[21*st July*, 1846.]

ROBERT GRAHAM, late Gunner in the Royal Navy, *Appellant.*

WILLIAM G. WATT, of Breckness, *Respondent.*

Prescription.—Absence from the kingdom on service as a common sailor in the Royal Navy—the service commencing by impressment—is not sufficient *non valentia agere* to elide the long prescription of forty years, pleaded in defence to an action for reduction of a conveyance of lands.

THE appellant, in 1839, brought an action against the respondent for reduction of a disposition, dated in July 1787, bearing to have been granted by his father to the father of the respondent, of lands situated in Orkney, the place of residence of the parties, upon the ground that the disposition was not a habile mode of conveyance of the lands, which were of udal tenure, and that the signature to the disposition was forged, or, at all events, had been obtained through fraud and circumvention.

The respondent pleaded in defence to this action, that he and his father had possessed upon the disposition challenged, for upwards of forty years; that their title was fortified by the positive prescription of forty years, and the right of challenge cut off by the negative prescription.

The appellant answered, that about the year 1790, during the life of his father, when he was only sixteen years of age, and while he was returning as an apprentice on board a merchant vessel on a voyage from India, he had been impressed into the Royal Navy, and remained in the "Cyclops" frigate for twelve months, until she was wrecked on the coast of France. That he then shipped on board a merchant vessel, and while on the homeward voyage, he was re-impressed at the Isle of Wight into the "Leopard" frigate, in the year 1793, then

cruizing off the coasts of France and Spain. That he was shortly afterwards transferred to the "Bellona," 74, and taken to the West Indies. That about the year 1795 he deserted, in order to visit his native country, but was taken and placed on board the "Quebec" frigate, and having again deserted and joined a vessel bound for England, he was again taken, subjected to fine and imprisonment, and afterwards placed on board the "Veteran," 74, then on the West India station, in which he served for some time. That he also served on board the "Duke," 98, and afterwards the "Bellona," on the coasts of France and Spain, and in the Mediterranean. That from the "Bellona" he was transferred to the "Zealand," and served in her for some time on the coast of Holland. That about 1800 he was placed on board the "Arrow," as gunner, and from that time for about twelve years he was in constant service on various stations; in particular, from 1800 to 1804, on the coasts of France and Holland and the Mediterranean; from 1804 to 1806, on the Mediterranean station; from 1806 to 1808, at Gibraltar; from 1808 to 1810, on the East India station; from 1810 to 1813, on the coast of France and the Mediterranean. That though, at one time, off the coast of England, he was drafted to another ship, and, as gunner, could not obtain leave of absence. That he wrote to his friends, but received no answer, and from the time of his impressment till the year 1813, was wholly precluded from attending to his interest as affected by the deeds challenged, and in ignorance of his father's death, and of the circumstances in which the property in question was placed. That from the year 1813 till 1836 he served on home stations, when he was paid off, and went to Scotland, and then he commenced inquiries, and lost no time in bringing his action.

The issue clerks prepared three several issues for trial by jury. The first being as to forgery, the third as to fraud, and the second in these terms:—"Whether the pursuer, from the "year 1800 till the year 1812, was *non valens agere*, and was so

GRAHAM *v.* WATT.—21st July, 1846.

"prevented from bringing any challenge of the said deed;" but upon the issues being reported to the Court by the Lord Ordinary, the appellant abandoned the first issue, and the second and third were disallowed by the Court on the 14th July, 1843; and afterwards the respondent was assoilzied from the action by an interlocutor of the Lord Ordinary of 9th February, which was adhered to by the Court on the 6th of March, 1844. The appeal was taken against these different interlocutors.

On the hearing of the appeal, a lengthened argument was maintained by the respondent to show that *non valentia agere*, though a good answer to the negative prescription, was none to the positive prescription; and by the appellant, to show that a party could not plead the positive prescription, even to this effect, without being able also to plead the negative. But in the view the House took of the case, it is not necessary to notice these questions further.

