No 17. laid on land, as their rights in it were equally well secured while it remained in money.—Prescription, therefore, cannot run sooner than from the death of Lady Forfar in 1741.

But the substitute heirs had not the beneficial right or interest in this money even at that time, nor until the death of John Lockhart, without issue, which opened the succession, in this trust-fund, to the pursuers. It was only on his death, that they came to have any right to demand either capital or interest. Previous thereto, though it had been competent for them to have insisted for a literal compliance with the trust, and that the money should be laid out, in terms of it, they could have had no benefit from such action; as, immediately after a purchase made, John Lockhart, by using fine and recovery, could have cut off their right as heirs in remainder.

The prescription, therefore, runs only from the death of John Lockhart; for, until that time, the pursuers were *non valentes agere cum effectu.*

*Replied* for the defenders; The plea of *non valens agere* does not apply.—The pursuers in this case, as creditors under a trust-right, had a *jus quæsitum* to make it effectual from the beginning—And they had a right to challenge every deed of the trustee in contravention of the trust.—It is of no consequence in this argument, that, if the action had been brought against John Lockhart, the pursuers, though successful, might have been deprived of any benefit from it, by his using a fine and recovery. The chance of this was a prudential reason for risking the prescription of the right, rather than bring an action during his life. But, as there was no defect of title in the pursuers, and the *jus exigendi* was clear, there is no room for the plea *non valens agere.*

This cause was advised upon informations, and a hearing in presence. The Court were of opinion, that both defences were well founded. The judgment was, 'Sustain the defences to the action, and assoilzie the defenders.'

Act. *Advocate, Solicitor-General.* Alt. *Ilay Campbell, Craig.*

*Fac. Col. No 7. p. 14.*

*** This case was appealed:

*10th March* 1779.—The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

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1781. *July* 3. York-Buildings Company *against* Wauchope.

No 18.
The negative prescription cannot be

James Wauchope acquired right to an old debt upon the estate of Earl Marischal, which had been ascertained by decree of the commissioners, and

declared to be a subsisting charge on the estate, in terms of the act 4th of George I.

No 18. pleaded against a debt by one who has no interest.

The York-Buildings Company, to whom the Marischal estate was sold, transacted this, along with the other debts affecting it, and gave Mr Wauchope, in payment, four of their transferable bonds, amounting to L. 325 Sterling; he, on the other hand, obliging himself to grant the Company a proper conveyance of the debt, upon actual payments being made; but, at the same time, reserving the effect of his diligence and other rights, in case of non-payment.

When the Company came to account in Exchequer for the price of the estate, it was agreed that they should be allowed credit for what sums they had actually paid in transacting the debts affecting it. But, as no direct or sufficient vouchers were produced, to show that the four bonds above mentioned had been paid, the Barons determined, 'That they could not give the Company allowance out of the price of the estate, for the sum of L. 375 Sterling, said to be paid to Mr Wauchope.' They afterwards refused a petition presented by the Company. And these judgments were affirmed by the House of Lords, upon appeal.

In the mean time, the Company had brought an action before the Court of Session, against Mr Wauchope's Representatives, concluding, that they should make up titles, and denude in terms of his obligation; and the defenders not appearing, decree was pronounced in terms of the libel. When, therefore, the question was finally determined against the Company in the Court of Exchequer and House of Lords, for want of sufficient vouchers of payment, they proceeded, in the view of supplying that defect, to carry the decree of the Court of Session into execution. A suspension, however, was obtained; and, in discussing the reasons, it was

*Pleaded* for the suspenders; The obligation founded on had fallen by the negative prescription, long before any demand was made in consequence of it; at any rate, as actual payment was the condition of that obligation, nothing but a direct proof of such payment can entitle the chargers to the conveyance they are now insisting for. No such proof, however, has yet been brought, as is evident from the judgments both of the Court of Exchequer and House of Lords. These judgments cannot surely be reversed in the present process; and, although it were competent to do so, it seems absurd that the suspenders should be obliged to grant an assignation acknowledging a payment to have been made, which does not consist with their knowledge, and has not yet been properly instructed.

The suspenders, it is true, have not the bonds to produce; nor have they hitherto attempted to prove the tenor, or asked payment of them, but that they may do or not, as they shall be advised. These bonds may still be recovered; and, were the suspenders to grant the conveyance now demanded of

No 18. them, which must necessarily proceed upon the narrative of payment, they would for ever be precluded from making any advantage of them.

