[Heard, *March*, 1841. — Judgment, *7th March*, 1842.]

Mrs Clementina Allan, or Dickson, Appellant.

Alexander Brander, Esquire; and Miss Catherine Williamson, Respondents.

Prescription. — Where purchasers, under a ranking and sale, had granted bond for their purchase money, payable at a definite term, and "that to those who shall be found to have right thereto by the "decreet of ranking;" and no claim for payment or otherwise had been made upon the purchasers for upwards of forty years, *found*, that creditors, before any decree of ranking had been made, were not, in the circumstances, entitled to an order for consignation upon the purchasers under the 6th sect. of 54 Geo. III. cap. 137.

Ranking and Sale. — If the creditors do not insist upon consignation by the purchasers of the lands within forty years from the term at which the price is payable, under the purchaser's bond, their right to do so will be cut off by the negative prescription.

On the 21st December, 1836, Mrs Clementina Allan, or Dickson, as daughter and only child of the deceased Elizabeth Allan, and Alexander Allan, and other persons, creditors-claimants in the process of ranking of the creditors of the deceased John Hay, and John Logan, common agent in the process, presented a petition to the Court of Session, in which they set forth: That in the year 1786, a summons of ranking and sale had been brought at the instance of Patrick Copland, as trustee for Elizabeth Allan and Alexander Allan, against Alexander Hay, grandson and apparent heir of the deceased John Hay, and the other creditors of John Hay: That after the usual preliminary procedure had taken place, an act of roup was pronounced and extracted, and the subjects belonging to the bankrupt were sold, on the 6th June, 1792, in three separate lots, particularly described, and were purchased as follows, viz.: —

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Lot 1st. By Walter Scott, at the price of L.280 sterling, for behoof of Alexander Brander, merchant in Elgin; Lot 2d. By Mr William Williamson, merchant in Elgin, at the price of L.380 sterling; and, Lot 3d. By Hugh Warrender, for behoof of the then Earl of Findlater and Seafield, at the price of L.235 sterling: That the prices were declared to be payable at Martinmas, 1792, and to bear interest from Martinmas, 1791, the term of entry being Whitsunday, 1792; and, in terms of the articles of roup, bonds were granted by the several purchasers, along with cautioners, for payment of the prices of their respective purchases, "at the said term of Martinmas, 1792, with the "annualrent thereof, from the term of Martinmas, 1791," with a fifth part more of penalty, and "the interest of the said prin- "cipal sum from and after the said term of payment, so long as "the same shall remain unpaid, and that to those who shall be "found to have right thereto by the said decreet of ranking "and scheme of division." That on the bonds being lodged in process, decreet of sale was pronounced in favour of the purchasers, upon the 6th July, 1792, whereby the subjects were sold, adjudged, decerned, and declared, to pertain and belong to the respective purchasers, heritably and irredeemably, "from and after the said term of Whitsunday last, (1792,) "and in all time thereafter, upon payment or consignation, "by the said Alexander Brander, William Williamson, and "Hugh Warrender, or their foresaids, of the prices they are "respectively bound to pay, as aforesaid, and that to those "who shall be found to have right thereto, by the decreet of "ranking and scheme of division to be made out and approven "of thereanent, and that at the term of Martinmas next, in this "present year, 1792, with a fifth part more of the said respective "prices of penalty, in case of failzie, and of the annualrent of "the said prices, from and after the said term of Martinmas "last, 1791, to the said term of payment, and in all time there- "after, during the not payment." That the purchasers entered