Mr. Anderson and *Mr. R. Henderson* for the Appellant.—The period which elapsed between the date of the deed challenged and of this action, is, no doubt, sufficient to cut off the appellant's right of challenge, unless he can establish a sufficient ground for the plea of *non valens agere* to elide the negative prescription of forty years. This plea is not statutory or defined, but is a common law exception to the operation of the Act 1617. It has been admitted in cases of minority and marriage, but in none of the authorities is it limited to these two cases. On the contrary, it is treated as of an expansive nature, embracing every state of circumstances, creating in the party an actual incapacity or inability to sue. *Ersk.* iii. 7, 37; *Stair* ii. 12, 27; *Bell's Prin.* 2023. In the civil law, on which the law of Scotland is founded, and to which reference is made in the preamble of the Act 1617, *absentia reipublicæ causa* was admitted as an exception to the *prescriptio quadriennii*. *C. L.* ii. tit. 51. *McKenzie*, in his "Observations on the Statutes,"

says, "the exception allowed by the civil law, of *non valens agere*, is "allowable in our's, though it be not expressed in this Act;" and *Bell*, in the passage which has been referred to, speaks of *vis major* as an exception admitted.

Here the appellant did not enter the King's service voluntarily, and thereby create the incapacity which he sets up. He was forcibly impressed into it, and brought back and compelled to remain in it after three attempts to escape.

[*Lord Chancellor.*—On each of these occasions he made himself *sui juris*, but he does not say where he was retaken.]

At all events, it does not appear that he ever returned to Scotland. The forcible nature of the original impressment gave the service a character which attached to it throughout. The foundation of the negative prescription is an implied abandonment for forty years of the right at last insisted upon, but any circumstance sufficient to rebut that presumption will destroy its effect. The appellant, at the time he was impressed, was a minor; he continued in that condition until the year 1800; and after 1800, till 1813 at least, he was detained abroad. Letters from him to his friends were unanswered, so that he was ignorant of his father's death or the state of his rights; and the communication between Orkney and the mainland of Scotland was such, at that time, that if he had obtained leave of absence, he could not have used it, from the time that would have been consumed in going and returning. If these circumstances should be proved, it would be impossible to presume that the appellant had abandoned his right to challenge the deed in question, the nature and effect of which he was wholly ignorant of. And all that the appellant desired, by asking the issue which was disallowed, was an opportunity of proving these facts, and taking the opinion of a jury, whether they did not create an incapacity to sue.

Mr. Bethel for the Respondent.—Assuming *non valentia agere*

to be an answer competent to be made to the positive prescription, the facts which the appellant has himself stated are not such as, if proved, would constitute *non valentia*. The position he takes amounts in substance to this, that every person, from the Field Marshal to the drummer downwards, if engaged abroad on military service, is exempt from the currency of the long prescription, positive as well as negative; a proposition sufficiently startling, as it would in effect do away with the law of prescription in a host of cases, and one, therefore, which the House will not accede to without authority for its adoption; but no authority in its favour is produced.

Absentia reipublicæ causa, whatever may have been the effect of it in the earlier period of the civil law, was not allowed by that law, as consolidated by *Justinian*, to be any answer to the *prescriptio longissimi temporis*. But were this otherwise, it is no where defined what is the *absentia reipublicæ causa* which will be good for this purpose. No authority makes military service a sufficient excuse, nor is there anything in the nature of the service which should render it such. It may prevent the party's bodily presence to attend to his interests, but it does not prevent his communicating with those who could do so for him in his absence. Sickness occurring just on the expiry of the prescriptive period, though a very evident *non valentia*, would not elide prescription, still less can mere absence. If they were, the very object of the prescription—the quieting of men's minds in the possession of their property—would be defeated. Instead of forty years being the limit, questions of title might be raised at any period, however distant, if excuses, such as that set up by the appellant, were admissible. But while the appellant does not produce any authority for the position he asserts, there is express authority against it in Whitefoord *v.* Kilmarnock, *Mor.* 11198. There, Whitefoord, in answer to the negative prescription, pleaded that he was *non valens agere*, because, from 1638 to 1649, he was on military

service in England, and from 1649 to 1660 he was banished from Scotland as an adherent of the royal cause. The Court admitted the answer for the last of these periods, but repelled it for the first period, "because he might have assigned or pur-"sued, notwithstanding his being in the king's army." So here the appellant might have assigned or pursued, though he was in the king's navy; there was nothing in the one case more than the other. A distinction was attempted, upon the circumstance that the party had been originally impressed into the service; but that was without any foundation, for there was no distinction, so far as regarded communication with their friends or advisers, between the man who had been impressed and the man who had freely entered into the service.

