1756. *July* 31. Thomas Ayton *against* James Monnypenny.

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Found, that the minority of the next heirs in succession interrupts the prescription upon titles of absolute property made up to an entailed estate; that the said minorities may be pleaded by a remoter heir to whom the entailed succession devolved, and that a postnuptial contract of marriage was not an onerous cause for altering the entail.

This was reversed on appeal, and the plea of prescription sustained.

In the year 1667, Sir John Ayton took out a charter of the lands of Kippo to himself, and such persons as he should afterwards nominate, and under such provisions as he should express; and, failing such heirs of tailzie and provision, to himself, his heirs and assignees whatever.

Anno 1672, Sir John executed a nomination of heirs, or an entail of the lands of Kippo, in favour of himself; whom failing, to John Ayton, his nephew, and the heirs-male of his body; whom failing, to certain other substitutes, under strict prohibitory, irritant, and resolutive clauses; and a particular *proviso*, that the heirs should not alienate, &c. 'without the special advice and 'consent of him (Sir John), being in life for the time; and failing of him 'by decease, without the advice and consent of Mr James Alexander of King-'lassie, Mr George Pittullo, minister at Kings-barns, and Dr George Pittullo 'his son, or of as many of them as be in life for the time, first had and ob-'tained.'

Sir John died in the year 1676, and was succeeded by the said John Aiton his nephew, for destinction called John *the first*, who possessed the estate as apparent heir of line to his uncle, without making up any titles till the year 1700, when, without taking any notice of the entail 1672, he completed his title by a service, as nearest and lawful heir to Sir John Ayton.

The said John the 1st had issue, John the 2d and Thomas the pursuer; and, in the postnuptial marriage contract of the said John the 2d, 1709, John the 1st settled the estate of Kippo and his proper family estate of Kinaldy upon John the 2d, and the heirs-male of his body of that or any other marriage; whom failing, 'to John the 1st, his other heirs-male mentioned in his rights 'and dispostions of the said lands.' John the 2d made up no titles in his person.

John the 2d had issue, Alexander and David, and was succeeded, in 1720, by Alexander his eldest son, who made up titles to the estate of Kippo upon the contract 1709, without taking any notice of the entail 1672.

In the year 1741, Alexander executed a settlement of the estate of Kippo in favour of himself and the heirs of his body; whom failing, to his brother David, and the heirs of his body; whom failing, to James Monnypenny, who was not a substitute under the entail 1672.

Alexander and David having died without heirs of their bodies, James Monnypenny took up the estate.

Thomas Ayton, son of John the first, and next substitute under the entail 1672 to Alexander and David, brought a declarator against James Monnypenny, that he Thomas had a right to the estate under the entail 1672; and that Alexander could not hurt his right of succession by his destination to James Monnypenny.

All this time the entail 1672 had remained a latent deed in the repositories of the family of Kippo. No 174.

It has been said that John the first and John the second had male issue of their bodies; and that the estate was taken successively up by the heir in possession, upon titles independent of the entail 1672. But if the minorities of each heir next in succession, to each heir in possession, had been deducted from the number of years in which the heirs in possession had possessed upon their titles made up as above, it would have been found that the possession of all these heirs in possession put together would not have amounted to 40 years.

James Monnypenny's first defence was, That the nomination of heirs executed by Sir John Ayton having been neglected by every person interested in it for eighty years, and John the second having made up titles contrary to it near sixty years ago, and the after heirs having made up their titles in the same manner, James's right was good both by the negative and positive prescription.

Pleaded for Thomas, *1mo*, That in this case no prescription could run, there not being two separate parties subsisting at the same time, one to acquire a right, the other to lose it by prescription; for that John Ayton the first, and the subsequent heirs who succeeded to the estate in question, continued to be both heirs of line and heirs of entail till the death of Alexander; and, during all that time, he, Thomas, was *non valens agere*, at least *cum effectu*.

2do, That as the minority of parties interested stops the course of prescription, so, in this case, the minority of each substitute next to the heir in possession of the estate at the time, as being more immediately interested in the prescription of the entail, ought to be deducted from the years of prescription; which being done, it would be found that 40 years had not run.