into possession of their respective purchases, and they or their representatives had held possession ever since, but had never yet paid or consigned the prices. That a state of the interests, and order of ranking of the creditors, was prepared by Alexander Grant, deceased, the common agent, in which certain objections were stated against the claims of some of the creditors, and in consequence, a discussion ensued with these parties, before the Lord Ordinary: That on the 31st January, 1800, Lord Armadale, Ordinary, before answer, remitted "to Mr Robert Allan, "accountant in Edinburgh, to consider the report, objections, "answers, and replies, to Isobel and Christian Hay's debts, to "make up a state of their claims, and to report the same to the "Lord Ordinary." That the process appeared to have been laid before Allan, and to have been kept alive by renewals of the remit to him for three or four years; but it was understood that Allan never made any report; and it did not appear, that after 1804, or 1805, any farther proceedings took place in the process. That some of the parties died, and their representatives being minors, the process was allowed to fall asleep. That Grant, the common agent, likewise died soon afterwards; and it was believed that all the original parties to the process were now also dead. That the process had lately been revived by a summons of wakening and transference, brought at the instance of the petitioner, Mrs Dickson, and the representatives of all parties having interest had been called either personally or edictally. That decree of transference had been pronounced by Lord Fullerton, Ordinary, on 6th July, 1836; after which, upon a petition for the pursuer of the wakening and transference, the process had been remitted by the Court to the Lord Ordinary, and the petitioner, John Logan, had since been appointed common agent. That as the matter had been allowed to stand over for so many years, and the prices were still in the hands of the purchasers, who had all along been in the possession of the subjects,

and drawing the rents, the petitioners had been advised that it was their duty to apply to the Court for a warrant on the purchasers, or their representatives, to consign the prices of their respective purchases, with interest. That by the Act 54 Geo. III. cap. 137, sect. 6, it was enacted, that "in every case of a "sale under the authority of the Court of Session, it shall be "lawful to the purchaser, at any term of Whitsunday or Martin-"mas subsequent to the term of payment of the price, to lodge "the price, with the interest due upon it, in the Royal Bank, or "Bank of Scotland, or the Bank of the British Linen Company, "at such interest as can be procured for it, by doing which, and "by giving notice thereof to the agent who carried on the sale, "he shall be discharged of the said price; and farther, the "Court of Session, upon the application of any of the creditors, "shall be empowered to make an order on the purchaser to "lodge the price and interest at any of the said terms subse-"quent to the term of payment, in one or other of the said "banks, sufficient intimation being always previously given, both "to the purchaser and to the common agent for the creditors, "that such application is made, in order that all parties may "have an opportunity to object." That it was understood that Alexander Brander, the purchaser of the first lot, was dead, and that his heir and representative was his son, Alexander Brander. That it was likewise understood, that Williamson, the purchaser of the second lot, was dead, and that Catherine Williamson, his daughter, was his representative. That with regard to the third lot, the subjects had, ever since the sale, been in the possession of his Lordship and his representative, the present Earl of Seafield.

On this narrative the petition prayed the Court "to ordain "the petition to be intimated to the said Alexander Brander, "Catherine Williamson, and the Earl of Seafield, as the re-"presentatives of the purchasers of the said subjects, and on the "Honourable Colonel Francis William Grant, curator-at-law

" of the said Earl; and thereafter, to grant warrant to, and " authorize and ordain the said Alexander Brander to consign " in the Bank of Scotland the said sum of L.280 sterling, being " the price or purchase money of lot first of the said subjects, " with the legal interest thereof from and since the term of " Martinmas, 1791, accumulated at the end of every ten years, " or at such other longer or shorter periods as your Lordships " shall deem just and reasonable, until the day of consignation; " and, in like manner, to grant warrant to, and authorize and " ordain the said Catherine Williamson to consign in the Bank " of Scotland the said sum of L.380 sterling, being the price of " lot second of the said subjects, with the legal interest therof " from and since the said term of Martinmas, 1791, accumulated " as aforesaid; as also, to grant warrant to, authorize, and ordain the said Earl of Seafield and his curator-at-law, to con- " sign in the Bank of Scotland the foresaid sum of L.235 sterling, " being the price of lot third of the said subjects, with the legal " interest thereof, from and since the said term of Martinmas, " 1791, accumulated as aforesaid; and upon such several con- " signations being made, and the bank-receipts produced in pro- " cess, to exoner and discharge the said parties and their " respective cautioners of the said prices, and grant warrant to, " and authorize and ordain the clerks of Court to deliver up to " them their respective bonds of caution; or to do other- " wise," &c.

Brander put in an answer to this petition, in which he stated, that lot first had been purchased for a person of the same name as his father, but that his father had joined in the bond of caution for payment of the price, and the price had been duly paid. That after the purchaser's death, his successor sold the subjects to his, Brander's father, and gave him a title by disposition and infeftment, and that no demand had ever been made, either upon him or his father, on the footing of the price under the judicial sale not having been paid.