Mr. Anderson in reply.—The statute is founded on a recital of the civil law, which held that one *absens sine dolo malo reipublicæ causa* was not open to prescription. When it is asked who is absent *reipublicæ causa*, the answer is obvious, *qui quia reipublicæ causa abesse est*—

[*Lord Campbell.*—What is the general proposition you contend for?]

That absence beyond seas on public service is an answer to the negative prescription.

[*Lord Chancellor.*—Will absence to Ireland, or Jersey, or Guernsey, be sufficient?]

It is impossible to fix a line—every case must depend on its own circumstances.

[*Lord Campbell.*—You must show, by some authority, that that is the law of Scotland. If the absence has been for various fractions of time, are these to be added together and be deducted?]

There is no inflexible rule; the question is always one of circumstances. The rule of the civil law has been adopted, both as to infancy and coverture; and military service is

equally within the rule. With regard to Whitefoord *v.* Kilmarnock, the party there was within the kingdom, though out of Scotland, during the service, and the period of banishment being deducted, prescription was thereby elided, and he ceased to have any interest to insist upon the period of service.

LORD CHANCELLOR.—In this case, the defender having set up a title of forty years' prescription, the question before the Court below was, whether, under the facts stated, there was sufficient in the history of the pursuer to explain the reason why he had not asserted his title, and why the forty years' prescription should not run.

My Lords, a distinction has been taken in the argument, between the positive and the negative prescription, and difficulties have been suggested as to the mode in which those two rules ought to be applied. If the Court of Session were right in the view that they took of this case, that the facts did not entitle the party to be exempted from the operation of the forty years' prescription, either positive or negative, that distinction becomes perfectly immaterial; and I, being of opinion that the Court of Session were right in the view that they took of the facts stated upon that point, do not think it necessary to express any opinion upon the argument urged at the bar. The question is, whether the facts which are stated by the pursuer himself are sufficient, according to the rule established in Scotland, to prevent the operation of the forty years' prescription.

Now the facts are, that the party was impressed into the royal navy during his minority; in that state he visited different parts of the world, and continued serving in the royal navy during the remainder of the forty years; and the question is, whether those circumstances are sufficient to prevent the forty years from running.

In favour of the argument that the forty years do not run against a person under those circumstances, no authority what-

ever has been quoted. If such an instance had existed, I am quite sure, from the industry and knowledge of the learned counsel for the appellant, our attention would have been drawn to the case in which that point had been established. But there is an early case which seems to have been followed ever since, and which we are entitled to assume has been followed ever since, from the fact of there being no authority of a subsequent date impeaching it, namely, Whitefoord's case, in which that very point was raised. There, according to the statement which appears to be correct, in the appellant's case, (I am quoting from page 14,) "Colonel Whitefoord charged Lord " Kilmarnock for payment of the teinds of certain lands, to " which, in defence, he urged that he held a prescriptive right. " The charger answered, *contra non valentem agere non currit præ-* " *scriptio*, and stated that he had been engaged as a soldier in the " king's service in 1638, and served the king in the wars during " the troubles till 1649; that he was taken with Montrose, and " ran the hazard of being executed, but with great difficulty was " saved, and only banished the kingdom, on finding caution not " to return under pain of 5000*l*. Accordingly he went out of the " country, and did not return until the Restoration in 1660. The " judgment on the principal point was to this effect:—The Lords " found the colonel was *non valens agere*, in respect of his banish- " ment, and therefore repelled the defence of prescription; but the " other point came to be argued, as to the time the colonel was " absent from Scotland on service *in England*. The pursuer con- " tended that the interruption must be sustained in his favour " from 1638, seeing he was in the king's army in England, and " so *absens reipublicæ causa*, which the Lords repelled, because " he might have assigned or pursued, notwithstanding he was " in the king's army."

Now, my Lords, there cannot be a more distinct and positive decision than this. The point was keenly raised, and distinctly

decided by the Court, and from that time to the present, as far as appears from any authority which has been brought before us, that has been considered as good law, and has been acted upon and adopted as the rule in Scotland. It is very true that a more extended rule applies in the civil law, and that the Scotch law is in a great measure taken from the civil law; but the case is not less an authority in Scotland because it is not founded on the civil law, which the law of Scotland has adopted to a certain extent. The law of Scotland has laid down rules and limitations to what extent that law is to be applicable in Scotland. In the present case it has prescribed the limits within which the rule is to be adopted; it has adopted it as far as banishment is concerned. Here the excuse is merely absence in the royal service; this case cannot be put higher than that.

