

## S E C T. XIV.

## Prescription against Latent Entails.

1739. July 10.

THOMAS M'DOUGAL *against* MRS BARBARA M'DOUGAL and her HUSBAND.

SIR WILLIAM SCOT of Harden having acquired right to the estate of Mackers-ton, (and who appears to have been a trustee for that family,) disposed the same, *anno* 1668, to Henry M'Dougal in liferent, (with ample powers to him, at any time during his life, to sell, annailzie, and dispone, &c.) and to Thomas M'Dougal, his son, in fee; on which a charter was expedite that year; and, upon the holding's being changed, a new charter, without any alteration in the settlement, was expedite the year following; and on both these charters the father and son were infeft. *Anno* 1684, Henry executed a bond of tailzie of that estate, in favours of himself in liferent, and Thomas M'Dougal his son, in fee, and the heirs-male of his body, &c. This settlement contained strict prohibitive and irritant clauses, limiting Thomas, and the whole heirs of tailzie, from burdening the land, alienating or altering the course of succession, &c. Henry lived till the year 1692; and, upon his death, Thomas his son possessed the estate, to which he had right, both by the infeftments 1668 and 1669, and likewise by his father's settlement last mentioned. Thomas M'Dougal died in 1701, leaving three sons, Henry, Thomas, and William, the eldest of whom, Henry, was not of age till the year 1709, who, neglecting the entail 1684, made up his title to the estate, by a service as heir-male to his father; and, in the 1715, executed a new settlement, wherein he obliged himself to resign the land in favours of himself and the heirs-male of his body; which failing, of Barbara M'Dougal, then his only daughter, and the heirs-male of her body, &c.

In the year 1722, Henry died, whereupon Barbara his daughter was served heir of provision in general to him, and, in virtue thereof, was infeft. *Anno* 1733, Barbara intermarried with Mr George Hay; and, by the contract, Mr Hay obliged himself to apply L. 1500 Sterling towards payment of the family debts. On the other hand, Mrs M'Dougal, with consent of her curators, provided the estate to herself and husband in conjunct fee and liferent, for his liferent use allenary, and to the heirs male of her body, &c. The tailzie executed by old Henry was discovered in the 1733; in virtue whereof, Thomas M'Dougal (uncle to Mrs M'Dougal) was served heir of tailzie and provision to his father Thomas; upon which title he brought a reduction of the settlement made by his brother Henry in the 1715, on his own daughter, and consequently of her contract of marriage with Mr Hay.

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Prescription sustained against a tailzie, upon 40 years possession, by the heirs of tailzie upon an unlimited title.

Found also, that the minorities of substitute heirs could not be deducted.

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Amongst other defences, it was *urged* for Mrs Barbara M'Dougal and her husband; That the power or faculty in old Henry to make a tailzie in the 1684 was prescribed, and that the prescription thereof must be held to have commenced from the time the faculty was created or given to him in the 1668; for, as the direct feudal right to the lands was vested in Thomas his son, who was the vassal of the Crown therein, and by whom the casualties of superiority must have fallen, the powers given to Henry were no more than a faculty or burden upon the estate of another man; upon which, if no claim is brought to make the exercise thereof effectual within forty years after that power is created, the same ought to cease for ever, and the estate of the fiar stand disincurbed thereof, as well as of all other actions or demands, by the general laws concerning prescription. *2dly*, The charter and infestment 1669 have been the sole title of possessing the estate ever since; for the private bond of tailzie, executed by old Henry, having never been published or made use of, cannot be accounted his title of possession. And as for Thomas, and Henry his son, and the present Lady, their titles were made up in the manner above deduced, upon the footing of the infestment 1669, which gave the estate in fee simple to Thomas and his heirs; and both Thomas and Henry acted as heritable proprietors in virtue of that investiture; nay, it does not appear that any of them ever heard of this latent deed; so that the estate has been possessed, as a fee-simple, from the date of the charter 1669, for the space of sixty-nine years, from the date of the tailzie 1684, for the space of fifty-four years, and even from the death of old Henry M'Dougal the liferenter, for the space of forty-seven years, before any action or claim was brought upon that tailzie, whereby the right thereto stands firm and entire by the force of prescription in the present Lady. *3dly*, It was *objected*, That the entail not being duly recorded, could neither affect Mr Hay or the issue of the marriage, who are onerous creditors; and that the irritant clauses not being ingrossed in Mrs M'Dougal's infestment, however this might have irritated her right in virtue of the second clause of the statute, yet, in terms thereof, the husband having *bona fide* contracted with her upon the faith of the infestment, which contained no such prohibitions, was safe.