Williamson also put in an answer, in which she stated, that her father had left a settlement, by which he conveyed his whole property to her, and her brother and sister. That she never had heard her father allude to the subject mentioned in the petition; and, from his well known habits of regularity, she felt satisfied, that if the purchase charged had in fact been made by him, which seemed probable, he had paid the price at the time.

Upon these statements of the facts, and of their knowledge, both Brander and Williamson pleaded, among other things, 1st. That the claim, so far as founded on the bond granted in 1792, was cut off by the negative prescription. 2d. That it was barred by the unaccountable *mora* of the petitioners.

A record was made up by condescendence and answers, in which the petitioners stated, that the common agent had died in 1806, and that the representatives of the creditors being minors the process of ranking and sale was allowed to fall asleep. The first of these statements was admitted by the respondents. The second was neither denied nor admitted. In answer to the pleas stated by the respondents, the petitioners pleaded, 1st, That there were no *termini habiles* for the currency of the negative prescription of the bonds, by reason of *non valentia agendi*, as the parties to whom the obligation was prestable had never been ascertained by any decree of ranking.

The Lord Ordinary, after closing the record, ordered cases by the parties; and, on advising these papers, he made avizandum with them to the Court. When the case came before the Court, they had some doubts as to whether the plea of prescription was not well founded. In consequence, they ordered farther arguments upon this point, by one counsel on either side, and thereafter, on the 8th March, 1839, they pronounced the following interlocutor:

"The Lords having advised this petition, with the revised cases "for the parties, and heard counsel in their own presence, they "sustain the plea of prescription, dismiss the petition, and de- "cern: find the petitioners liable in expenses, and remit," &c.

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The appeal was taken against this interlocutor.

Mr Pemberton and Mr Anderson for the appellants. — The bond here is not to any creditor or other obligee, but to the Court, and therefore cannot be liable to prescription, but if it be as against the creditors, *contra non valentem agere non currit prescriptio*, *Ersk.* III. 7. 37. Until decree of ranking and scheme of division, the creditors to whom the bonds were payable were not ascertained, nor the proportions in which they were entitled. Until then there was no one entitled to make any claim under the bond. That decree has never yet been pronounced, nor the scheme prepared; there has not therefore been at any time during the currency of the forty years, a party having a right to sue upon the bonds which could be the subject of prescription; and without such a right, prescription has no place, Gaw, *Mor.* 11,183; Bruce, *Mor.* 11,185. The presumption of the negative prescription is not payment, but abandonment of the claim, *Ersk.* III. 7, 15, and 39; 1 *Bell's Com.* 335. But so long as the action of ranking was in existence, there could not be ground for such a presumption. The presumption, moreover, is elided if any just cause of forbearance can be assigned, Mackie, *Mor.* 11,204; Elliot *v.* Aitchison, *Mor.* 11,209; Ramsay *v.* Ogilvie, 2 *Fount.* 77; Scott *v.* Buccleugh, *Mor.* 11,192; Anstruther *v.* Rothes, *Mor.* 10,713; Wemyss *v.* Advocate, 5 *Bro. Supp.* 933. And the case must be much stronger where, as in the present, the document of debt bears upon its face the impediment to action.

The Court below has held the power of exacting consignation to be equivalent to the power of suing; but the statute 1469 is, that the party "shall take document" upon the obligation within the forty years. If the party could not sue, how could he take document. The statutes 1469, cap. 28, and 1474, cap. 54, speak of "following the obligation;" and the act 1617, cap. 12,