Pleaded for James Monnypenny, That two rights of a different and contrary nature had devolved to the same persons, the one limited and the other unlimited; that John the first declared his intention in the most express manner, to take the estate as heir of line to his uncle, and accordingly possessed it upon the unlimited title; that all the subsequent heirs completed their titles, and possessed the estate in the same manner, totally relinquishing the other limited title, which subjected them to fetters and restrictions; that hereby they had established a right pure and unlimited, which could not be defeated by a contrary right, that had continued dormant beyond the years of prescription that it was always competent to the remoter heirs of entail to pursue for registration of the entail, or at least to oblige the heir entitled to possess, to make up titles conform thereto; that if Thomas's principle should take place, the salutary effects of prescription would be lost, and every family in the kingdom be exposed to the loss of their estates, even after the lapse of centuries, upon the discovery of old neglected deeds; that even purchasers might be rendered unsecure, as limitations might be contained in ancient rights, which

No 174. could not be discovered from the records; and, therefore, it had been an established principle, that the limitations and restrictions of an entail could be wrought off, by the heirs possessing the estate upon unlimited titles, during the years of prescription.

2*do*, That Thomas could not avail himself of the plea of minority, when he himself had been of age above fifty years past; that the privilege of minority is entirely personal, and optional to the minor; it can be used by himself, and by those claiming his right only, but by no other person whatever; and therefore, though Thomas could have objected his own minority, yet he could not object that of any other of the heirs.

James Monnypenny's *second* defence was, That the nomination 1672, referring to the charter 1667, imported only a temporary restriction or interdiction, whereby the granter only intended to subject his heirs to the direction of himself and the three persons therein named, by whose advice and consent the whole limitations might have been discharged, and upon whose death they were absolutely at an end.

And 3*tio*, he *pleaded*, That the estate in question was, by the marriage-settlement in 1709, provided to the heir of that marriage in fee-simple; and Alexander Ayton, in consequence thereof, took the estate in the same manner as a purchaser, for a valuable consideration, whose right cannot be defeated by a latent deed, which never was recorded or made effectual

Thomas Ayton *answered* to the *second* defence, That, by the nomination or entail 1672, a permanent rule of succession was made, and by the words, as well as the intention of the settlement, the limitations were imposed upon all the heirs of entail, and were co-extensive with the destination of succession. A power was indeed granted to certain persons, in whom the maker had confidence, of relaxing the fetters or limitations; but that power was temporary and personal; and as it was never executed, the entail became absolute and perpetual upon the death of those nominees.

To the *third*, That the conveyance made by John the first to his eldest son John the second in the postnuptial articles 1709, was, in respect to John the second, and the children of the marriage, not an onerous, but a voluntary and gratuitous deed. It was a *præceptio hereditatis*, a passive title, which subjected John the second to all the debts and obligations of his father, and besides contained a destination of succession consonant with the entail 1672; and therefore these articles could not be pleaded by John the second, or his son Alexander, in bar of the entail 1672, which was binding upon John the first, and all his representatives.

'The Lords found the negative and positive prescriptions not run; that the prohibitions in the entail are perpetual and binding on the several substitutes

after the death of the maker of the entail, and nominees, and repelled the defence founded on the contract of marriage 1709.' No 174.

Act. *Lockhart, And. Pringle, A. Hamilton, & D. Rae.* Alt. *Advocatus, Ferguson, J. Craigie, & M'Intosh.* Clerk, *Forbes.*

J. D. *Fol. Dic. v. 4. p. 98. Fac. Col. No 214. p. 312.*

*** This case was appealed:

The HOUSE of LORDS "ORDERED, That the interlocutors complained of (viz. those which repelled the defence of prescription, and found the entail 1672 to be perpetual) be reversed; and further ordered, That the defences made by the appellants, founded upon the construction of the deed of nomination of the 15th of October 1672, and upon prescription, be sustained; and that the said appellants be assoilzied from this suit."