*Answered* for the pursuer; As old Henry's powers were engrossed in the title-deed of the estate, it was impossible they could be liable to a prescription. Had he lived to this day, as his power was contained in the only title that his son or his heirs could have to the estate, he might still have exercised the same, he could have cut down the fee of his son, and all claiming under him; they had but a qualified right, and they never could plead a prescription against the quality of their own title: Likeas, in the case with a reversion in the body of a right, which, by the nature of the thing, as well as by the statute 1617, admits of no negative prescription. A vassal might, at the same rate pretend to exclude the *reddendo* of his own charter by the negative prescription. The title of Thomas and his heirs made his right precarious, dependent on the will

of Henry the father ; and it is impossible that a precarious possessor, possessing as such, can plead a prescription against him under whom he holds his possession. Besides, these powers were actually exercised within sixteen years of Sir William Scot's disposition ; so that the only question is, If the bond of tailzie is cut off by the negative prescription ? As to which, it falls to be observed, That by the tailzie, Henry reserved his own liferent, as also a power to alter ; and therefore, as it is a settlement of the succession of this estate, it must be considered in this question as only dated in the 1692 ; for it is impossible the prescription could run from an earlier period ; till then no mortal could claim upon it ; it is the same case as if one should make his testament, and should live thereafter forty or fifty years. Is it possible to plead, that the testament could be cut off by the negative prescription, or that the prescription could run against it before the testator's death ? Had Henry lived till yesterday, the settlement would have had the same force, as little hurt by prescription, though made fifty-eight years ago, as if it had been executed within these three months. And though it be true that, from the 1692, the death of old Henry, to the commencement of this action upon this settlement, forty years are run ; yet, as by the statute, minority is excepted, so every person, to whom prescription could be obtruded, was minor for near twenty years after the 1692.— Thomas the first fiar and member of the tailzie, was the person who might have been compelled to implement the bond of tailzie, and who was limited by the irritant clauses, and it was in his favours alone that the prescription could run against the heirs of entail. Now, his sons, Henry, Thomas, and William, were all minors from the 1692 downward till the year 1711 ; and therefore these years fall to be deducted from the prescription. Nor can it afford any ground for an objection, that Thomas, the first member of the entail, was major, and therefore the minority of the after heirs of entail could not stop the currency of the prescription, seeing Thomas was the person bound to implement the settlement 1684, and subject to the limitations ; he pleads prescription against the heirs of tailzie, and against the limitations therein contained ; sure the prescription does run in his favours, not against himself, but against his sons, the heirs of entail ; and therefore it is their minority, and not his, that must be considered. To illustrate this, put the case Thomas were alive at this day, and that he had made the alteration of the course of succession contrary to the tailzie ; that a challenge had been brought by this pursuer, and that Thomas had pleaded the negative prescription, would not the pursuer's minority have been an interruption ? And would it have been a good answer, that the defender, who pleaded the prescription, was major ? The negative prescription is *exceptio temporis*, it is the exclusion of an action by the lapse of time, it is stopped by the minority of the creditor, and the pursuer to whom the action is competent ; but, whether the debtor, or the defender who pleads it, is major or minor, is of no manner of importance. *2do*, No prescription could run against the entail, at least until the 1701, the death of Thomas, the first mem-

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ber thereof; for, by the infeftments 1668 and 1669, the fee was in him, but with reserved powers to his father to evacuate the same; which powers the father having exercised, Thomas ceased to be fiar by these infeftments, and came to have the right of fee by the settlement 1684. And, though this deed was not completed by infeftment, yet it was a good title of possession; consequently his possession must be ascribed to it, and not to the infeftments that were superseded by the exercise of his father's power. Now, from the 1701, the death of Thomas, forty years are not elapsed. 3dly, No prescription could run until the 1722, the death of Henry, the pursuer's eldest brother; it was only then the succession opened to this pursuer upon the entail; till then he was *non valens agere*; and it is a maxim in the law of Scotland, *Contra non valentem agere non currit prescriptio*. See February 1666, Earl of Lauderdale, Div. 13. *h. t.*; January 17. 1672, Young, *IBIDEM*; January 25. 1678, D. of Lauderdale, *IBIDEM*; February 5. 1680, Brown, *IBIDEM*; December 13. 1705, Livingston, No 69. p. 3261.

With respect to the *second* defence, it was *answered*, That as the positive prescription is the acquisition of the property of a subject by uninterrupted possession, it is not easily comprehended how the same can apply to the present case. Thomas Macdougall and Henry, who are supposed to have acquired by the prescription, were confessedly proprietors upon the settlement 1684; and, therefore, how they could acquire the property of their own estate by a prescription, appears inconceivable; or how they could acquire by the prescription against their own heirs.

