NO. 6. Bruce Cumming against Andrew, January 1722, mentioned in the note under No. 303. p. 11100.; Forsyth against Simpson, 15th February 1791, No. 276. p. 11081.

The Court (4th February 1807) "alter the interlocutor reclaimed against, and sustain the pursuer's claim for repetition of the aliment of the defender, during the time she maintained her; remit the cause to the Ordinary to ascertain the amount of this claim; to find the defender liable in expences, and to do otherwise in the cause, as his Lordship shall see cause."

To which judgment, the Court (19th February 1807) adhered, by refusing a reclaiming petition, without answers.

Lord Ordinary, *Cullen.* Act. *R. Bell.* Agent *H. Moncrieff*, W. S.
Alt. *Copland.* Agent *Vans Hathorn*, W. S. Clerk, *Scott.*

F. *Fac. Coll. No. 273. p. 61*

1808. *March* 1. SIR ALEXANDER KINLOCH, *against* JAMES ROCHEID.

NO. 7. The negative prescription may take place against a general accounting for tailzied funds, though saved as to particular articles.

THIS case having, according to the judgment of the House of Lords, (see No. 4. *supra*,) being again taken into consideration by the Court, they appointed memorials. On advising these, the Court pronounced this interlocutor: (Jan. 27. 1807,) "Sustain the defence of the negative prescription against the general accounting demanded by the pursuers, and adhere to their interlocutors, in so far as the same have been submitted to review, in terms of the order of the House of Lords." The case was again laid before the Court by petition and answers. The arguments already given in the former report were gone over again at great length; but it does not appear necessary to restate them here. In addition to these arguments, it was now pleaded,

For the pursuer.

1*st*, As the defender's father and himself were not heirs *alioqui successuri*, the only right by which they held the subject in question was Mrs Rocheid's settlement. This right, however, was not absolute, but qualified. It was a trust. The defender's father and himself were indeed among the persons and first in order among them, for whom the trust was granted, but that did not make it less a trust than if it had been granted to a mere stranger, for instance to an accountant. Now, what was the right arising out of this

trust to those in whose favour it was granted? It was a right of calling upon the trustee to account for the whole trust funds, and to employ the balance according to the trust. It was not a right to any particular sums; it was nothing else but a right to a general accounting, and to a certain disposal of the balance on a general accounting. Suppose, then, this right, though arising out of a condition essentially qualifying the defender's right, to be capable of the negative prescription, it cannot prescribe by less than a total neglect of forty years, and it must prescribe *in toto*, or not at all. It cannot be kept alive with regard to certain sums, and not with regard to the rest. For the acknowledgment of the trustee, with regard to those sums, was an acknowledgment of the general obligation to account, the only obligation to which he was subject; it could not be an acknowledgment of any special obligation relative to these sums, for none such existed, It was an acknowledgment, in short, of the trust, and must preserve it *in toto*. No. 7.

The distinction between cases where a part of a right may be saved from prescription, and a part cut off, and those where, if any part is safe, the whole must be saved, is pointed out by Mr Erskine, B. 3. Tit. 7. § 46. and 47. and appears in the decisions, Lord Balmerinoch against Hamilton, 22d June 1671, No. 6. p. 3350.; Laird of Waughton against Home, 26th June 1635, No. 408. p. 11230.; Macleod *contra* Vassals of Muiravonside, 25th July 1727, No. 68. p. 10772.

In the one set of cases, the right or the obligation has been divided into distinct parts. The parts of it have fallen into the hands of different creditors, or have come to affect separately different debtors or different subjects. In the other set, the whole right remains in the same creditor or creditors, and affects equally all the debtors or subjects of it. Hence, in this last case, if one of the debtors or subjects should be untouched for forty years, still the right is not diminished by prescription, but remains entire, and continues to affect that debtor or subject as well as the rest. Now, the right under this trust is of the latter description. It was not divided in any way; it all remained in the same creditors; it continued wholly to affect the same debtor and the same subject.

But this right is unquestionably preserved with regard to certain sums, for so the Court and the House of Lords have found. This finding is not in a question of positive prescription, but negative. It is a finding, not that the defender cannot prescribe positively, because his right is intrinsically limited, but that the right of the pursuer cannot be prescribed negatively in relation to those sums. That must be because there has been an acknowledgment of the pursuer's right by the defenders in relation to those sums, for nothing else could prevent the negative prescription. The making up of titles, and allowing the money to remain on the old securities, is

NO. 7. viewed in this light; but, at all events, some circumstances in the case is so viewed; and whatever it be, it must be an acknowledgment of the *trust*, and must preserve it *in toto* from prescription.