of "action being pursued," and do not deal with equivalents, such as exacting consignation or otherwise. There must, therefore, be a party in a situation to "follow the obligation," or "pursue "action," before these statutes can have application. Formerly the sale of the lands was under a distinct action, and the ranking of the creditors was under a separate action of multiplepoinding, and the bond by the purchaser was to pay to the creditors at the first term after they should be ranked; so long, therefore, as the action of ranking was not prescribed, or was subsisting, prescription could not run upon the bond, though much more than forty years should have elapsed from its date; this was found in Middleton *v.* Falconer, 5 *Bro. Supp.* 320, *Mor.* 13,353. Afterwards, the rule of procedure was altered by act of regulations 1695, and the ranking of the creditors was made to precede the sale. But by the statute 23 Geo. III. cap. 18, the old rule was reverted to, the two actions of sale and multiplepoinding merged into the form of action now in use, and from thenceforth the bond was, as in the present case, taken payable to the creditors who should be found to have right by the decree of ranking; thereby *non valentia* was created as to the creditors until that decree should be pronounced. But on the other hand, the same statute, 23 Geo. III. cap. 18, allowed the purchaser to protect himself by consigning his purchase money. No doubt, the statute likewise conferred the privilege upon the creditors of requiring the purchaser to make consignation, and this has been continued by 54 Geo. III. cap. 137; but there is no power given to the creditors to enforce the bond by consignation, they have merely a right to move the Court upon intimation, that all parties may have an opportunity to object; this is but a privilege to be resorted to in case of need, *res meræ facultatis*, which is not subject to prescription. If the two original actions of sale and mutiplepoinding had remained separate, the creditors, if the pursuer of the multiplepoinding had been *vergens ad inopiam*,

might have applied for consignation of the fund *in medio*, but had they not done so, he could never have pleaded prescription, no matter how long the period before conclusion of the competition. The statute 23 Geo. III. truly did no more than extend this right of the creditor.

The common agent in the ranking and sale, whose duty it is to represent the creditors, died in the year 1806; from that period until 1836, when a new common agent was appointed, the creditors could not act as a class, but had individual rights, which might or might not be identical; and necessarily, in a large body of creditors, some of them may have been minors, or otherwise incapacitated from prosecuting their right. The *laches* of the adult creditors can never bind the minor creditors, or those otherwise incapable of protecting their interests.

Lord Advocate (*Rutherfurd*) *and Mr Stuart for respondents.*—In Middleton *v.* Falconer, the term of payment was the decree of preference, and was therefore indefinite, and conditional on the decree of preference; here the term of payment was expressly Martinmas, 1792, and the bond is no part of the process of ranking as a depending process; it was a step in the separate process of sale, and was, together with the decree of sale, transmitted to the keeper of the records, with whom it has since remained. The bond, therefore, was one which should have been "followed," or upon which action should have been pursued within forty years, otherwise it prescribed by the acts 1469, cap. 29, 1474, cap. 74, and 1617, cap. 12. The form of a precise term of payment was introduced in consequence of the 7th sec. of 33 Geo. III. cap. 74. If the creditors were not in a situation to demand payment at the term fixed, they had at least the power under 23 Geo. III. cap. 18, and also under 33 Geo. III. cap. 74, to have required consignation of the purchase-money, immediately after Martinmas, 1792; and it was with the view of giving them this power, that

the fixed term of payment was introduced, although the parties entitled might not then be ascertained.

No change has occurred in the situation of the creditors from what it was in 1792; no decree of preference is yet pronounced, and therefore the present proceeding is the best answer to the plea of *non valentia*. The original petition is not for payment, but for consignation, and might have been presented at any time since 1792. A party cannot found on a *non valentia* arising from his own default.

So soon as the term of Martinmas, 1792, arrived, the creditors acquired a right to demand consignation; a right which, in its consequences to the debtor, was equivalent to a right to demand payment; and equally with it the subject of prescription, as has been found in similar cases, Porterfield, *Mor.* 10,698; Pollock, *Mor.* 10,702. Whatever uncertainty there might be as to the ultimate right to payment, this formed no bar to interrupting prescription, Campbell *v.* Breadalbane, *Mor.* 11,275, and 6554, where prescription was held to have been interrupted by action at the instance of a party whose title was ultimately set aside.

It is not the common agent's duty to enforce consignation; the power is given to the creditors individually; and even if it were otherwise, from 1792 till 1806 there was a common agent, and after that period it was in the power of the creditors at any time to have had a new common agent appointed.