At least, this prescription could not commence till the 1692. This was the date of the commencement of Thomas's possession; and if he was to acquire by prescription against his heirs, sure their minority must be deducted. And, again, if Henry his son was to acquire by prescription against his brother Thomas, his minority must deduct out of the years of prescription; there must be some person from whom the acquisition is made by the positive prescription; and that party's minority must undoubtedly be deducted. Besides, the maxim *contra non valentem agere* applies to the positive, as well as the negative prescription, as appears from the decisions above quoted. Wherefore, as the pursuer could not have attained the possession in consequence of the entail 1684, by any action before the death of his brother Henry in the 1722, the positive prescription could not begin to run till that period; conform to which, this point was solemnly determined in 1726, Dundonald, No 3. p. 1262. And, as to the *third* defence, it was *answered*, That Mrs Macdougall had no right to the succession by the entail, neither with nor without limitations; that her title depended on a gratuitous deed, which her father had no power to grant, he being restrained by the entail; consequently, she can neither plead the not recording, nor her *bona fide* contracting with a party who had not engrossed the irritancies in his infeftment; and her right being reduced, her creditors, however onerous, can have no claim against the estate, in which their debtor has no interest. If indeed Mr.

Hay had contracted with any of those called to the succession by the entail, there he might have pleaded his *bona fides*, the onerosity of his debt, and the not recording of the entail: but that is not the case here.

*Replied*, The *res meræ facultatis*, which cannot prescribe, are the powers a man has in virtue of his own dominion or property. But a right that gives him a power over the estate of another, may be lost by prescription, although it was optional for him, so long as the right subsisted, whether he should use it or not: Which is the case, for example, of all the rural servitudes. See likewise Peresius ad tit. cod. De præscrip; 30. vel 40. Ann. And, if such power were not to prescribe from its date, it would be harder to be defeated than if the same person had the full right of property itself in the subject. Now, if the prescription can thus run, it will be no interruption thereof that old Henry, by a private deed, attempted to exercise this faculty in the year 1684; for this is but like a creditor assigning his claim to a third party, who takes no document thereon against the party liable. And since no action was brought upon that deed, nor any thing done in virtue thereof, it is believed the latent exercise of the faculty cannot hinder it to prescribe. As to the objection, that the prescription against the tailzie could not begin to run until the year 1722, when Henry died; it was *observed*, That the estate was truly vested in Thomas and Henry, and possessed by them upon the direct title, which made it theirs in full property; the bond of tailzie was unknown to them, and could not be a title of possession until a charter had followed thereon; consequently, it was their interest, who thus possessed *uberiori titulo*, to make the same good by prescription, and to acquire an immunity from the fetters imposed on them by the tailzie; and they having thus possessed the estate *tanquam optimum maximum*, for more than the years of prescription, there appears to be no just reason why they should not have the benefit of the statute 1617. Besides, if the objection were of any force, it would go so far that no course of time could get the better of it; for if a settlement had been made to heirs-male a century or two ago, upon which, all the while, nothing had followed, but the estate continued to be possessed on the old investitures, which were in fee simple, and by succession from father to son, who were at the same time heirs of line as well as heirs-male, the claim of the heir of tailzie would be still entire and competent upon such ancient deed, after the years of the longest prescription had been frequently elapsed, which would be too absurd to maintain. See 31st Dec. 1695, Innes, Div. 13. *h. t.* As to what is objected, that Henry Macdougall last of Mackerston, and the pursuer his brother, were both of them minors for several years after the death of Thomas their father, and that, discounting their minority, there will not remain 40 years from the death of old Henry the liferenter to the bringing of this action, consequently no prescription is run to validate the direct title, distinct from the tailzie; it was *answered*, That, as to the minority of Thomas, in whose name the claim upon the tailzie is now set up,

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no regard can be had to that; because, even upon the footing of the tailzie, the succession would not have opened to him until the death of his brother Henry, in the 1722, long after his own majority. And it seems impossible to maintain, that the minority of any one substitute in a tailzie shall hinder prescription to run against it; for, upon that supposition, no prescription could ever run, seeing, amongst the various substitutes in a tailzie, it can hardly occur but that some one or other of those who are in life for the time must be under age; and therefore the person whose minority is to be considered, is only he who would be entitled to claim for the time being, even as in the case it were a bond containing substitutions. If the creditor was major, the prescription would run against it, notwithstanding the minority of the next, or any other substitutes. It is true, that by the conception of this tailzie, Henry himself was the person entitled to claim under it; but surely his own minority cannot be pleaded against himself to hinder the positive prescription from running in his favour, in order to complete the better and more ample title under which he truly possessed it.