For the defender:

It is denied that this deed constituted a trust; but that is of little consequence, as it is admitted, in this argument, that the supposed trust did not do more than create an obligation liable to the negative prescription. The defender has shewn, that this prescription has run against that obligation in general, and that it is extinguished as to the funds in general. It may be presumed, that the obligation is derelinquished, or that it never existed; that no such funds ever came into the hands of the defender's father. The respondent is not bound to give any account of them, because he holds a legal discharge under the statutes of prescription. As to them he is entitled to say, that no surplus ever existed; and he cannot be required to go into any account to shew in what manner the fact really stood. But, on the other hand, it may very well be said, that where there are certain funds clearly belonging to Mrs Rocheid's estate remaining upon her original securities, and only uplifted within the years of prescription, the defender has not the same defence. He cannot say, with regard to them, that they have been exhausted in the payment of debts, or that there once was a discharge of them which may have been lost. As they are uplifted under Mrs Rocheid's settlement within the years of prescription, he cannot dispute that they at least are funds disponed by her for the purpose of being laid out in favour of the heir of tailzie; and, as he has no prescription to plead, he can only defend himself by going into the fact, and shewing that they do not constitute a surplus after payment of the debts and legacies.

In short, the general obligation to account for all Mrs Rocheid's funds, or for the surplus of the whole of them, is entirely and absolutely cut off. But this notwithstanding, there are certain funds which have remained invested as her succession, and been uplifted in virtue of her settlement within the forty years, which the respondent is liable to account for, and apply as surplus, unless he can show that they were otherwise exhausted. The petitioners may call this a division of the obligation into parts, if they think proper; but the legal idea will not be changed by any form of expression which may be adopted, and it is fully sufficient to distinguish this case entirely from all those referred to on the other side.

The case of one part of a general obligation being preserved from prescription, while the rest is cut off, is very far from being new. The rule is thus given in Macdowall's institute: "If a creditor assign part of his "bond, the cedent using diligence for the remainder, or the assignee for "the part assigned, will not interrupt the prescription as to the sums for

" which no diligence is used, more than if they were contained in a separate NO. 7.
" bond; for as the negative prescription is grounded upon a presumption
" of payment, doubtless the debtor might have paid the one, and still be in-
" debted in the other."

The principles of this rule apply to the obligation in Mrs Rocheid's settlement. In like manner, any funds which may have been intromitted with, before the commencement of the forty years, may have been exhausted in the payment of the debts, or the obligations with regard to them may have been in various ways fulfilled or discharged, while, at the same time, other funds remain, with regard to which it may be clearly unsatisfied. But as the effect of the negative prescription is to presume payment, or discharge, absolutely, with regard to every thing previous to the forty years, this presumption cannot be elided by the mere fact that certain other intromissions, within the forty years, have been found not entitled to the benefit of the same presumption.

Two of the Judges adopted the argument of the pursuer; and one Judge particularly observed, that though he was of opinion the whole obligation to account was prescribed, yet since he had been forced by the judgment of the Court, and of the House of Lords, to give up that opinion, and to hold that the obligation was preserved as to certain sums, he must presume that the trust itself was acknowledged and preserved from prescription *in toto*.

On the other hand, the majority of the Court did not quite adopt the argument of the defender; but rather seemed to be of opinion, that the original right under the trust had been violated by the acts of the defender's father to a certain extent, and that to this extent there had been an *interest* to pursue in the substitutes of entail, in consequence of which their right to the same extent was lost by prescription. That as to the particular debts remaining on the old securities, in regard to them no violation had taken place; and therefore there had been no interest to pursue on the right, and the substitutes in relation to them had no *valentia agendi cum effectu*. That in this respect the case was similar to that of the Earl of Dalhousie against Maule, 1st March 1782, No. 176. p. 10963.

The judgment of the Court was, " Adhere to their interlocutor reclaim-
" ed against."

Lord Ordinary, *Stonefield*. Act. *John Clerk* et *David Monypenny*. Alt. *Jas. Moncreiff*.
Agents, *James Bremner*, and *C. Innes*, W. S. Clerk, *Scott*.

M. *Fac. Coll. No. 34. p. 117.*