affect the debtor's estate by a comprising or adjudication upon the apparent heir's renunciation; which reason could not be pretended by this pursuer, to whom he was willing to grant a renunciation, so that he ought to condescend upon a passive title if he would have him personally liable. No 60.

Gosford, MS. No 739.

1698. *December* 13. JOHN MOFFAT *against* BROWNS and AITCHESON.

No 61.
A feu-charter granted to a young man in contemplation that his predecessors had been rentallers of the lands, found not to infer behaviour.

MOFFAT pursuing mails and duties of a tenement and croft of land in Kelso, as being infeft on a feu-charter flowing from the Earl of Roxburgh; they defend with a wadset from his father. He repeats a reduction, that it was *a non habente potestatem*, his father being never heritor, but only a kindly rentaller during his life. They oppone a pursuit at their instance against him, as representing his father on the passive titles, and so was bound to warrant his father's deed; and the passive title insisted on was, that he had got the feu-charter from the Earl, his superior, in contemplation that his father and predecessors had, past all memory, been kindly rentallers in that land; and so he having got this benefit by his father, he ought to represent him. *Answered*, His father's right was only a precarious rental, and at best expired with his life; and so the continuation of his son's possession, or the narrative of his charter, imports no passive title, especially seeing it bears payment of sums of money, besides the kindliness. THE LORDS were clear this could never infer a passive title. But some of them thought, if a rentaller's son get a feu for paying 500 merks, which the superior would not have granted to a stranger under L. 1000, in that case, though he could not be liable personally, yet the land might be affected *in quantum erat lucratus*. The President was of a contrary opinion; but this was not decided. There was another ground insinuated, viz. that the Earl had entered into a contract with his rentallers to grant them feus at such a rate, and that Moffat's father was one of them. This the LORDS thought relevant; for then his father was a feuer upon the matter, and he succeeds to him therein; but the LORDS appointed them to be farther heard upon this.

Fol. Dic. v. 2. p. 31. Fountainhall, v. 2. p. 24.

1715. *June* 23.
JAMES FORRET *against* The REPRESENTATIVES of JAMES CARSTAIRS.

No 62.
The proponing the peremptory defence of prescription found to infer acknowledgment of the passive titles.

IN a process of aliment at the instance of Forret against the Children of Bailie Carstairs, as representing Mr Thomas Finlay, schoolmaster at Drumeldrie, whom the pursuer, who kept a public boarding-house, had entertained several years; these three points coming to be discussed, viz. 1*mo*, How far

No 62. aliment is due for a major without paction? 2*do*, From what time the three years prescription of such processes does commence? 3*tio*, Whether the proponing prescription does infer acknowledgment of the passive titles?

And it was, as to the *first* of these, *answered* for the defenders, That it is an uncontroverted principle, that no action for alimenting a major can be intented, except upon paction; seeing it is presumed to be done out of friendship, or some other respect; otherwise it is presumed that he paid for his entertainment at the time.

Replied for the pursuer; That there is an exception set down immediately after that rule by my Lord Stair, Lib. 1. Tit. 8. viz. 'Unless it be in such 'houses where they usually aliment for money;' and that because in this case, the weightier presumption overbalanceth the weaker. And this exception is founded on an express act of Parliament, James VI. Parl. 6. cap. 83.; for there mens ordinaries, not founded upon writ, are to be pursued for within three years, otherwise no probation allowed, except by oath of party; *ergo a contrario sensu*, where a party can neither prove by writ nor oath of party, mens ordinaries can be pursued within three years.

Duplied for the defenders, That though mens ordinaries may be pursued within three years, without founding either upon writ, or offering to prove by oath of party; yet still it remains necessary that the pursuer found on a paction, which in that case he may prove by witnesses. Mens ordinaries, in the act of Parliament, signifies plainly their entertainment, and is not confined simply to that sense we generally take the word in, when we say, 'Such a man 'keeps an ordinary;' and therefore, if the pursuer's sense of the law were taken, any person, though neither cook nor vintner, might pursue those to whom they had given meat and drink within three years, as well as cooks and vintners, which would entirely evacuate the rule anent aliment due only *ex pacto*.

As to the *second* point, *answered* for the defenders, That the pursuit can go no further than three years, immediately preceding the citation; because, in the act of Parliament, anent the three years prescription, mens ordinaries are expressly mentioned. And in the other prescriptions of that same nature, though the obligations continued for more than three years, yet the Lords have always restricted the pursuit to three years preceding the commencement of the process, as in the case of servants fees, 12th February 1680, Ross *contra* Master of Salton, *voce* Prescription; and the *ratio decidendi* given by the Lord Stair is, That it is to be presumed that servants fees being for their necessary provision, must be frequently paid; which reason, in the present case, holds much stronger.

Replied for the pursuer, That the specialty here is, that the present process is not against the person himself, but his Representatives; and therefore the interval from his decease to the time of raising of the process, cannot be reckoned any part of the three years; but in this case, the three years which the law presumes may be owing, or rather the time at which he ceased to be alimented; for the process could not well commence sooner.

No 62.

As to the *third* point, *answered* for the defenders, That though proponing peremptory defences generally exempts the pursuer from proving the passive titles, yet where either dilatory defences are proponed, or objections against the relevancy of the libel, here there is no right peculiar to the defunct assumed, (as in the case of proponing peremptors) it being proper for any man to say, that either he is not legally cited, or not before a proper judge; or that the facts libelled upon do not infer the conclusion. And of this last sort is the present defence, viz. that the defunct's having barely dieted with the pursuer, did not infer an obligation upon him to make payment, and that necessarily the same continued yet due, unless the pursuer libelled a positive paction, and that the samen was yet resting owing; for this is properly not so much a defence, as an objection against the relevancy of the libel.

Replied for the pursuer, That as the proponing prescription is undoubtedly a peremptory defence, so there is no principle of our law better established than this, that such a defence cannot be proponed, without acknowledging the passive titles; for how can a defender propone a defence competent to his predecessor, without acknowledging that he represents him?

THE LORDS repelled the defence, That there was no paction; and found an aliment due three years before the citation: and found the defender cannot propone prescription, without acknowledging the passive titles.

Act. *Graham.* Alt. *Jo. Falconer.* Clerk, *Gibson.*

Bruce, v. 1. *No* 106. *p.* 131.

1717. *July.*

WILLIAM WILSON *against* The CHILDREN and HEIRS of ALEXANDER SHORT, Merchant in Stirling.

No 63.
A disposition was granted on death-bed in prejudice of the granter's apparent heir, but with this condition, that the disponee should denude in favour of the apparent heir's children whenever they should exist. The apparent heir granted a trust-bond in order to have the subject adjudged from him as repre-

JAMES SHORT made a disposition of his heritage, upon death-bed, to Mary Scot his mother, in prejudice of Alexander Short his eldest brother and heir; and the mother afterwards conveys her right in favours of her grandchildren the Lord Salin's daughters, under this condition, 'That in case of heirs of her 'eldest son Alexander's own body, Salin's children should denude in their fa-'vours.' In the mean time, Lord Salin obtained bonds from the said Alexander, upon which he adjudged from him the heritage, as charged to enter heir to James his brother; but at the same time granted a back-bond, wherein he obliged himself, so soon as he should attain possession, to dispone the same in favours of Alexander Short in liferent, and to the heirs of his body in fee; which back-bond was registered. Afterwards, it happened that Alexander Short had children of his own body, who in their minority intented action against Lord Salin's daughters, for denuding of the subjects disponed to them by Mary Scot, in terms of the above quality in the disposition: In which