“ THE LORDS found, That the bond of tailzie 1684 having lain latent, and not having been claimed upon, or any document taken upon it for upwards of 40 years from the date thereof, and the estate having been possessed by Thomas and Henry Macdougals, and Barbara Macdougal, present possessor thereof, for upwards of 40 years, in virtue of the disposition *in anno* 1668, and the infeftment following thereon, they have the benefit both of a negative and positive prescription; and that the tailzie in *anno* 1684 cannot now be set up as a title of eviction of the estate from the said Barbara Macdougal, notwithstanding that Henry and Thomas Macdougals, her father and grandfather, were heirs by the tailzie 1684 years, as well as by the disposition and infeftment 1668: And found, That the minority of Thomas Macdougal, or of William Macdougal, could not interrupt the prescription, they being only substitutes by the tailzie 1684, and the right thereof not having devolved upon them during their minority: And found, That Thomas Macdougal, pursuer in this process, cannot found on the minority of Henry Macdougal his brother, in order to prevent the running of the prescription in favours of Henry Macdougal himself, and Barbara Macdougal, who derives right from him: And found, That George Hay having entered into marriage-contract with Barbara Macdougal, who stood seised in the lands, by virtue of a progress of infeftments, containing no limitation upon her father, and having become bound to advance L. 1500 Sterling towards payment and exoneration of the debts of the family, in contemplation, and upon the mutual agreement of the estate's being settled upon him in liferent, and the heirs-male of the marriage, the contract was fully onerous, and therefore must be available, and subsist according to the conception thereof, in favour of the said George Hay, and the heirs-male of the marriage, notwithstanding of the latent tailzie 1684 years, the same having never

been recorded, nor any infeftment or document whatsoever taken there-upon. No 172.

*Fol. Dic. v. 4. p. 97. Home, No 126. p. 206.*

\*.\* Kilkerran reports this case :

*July 12. 1739. and July 10. 1740.*—In the year 1669, Henry M'Dougal, then of Makerston, settled his estate upon his son Thomas, and the heirs-male of his body, by simple destination, but containing a power to alter; on which Thomas was infeft, and on that title possessed during his life; and, upon his death, Henry M'Dougal last of Mackerston, his son, was served and infeft as heir to him on the said investiture, and on that title possessed the estate till his death in the year 1722.

This last Henry, having only one daughter and no sons, he, *in anno 1715*, made a new settlement of his estate, by bond of tailzie and procuratory of resignation, in favour of himself and the heirs-male to be procreated of his body; which failing, to Barbara M'Dougal, his only daughter, and the heirs-male of her body; which failing, to William M'Dougal, his youngest brother-german, (passing over Thomas his immediate younger brother, a weak man, not likely to marry), and the heirs-male of his body; which failing, to his other heirs-male. And Henry M'Dougal dying without issue-male, was succeeded by his daughter Barbara, who was served heir to him upon the said disposition 1715, and was thereon infeft in the estate.

In 1733, she married George Hay, second son to Sir John Hay of Alderston; and in her contract of marriage, whereby Mr Hay for his part contracted to her L. 1500 Sterling, to be applied towards extinction of the debts of the family; she on the other part, with consent of the said William M'Dougal her uncle and her other curators, disposed the estate of Makerston to Mr Hay in liferent, and to herself and the heirs-male of her body in fee; which failing, to the said William M'Dougal her uncle; with several other substitutions; and Mr Hay's fortune was applied accordingly.

In the year 1738, a discovery was made by William M'Dougal of a bond of tailzie, bearing date in 1684, granted by the said first Henry M'Dougal, great grandfather to the said Barbara, in consequence of the power to alter reserved in the disposition 1669, with a procuratory of resignation in favour of the same Thomas his son, and the heirs-male of his body, as in the settlement 1699, but containing a prohibition on the said Thomas his son, and the heirs substitute to him, to alter the order of succession, alienate the lands, or contract debt, with irritant and resolute clauses in case of contravention.

Upon this latent tailzie 1684, a claim having been set up by the said William M'Dougal, in the name of his elder brother Thomas, Barbara and her husband Mr Hay brought a reduction thereof, on several grounds; and *inter alia* insisted:

No 172. upon prescription: That the estate having been possessed down till this day upon the settlement 1669, first by Thomas, afterwards by Henry his son, and father to Barbara the pursuer, and by Barbara herself, during all which time the said tailzie 1684 lay dormant, the same was cut off by the negative as well as positive prescription.