As to the minority of some of the creditors, a party can only found on his own minority. But there is no evidence of the minority of any creditor, and at any rate, if a plea of this kind will bar prescription, it is evident that prescription can never apply to the case, for in a large body of creditors, there will in all likelihood be always some one in minority; but the creditors had a common interest in requiring consignation, which, if made on the motion of one, would have benefited the whole. The case is similar to that of substitutes of entail, where the minority of sub-

stitutes does not bar prescription, if, during the prescriptive period, there have been heirs in majority. The deduction of minorities, therefore, has no application, Kinloch, *Mor. App. Voce* Prescription, Nos. 4 and 7. See Clark *v.* Home, *Mor.* 10,662, referred to by Stuart; Middleton *v.* Falconer, *ut supra.*

Mr Pemberton, in reply.—The application is not founded on the bond, but is a proceeding in the separate process of ranking; prescription, therefore, cannot apply. The statutes do not make it necessary to take any bond from the purchaser — this may be dispensed with; had it been so, would this application have been barred? if not, the bond cannot make any difference. The appellants are merely availing themselves of a statutory provision.

[*Lord Chancellor Cottenham.* — Suppose the lands had remained in the purchasers, would the lands have been discharged of the price?

Lord Advocate. — Yes. If they got a charter, they would have had a simple unqualified right.]

No doubt.

[*Lord Chancellor.* — Could the purchaser have got a charter, when the decree adjudges the lands "upon payment or consigna-" tion?"]

Though the purchaser had obtained a charter, he never could have retained possession without either payment or consignation, whatever might be the case of a third party not having notice.

LORD COTTENHAM. — My Lords, In this case, I think the judgment of the Court of Session ought to be affirmed, and I think the grounds upon which it ought to be supported are perfectly clear. It would therefore be unnecessary to advert to other questions, which may arise upon the same matter in some other form of proceeding, were it not proper to guard against

any inference, that such other questions are concluded by the judgment in this case.

The sum in question, is the purchase-money of property sold under an order in an action of ranking and sale, and the bond dated in June, 1792, which is in the now usual form, is for payment at Martinmas, 1792, with interest from Martinmas, 1791, so long as the same shall remain unpaid to those who shall be found to have right thereto by the decreet of ranking and scheme of division.

The present demand was made by a petition in the name of Clementina Dickson, described as the only child and representative of Mrs Elizabeth Allen, and Alexander Allen, which stated, that the original summons of ranking and sale was brought at the instance of Patrick Copland, as trustee for the same Elizabeth Allen and Alexander Allen. That there had been no proceedings after 1804 or 1805, but that some of the parties having died, and their representatives being minors, the process had been allowed to fall asleep, and had been only lately revived by a summons of wakening and transference at the instance of the petitioner, Clementina Dickson. Other creditors joined as petitioners, but there is no statement or evidence as to the time at which the original pursuers died, or when the petitioner, Clementina Dickson, first represented them, or of any incapacity from infancy, or otherwise, in the parties entitled to prosecute the suit, or indeed of any of the parties interested as creditors.

The right of the parties to the fund has not been found or declared, the claim therefore is not made by them as persons in the terms of the bond, who have been found to have right to the purchase-money in question, by a decreet of ranking and scheme of division, but under the provision of the act 54 Geo. III. chapter 137, section 6, which enacts, that the Court of Session, upon the application of any of the creditors, shall be empowered to make an order on the purchaser to lodge the price

and interest, sufficient intimation being always previously given both to the purchaser and the common agent for the creditors, that such application is made, in order that all parties may have an opportunity to object. All the purchasers whose purchase-money is claimed by the petition are stated in the petition to be dead, and the claim is against their representatives. There is no question as to any claim upon the land sold, which is not proved to have been derived by these representatives from the purchasers, and of which they are stated to have had possession in the year 1792, and there is no statement or proof of any acknowledgement of liability, for the purchase-money claimed, by any of the purchasers or their representatives, or indeed of any demand having been made.

The representatives of the purchasers having, under the provisions of the act, had intimation of the application, "that they might have an opportunity to object," have objected and do object, that under these circumstances, no order ought to be made for the payment required, and they refer to the acts upon which the negative prescription of forty years is founded, by the first of which in 1469, chapter 29, it is provided, that the parties to whom the obligation is made, shall follow the said obligation within forty years, and take document thereupon, and if they do not, it shall be prescribed and be of none avail; and by the second of which, in 1474, chapter 54, it is enacted, that in time to come, all obligations that be not followed within forty years, shall prescribe and be of none avail. The statute of 1617, chapter 12, does not alter these provisions.