As to any distinction about the sea, or whether the absence or distance from Scotland is over the sea or over the border, that can make no difference. The ground is absence from the country in which the title exists.

Now, we have a positive decision upon the subject, which does not appear to be interfered with by any subsequent decision; and therefore I advise your Lordships to adhere to the rule so laid down, which is not far from 200 years old, and not to disturb the rule which has been incorporated in, and adopted by the law of Scotland.

LORD CAMPBELL.—My Lords, I am entirely of the same opinion. I think that we are not in this case called upon to give any opinion with respect to the distinction between the negative and positive prescription, because it appears to me upon the facts that are alleged in this case by the pursuer, that he does not show that the plea of prescription should not prevail.

I think that the Court of Session were quite right in refusing the issue. The issue in its terms seems to me to be

GRAHAM *v.* WATT.—21st July, 1846.

quite preposterous—"Whether the pursuer from the year 1800 "till the year 1812, was *non valens agere*, and was so prevented "from bringing any challenge of the said deed."

I must express my great surprise that any lawyer should propose to send such an issue for the determination of a jury; because it would resolve itself into a question of law much more than a question of fact. But still, if, upon the allegations there were a disputed fact which might be material for the consideration of a jury, we might frame another issue, and direct that issue to be tried; but it seems to me, my Lords, that, looking to all the facts that are alleged by the pursuer, and giving credit to everything that he alleges, he offers no answer to the plea of prescription.

Now, as has been stated by my noble and learned friend the Lord Chancellor, giving the fullest credit to all that the pursuer says, the effect of it is this, that he was abroad in the service of his country, serving in the royal navy for a sufficient period of time to reduce the period below the forty years. Well, then, there must be some rule laid down upon which that should be considered as an answer to the plea of prescription, because it is utterly impossible to look to the circumstances of each particular case. There would be no safety to titles, no security to mankind, if there were not a general rule upon this subject. It is said there is a hardship upon the claimant; but consider the hardship that there is to the party against whom the claim is brought; the documents are destroyed, the witnesses die; a title that might be proved, if it were recently disputed, cannot afterwards very possibly be supported. Look at this very case:—It is alleged that the signature of the pursuer's father was forged, and that the pursuer's father was in a state of imbecility, and was not competent to execute a deed; and these facts are to be inquired into half a century after the period when the deed was executed! The witnesses and the documents that would clearly have established the validity of the transaction,

may now have vanished; it is of the last possible importance, therefore, that a rule of prescription should be laid down, and that that should be adhered to, subject to certain defined exceptions.

Coverture and infancy are well-known exceptions; but it lies upon the pursuer to show that what he relies upon is likewise an exception. Where is the authority for saying that the fact of a party being absent in the public service, suspends the operation of prescription. It certainly would be a very inconvenient rule, because, if prescription is suspended once, it may be suspended again and again. You can make no distinction between a gunner and a commander-in-chief of an army; you can make no distinction between a military officer and an ambassador. At the distance of a century, or of nearly a century, when the plea of prescription was pleaded, it might be answered:—"Yes; but seventy years before, or fifty years "before, or forty years before, for two or three years, the in- "dividual was serving his country in the army, or was repre- "senting his sovereign at a foreign court." It would require very strong authority to prove that a rule that is so inconvenient, has been adopted by the law of Scotland. Now, there is no authority to show that such a rule has been adopted; but there is this positive case of Whitefoord to show that it has been rejected. It is not the law of Scotland, it never has been acted upon; and, when it was contended to be the law of Scotland, that argument wholly failed.

I therefore think that the Court of Session was perfectly justified in overruling this plea, and saying that no answer whatever had been given to the plea of prescription.

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House; and that the said interlocutors, so far as therein complained of, be, and the same are hereby affirmed. And it is further ordered, That the appellant do pay, or cause to be

GRAHAM *v.* WATT.—21st July, 1846.

paid, to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DUNN and DOBIE—DEANS, DUNLOP, and HOPE, Agents.