To which it was *answered, 1mo*, as to the negative prescription, That the same could not run till the death of the last Henry in 1722, when the succession opened to Thomas M'Dougal the defender, and who till that time was *non valens agere. 2do*, As to the positive prescription, neither could it begin to run sooner than the death of Henry in the said year 1722, when the estate came to be possessed by Barbara, the first who was a different person from the heir entitled to possess upon the tailzie 1684; and while the heir in possession was entitled to possess both on the settlement 1669 and settlement 1684, he could not acquire the property upon one of these titles against the other, and in prejudice of his own heirs, as had been frequently found in former cases. And, *3tio*, as to both negative and positive prescription, That the same was interrupted by the minority of the last Henry, and of his two brothers, Thomas the defender and William.

THE LORDS found, " That the bond of tailzie 1684 having lain latent, and not having been claimed upon, or any document taken upon it for upwards of 40 years from the date thereof, and the estate having been possessed by Thomas and Henry M'Dougals, and Barbara M'Dougal present possessor thereof, for upwards of 40 years, in virtue of the settlement 1669, they had the benefit both of the negative and positive prescription; and that the tailzie 1684 could not now be set up as a title of eviction from the said Barbara M'Dougal, notwithstanding that Henry and Thomas M'Dougals, her father and grandfather, were heirs by the tailzie 1684, as well as by the settlement 1669: And found, That the minority of the defender Thomas M'Dougal or of William M'Dougal could not interrupt the prescription, they being only substitutes by the tailzie 1684, and the right thereof not having devolved upon them during their minority: And found, That Thomas M'Dougal, defender in this process, could not found on the minority of Henry M'Dougal, his brother, in order to prevent the running of the prescription in favour of Henry M'Dougal himself, and Barbara M'Dougal, who derives right from him." And upon advising petition and answers, and a hearing in presence following thereon, the Lords " adhered."

As to the first objection to the negative prescription of *non valens*, the same was dropped; for a declarator was competent to any heir of entail, however remote.

As to the objection to the positive prescription, that it could not run while the heir in possession had right by both titles; although, where the investitures of an estate are simple and absolute, there are no habile terms of prescription in such case, because no man can prescribe against himself; yet where an investiture contains limitations and restrictions, the heir in possession upon a different title, though likewise heir of the investiture containing the limitations and re-



restrictions, may, even before the succession split, by the positive prescription work off these restrictions.

That the minority of the heir in possession could not be pleaded against himself, was also a clear point. And so far the Court was unanimous. But it was more doubtful, whether the minority of the remoter heirs, viz. of the defender Thomas and of his brother William, should not interrupt; for if not, then here would be a prescription incapable of interruption, if the minority of the heirs *in spe*, and whose interest it is to restrain the powers of the heir in possession, did not interrupt the prescription. On the other hand, it was thought no less inconsistent to suppose a prescription, and at the same time to destroy it by an hypothesis that would render it incapable ever to run; which must in great measure be the case, if the minority of an heir, however remote, other than the heir in possession, should interrupt it. Upon which point the Court, by plurality of voices, found as above.

*Kilkerran*, (PRESCRIPTION), No 5. p. 416.

1753. February 2.

WILLIAM DOUGLAS *against* Mrs ISOBEL DOUGLAS of Kirkness.

A LAND estate in possession of the heir of line, was claimed by the heir-male, upon this medium, that the former investitures were in favours of the heirs-male, with limitation sufficient to debar a gratuitous alteration. It was *answered*, *imo*, That there was no limitation which could bar a gratuitous alteration; *2do*, That the alteration was made above 40 years ago; during which time the investitures had stood in favours of the heirs of line. *Replied*, That, till lately, the same heirs who possessed the estate were heirs-male as well as heirs of line; and that the pursuer needed no action for supporting the right of the heirs-male till the succession divided, and the heir-male come to be different from the heir of line; *et contra non valentem agere non currit prescriptio*. *Duplied*, An action of declarator was always competent concluding against the heir in possession that he should be bound to make up his titles, and possess in his quality of heir-male: But, without regard to this, that it would be intolerable to keep up such old pretensions, without end, never to be sopited by prescription; for, at that rate, no man could be secure of land-property.

“THE LORDS were unanimous as to the defence of prescription; and that possession for 40 years of a predecessor’s estate must free the heirs of all limitations and fetters.”

*Fol. Dic. v. 4. p. 97. Sel. Dec. No 37. p. 41.*

Affirmed upon appeal.

\* \* See this case as reported in Faculty Collection, No 38. p. 4350. *voce*  
FIAR, ABSOLUTE LIMITED.