*** Lord Kames reports this case:

1756. *July* 40.—IN the year 1672, Sir John Ayton executed an entail of his lands of Kippo, in which, failing heirs of his own body, he nominates and appoints his nephew John Ayton, and the heirs-male of his body; whom failing, the other heirs therein named, to succeed to him in the said estate; and the entail is secured by prohibitory and irritant clause. Sir John died in the 1677 without issue; and from that time, till the 1700, the estate was possest by John the nephew, without establishing any title in his person. In the year 1700 he expede a special service, as nearest and lawful heir to his uncle Sir John, and was thereupon infeft in the lands of Kippo, but without any relation to the entail. The lands descended from him to his son John, the second of that name, and from him again to his son Alexander, who, in the 1732, expede a charter under the Great Seal in favour of himself, and of his heirs and assignees. This Alexander, in the year 1741, executed a new settlement in favour of himself and the heirs whatever of his body; whom failing, to his brother David, and the heirs whatever of his body; whom failing, to James Monypenny, second son to Monypenny of Pitmillie. And by this settlement he set aside Thomas Ayton, son to John the first, who, failing Alexander and David, and their male issue, was heir of entail by the deed 1672, and also heir of line to Sir John Ayton.

Alexander and David having died without issue, James Monypenny, by virtue of the settlement last mentioned, entered into possession of the estate; which obliged Thomas Ayton to bring a reduction of the said settlement, founding upon the entail, and the prohibition to alien or do any deed prejudicial to the heirs of entail; and concluding, that the said gratuitous settlement ought to be reduced.

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The defence was laid upon the negative prescription. It was *observed*, That John the first, in the 1700, was infeft in the estate, as nearest and lawful heir to his uncle to Sir John; that from that time downwards, the estate was possessed by him and his decendants as heirs of line, for more than 40 years before Alexander made his settlement in favour of the defender; and, therefore, that the reduction founded on the entail is lost by the negative prescription. In support of this defence, the famous case of M'Dougal of Makerston, No 172. p. 10947.; and several others of the kind, were cited, where this defence was sustained to free from the fetters of an entail, or from conditions of whatever nature, an estate, which, for 40 years, had been possessed upon the title of absolute property.

In making an answer to this defence, the pursuer distinguished betwixt different actions that may arise upon an entail. When an heir of entail, neglecting the same, takes the estate as heir of line, this is a wrong which every substitute is entitled to challenge, and every substitute may bring an action against him, to compel him to make up his titles upon the entail. The pursuer admitted, that were this the nature of the present action, there might be some ground for sustaining the negative prescription against it; because such action was competent in the 1700, when John the first entered to the estate as heir of line. But the present action is of a different nature. The pursuer is claiming the property of the estate as heir of entail, by the failure of all the nearer heirs; and in order to remove an obstruction, he insists in a reduction of the settlement under which his antagonist claims. It will not be contended, that this claim of property, this *rei vindicatio* has subsisted 40 years. The deaths of Alexander and David the nearer heirs of entail gave it birth, and it scarce existed sooner than the process was commenced. There cannot then be the least pretext for applying the negative prescription to this claim.

In advising this case upon the Bench, many of the Judges, prepossessed by the authority of the decisions formerly given in cases of this kind, stuck close to the defence of prescription. But when they were pressed with the foregoing answer, all they could say in the way of reply was, that the entail was cut off by the negative prescription, after which there remained no foundation for the pursuer's claim of property. This was far from giving satisfaction. It was urged on the other side, that deeds, or clauses of deeds, are not properly speaking the subject of prescription, but rights and actions only. Indulging, however, the expression, and admitting that deeds, or clauses in deeds, may be subject to the negative prescription, the pursuer's argument will stand just where it did. Be it so, that a clause *de non alienando* may prescribe. But when does the prescription commence? Not surely before there is occasion to claim upon it. A man cannot lose his right by negative prescription, before it has an existence. No substitute can found upon the clause *de non alienando* or claim upon it, till the clause be contravened by an alienation. The case is precisely similar to a reduction *ex capite inhibitionis*. The negative prescription does not begin to run against this action from the date of the inhibition,

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but from the date of the alienation struck at by the inhibition. To give the negative prescription an earlier commencement would be absurd; because surely prescription cannot begin to run against any action before the action has an existence. It cannot begin against a reduction *ex capite inhibitionis* till there be an alienation; because while there is no alienation there is no contempt of authority, and no deed to be reduced. It could not begin against the present reduction till the deed was made, contravening the clause *de non alienando*; because, before that time there was no deed that could be reduced. Again, considering this action as a declarator of property, the prescription could not begin to run before the declarator had a being; and the pursuer's claim of property did not arise till the succession opened to him by the death of all the heirs of entail which were called to the succession before him.