Much of the discussion in the papers and at the bar, proceeded upon the assumption that the present demand was upon the bonds, and the questions made were, whether these bonds are within the statute giving the negative prescription; and if so whether the parties against whom the claim was so made, are not precluded from the benefit of those statutes, upon the principle of *non*

valentia agendi, founded upon some supposed incapacity in the parties claiming, and much learning and industry were exhausted in discussing the law upon these subjects. There appears to me to be a considerable want of accuracy and precision in this view of the case, but being very clearly of opinion that the petitioners ought not to have succeeded in their application upon any view of the case, it will be unnecessary to observe upon these subjects in detail.

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If the application be founded upon the bonds, then, as the parties to whom the money is made payable by the bonds have not been ascertained, and are not the parties applying, the parties who do apply must shew that they are entitled to enforce the obligation, which they can only be if the act of the 54th of Geo. III. chapter 137, gives them that right; but if they were entitled to put these bonds in force, they must be subject to the law of negative prescription, as protecting the obligors in the bonds against all who may enforce them. More than forty years elapsed between the time at which the bond was payable, and the time at which the petition was presented; the negative prescription therefore, must operate against the parties seeking to enforce the payment of the bond by means of this petition, unless some case of *non valentia* is proved to exist, but as to these petitioners, no such case is stated or proved. The action, indeed, was permitted to sleep for many years, but they might at any time have caused it to be awakened. The common agent died, but they might at any time have procured the appointment of another, and, for any thing that appears, the application now made might have been made by the same parties as those they represent at any time since 1792, when the bonds became due. The fact of the parties entitled not having been ascertained, did not create any *non valentia agendi* to these parties. Whether any of the other creditors were, during any part of this time, under any incapacity, does not appear, and is, as I conceive, perfectly immaterial. But if it

be said, that the claim by this petition is not under the bonds, the parties entitled to enforce which have not been ascertained, but under the act the 54th of George III. chapter 137, for payment of the purchase-money as such, and therefore, that the negative prescription does not apply; the answer is obvious, that the Court, in the exercise of the discretion which the act gives, ought not to order payment of the purchase-money upon the application of parties, who, on account of the negative prescription, could not have enforced the bonds.

In this country, before a late act, the 3d and 4th of William the IV. chap. 42, sect. 3, there was no statute of limitations, preventing an obligor from suing upon a bond of more than twenty years' standing, but the Courts held the lapse of twenty years unexplained as affording presumption of payment. So our Courts of Equity, in the exercise of their large discretion, assumed the period which the law had fixed for the limitation of legal demands as their guide in the administration of equity.

I pass over all that part of the case which applies to the supposed evidence of payment, as immaterial. When a time is fixed by statute, or by a rule of any Court, as a bar to any demand, the object is to avoid the necessity of going into such evidence, and to do justice in cases in which it may not be producable, it being assumed, as the fact no doubt is, that when a demand has not been made for a great length of time, there is more danger of doing injustice, in compelling payment, than in refusing to do so.

I have been anxious to explain my reasons for affirming the judgment of the Court of Session, and of stating the extent to which I concur in the reason given for it, because without due precision upon that point, the decision of the House might be supposed to establish a doctrine fatal to the claims of others, who are not, and cannot be parties to this discussion. In the view I take of this case, it is not necessary to express any opinion upon

the case of Middleton *v.* Faulkner, in the 5th volume of Brown's Supplement, page 820, or as to how far the act of the 54th of George the III. chap. 137, may have affected the law there laid down, those who may hereafter establish claims, and who in the terms of the bonds shall be found to have right thereto, by the decreet of ranking and scheme of division, will be entitled, if they can, to distinguish their cases from the present. It is sufficient for the present purpose, that the parties appellant have failed to shew that they are entitled to what they ask.

I move your Lordships that the interlocutor appealed from, be affirmed with costs. The Judges all expressed doubts in the first instance, they all gave very decided opinions when they finally decided the case, and I see nothing to induce the House to depart from what I think a most wholesome practice, of admitting as few exceptions as possible to the rule of making an unsuccessful appellant pay the costs of the appeal.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of, be affirmed with costs.

RICHARDSON and CONNELL — HAY and LAW, Agents.