*Answered* for the chargers; There are here no *termini habiles* for pleading the negative prescription. For, 1*st*, the present demand is founded not merely on an obligation, but on a duty, which every good man owes to his neighbour, and which, therefore, cannot prescribe. *Unusquisque præsumitur consentire in id, quod sibi non nocet, et alteri prodest.* The suspenders cannot, by any direct action, recover a sixpence of this debt, because the bonds are prescribed many years ago. They can, therefore, lose nothing by the conveyance demanded; while, on the other hand, the chargers, if that conveyance is with-held, must again pay a sum of money, which there is good reason to believe they have already paid, though the evidence of payment is in some sort defective. 2*dly*, The present demand resembles an action of warrandice. It was not, till lately, that the Barons of Exchequer ultimately disallowed the chargers claim; and the prescription can only run from the date of their judgment.

The obligation then being still in force, the suspenders must produce the bonds in question, or they must grant the conveyance demanded. It is clear, that these bonds have either been paid, or are still outstanding. In the one case, the condition of the obligation has been fulfilled; in the other, a debt remains upon the estate, for which the chargers are entitled to have credit in accounting with the Crown.

Nor are the chargers barred from insisting, by any orders pronounced by the Court of Exchequer upon this matter. The Barons have no jurisdiction as a court of record, except in matters of revenue. They are here settling the price of the Marischal estate, as Commissioners of the Treasury; and although, in that character, they necessarily heard and decided upon the claims of parties, yet they did so, only in their official, not in their judicative capacity. Their opinions could not prevent any of the parties from bringing an action before the Court of Session; and to the judgments of this Court the Barons of Exchequer must give effect, whatever may be their own sentiments; agreeably to the determination of a late case between Captain Elphinston and Mr Haldane of Gleneagles, affirmed by the House of Lords. Indeed, the appeal in the present case was dismissed as incompetent, for this very reason, that the Barons had not given judgment as a court of judicature, but had disallowed the claim as commissioners of the revenue, whose resolves could be altered by the Lords of the Treasury alone.

The Lords 'found sufficient presumptive evidence that the four several bonds in question, granted by the York-Buildings Company to John Wauchope, late merchant in Edinburgh, amounting to three hundred and twenty-five pounds Sterling, are satisfied and paid by the York-Buildings Company; that no prejudice can arise to the Representatives of the said James Wauchope from granting the conveyances of the said debt now pursued for, in favour of the York-Buildings Company and their creditors, and of consequence that the

defenders have no interest to plead the negative prescription; and, therefore, decerned and ordained them to convey and make over said debt accordingly, but with warrandice from their own fact and deed allenarly.' No 18.

Lord Ordinary, *Alva.* Act. *G. B. Hepburn.* Alt. *M'Laurin.* Clerk, *Colquhoun.*
*L.* *Fac. Col. No 67. p. 107.*

*** This case was appealed:

1782. *April* 22.—The House of Lords ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 100 costs.

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## SECT. II.

### Negative prescription pleadable only by a person infeft.—Effect relative to the original tenure of land.—Claims of relief.

1725. *July* 20.
FRANCIS PATON, Portioner of Hillfoot, *against* JOHN DRYSDALE of Townhead, and Others.

No 19.
In a reduction of an adjudication, found, that the adjudger, tho' forty years in possession, could not plead the negative prescription, not having been infeft.

FRANCIS PATON, as heir to his predecessor in the lands of Hillfoot, insisted in a reduction against John Drysdale, of an adjudication led at the instance of Robert Blackburn, in the year 1679, against Paton's predecessor; to which adjudication Drysdale had right, and, in virtue whereof, he and his authors had possessed the lands for upwards of 40 years without interruption.

The grounds of reduction were certain nullities objected to the adjudication; particularly, that it was pronounced and extracted upon the same day. Particular answers were made to the nullities; but a general defence was *pleaded* for Drysdale, namely, That he and his predecessors and authors having obtained possession upon the adjudication, and continued therein upwards of 40 years, his title was secured by the positive prescription; and no action being brought within that time against them, the pursuer could not now be allowed to object the nullities, because he was excluded by the negative prescription.