Notwithstanding the weight of former decisions, the argument urged for the pursuer was so clear and convincing, that it carried to repel the defence of prescription.

The defender urged a separate defence, which was the positive prescription; qualified thus, that the estate had been possessed above 40 years, upon a title of absolute property, *viz.* the service and infeftment of John the first, as heir of line to his uncle, Sir John Ayton. And he argued, that this established a fee-simple in the person of Alexander, which could not be challenged upon the entail, or upon any ground whatever. But this defence was not listened to by the Court, because of a maxim which seems to prevail at present, that the positive prescription cannot run independent of the negative prescription; or, in other words, that 40 years possession, upon a title of property, can afford no security, unless where the person who is entitled to challenge the possessor's right has lost his claim by the negative prescription; which was found lately in a remarkable case, 6th December 1754, Hamilton-Blair of that Ilk *contra* Robert Sheddan, Division XII. *h. t.*; where minority was sustained against the positive prescription, because it interrupted the negative prescription of the action challenging the right of the person defending himself by the positive prescription. I never could approve of this decision, nor of the maxim upon which it is founded. Forty years possession is a long period; and being founded upon a title of property, ought to secure the proprietor from all challenges whatever. Some such remedy is necessary to quiet the minds of the lieges about their property; and this remedy is afforded by act 1617, introducing the positive prescription. The intendment of this statute, as declared in the preamble, is to cut off law-suits, by giving people a certainty about their land property; and, therefore, enacts, that possession for 40 years without interruption, in consequence of an infeftment, shall be a good title, effectual against all mortals, and against all objections, except falsehood only. In the present case, the estate of Kippo has been possessed for 40 years upon a title of absolute property; and, therefore, upon authority of the statute, this title is effectual against obsolete claims, latent tailzies, or other latent deeds. And, indeed, there cannot be a stronger instance than the present, of the cruel con-

No 174. sequences that may attend the maxim I have been complaining of. At that rate, an estate may be possessed, for centuries, upon a title of property, without bestowing upon the proprietors a power to name their own heirs, or to make any gratuitous settlement whatever. Upon the footing of the present judgment, there can be no prescription while the persons who hold the estate happen to be both heirs of entail and heirs of line; and the prescription does not begin to run till the person who takes the estate is not heir of entail.

This matter being carried by appeal to the House of Lords, the following judgment was given, 11th May 1757: "That the interlocutors complained of in the appeal be, and the same are, hereby Reversed. And it is further ordered, that the defence made by the appellants on prescription be sustained." Here it remains uncertain, whether it was the positive prescription or the negative that moved the House of Lords.

Sel. Dec. No 116. *p.* 164.

1762. *December* 9.

Duke of Hamilton and Tutors *against* Archibald Douglas of Douglas.

No 175.

The Duke of Hamilton claimed the estate or earldom of Angus, on the ground of a contract of marriage, date 1630, between Archibald Lord Douglas, son of the Earl of Angus, and Lady Anne Stewart, by which that estate was disponed to the heirs-male of the body of Lord Douglas; whom failing, to return to the said Earl of Angus his father, and his heirs-male and of tailzie, under which denomination the Duke now claimed. It was *pleaded* for Archibald Douglas of Douglas, Esq. That the estate had been possessed since 1698, by his predecessors, upon charters under the Great Seal, and other feudal titles, containing no such clause of return or limitation; and being in this manner possessed for more than 40 years, without challenge or molestation on the part of the family of Hamilton, their claim was now cut off, both by the positive and negative prescription. *Answered* for the Duke; The heirs of the contract 1630 had no call or occasion to bring their challenge, so long as no act or deed was done to intercept their right of succession in those events in which the right of return was to operate in their favour; and the estate being all along possessed by those who were heirs-male by the contract 1630, the challenge was never competent till now. *Replied*, That there was a great difference between possessing on titles which could not be altered, and possessing on such as were unlimited, and defeasible at pleasure; and so long a possession on these last certainly bars all challenge.—The Lords found, that the Duke's claim was cut off by the positive and negative prescription.

Fol. Dic. v. 4. *p.* 98. *Fac. Col.*

*** This case is No 40. p. 4358. *voce* Fiar, Absolute Limited.