's tenements. The question was, Whether the annualrents of Janet's proportion of the price, which run during the life of Nicol, belonged to Janet herself, or to Nicol *jure mariti*. It became of moment to determine this point; for, if those annualrents should be found to fall under the *jus mariti* of Nicol, and to transmit to his heirs, the defenders offer to prove that Geddes of Scotstoun made advancements to Nicol sufficient to compensate those annualrents.

On the 7th August 1766, the Lord Pitfour, Ordinary, found that the annualrents of the pursuer's share of the price did not fall under the *jus mariti* of her husband.

The defenders reclaimed, and pleaded in manner following:—All annual profits, whether arising from land or money, whether on moveable bond or heritable security, are, with respect to bygones, considered as moveable, transmit to executors, and fall under the *jus mariti*.

The only difficulty arises from the case, *Ramsay* against *The Creditors of Clapperton*, Dict. vol. 1, p. 13, where it was found that the whole sums contained in an adjudication, principal, annualrent, &c. fall to the heir, and not to the executor. Hence the pursuer argues, that her debt was secured by adjudication; that such adjudication is not understood to be cleared by the sale, unless the purchaser has paid the price; and therefore that the annualrent of her share of the price is to be held as heritable, in the same manner as the debt itself would have been heritable had no sale happened.

To this the following answer occurs. An adjudication is an absolute trans-