ought to be decided; and your Lordships know, with respect to entails and the mode of effecting them, there have been very important decisions within the last few years, reference to which must be had in the determination of this case. I therefore feel, that, as it respects all parties, it will be exceedingly desirable that these interlocutors should be remitted to the Court of Session."

Ordered accordingly.

Whereupon the Lord Chancellor pronounced the following judgment in the last of these appeals:—

It is declared, That it is not competent in the circumstances of this case to affect the purchasers by the proceeding of appeal; it is therefore ordered that the said appeal be, and the same is hereby dismissed this House, reserving to the appellant such relief (if any) as he may be entitled to in any other mode of proceeding.

For Appellant, *John Clerk, John Greenshields, Alexander Maconochie, J. Murray.*

For Respondents, *Sir Saml. Romilly, Math. Ross.*

NOTE.— *Vide* Shaw's Appeal Cases for what was done under this remit, vol. i., p. 333.

(Scarr Case.)

[Fac. Coll., Vol. xiv. p. 209; et Napier on Prescription.]

Mrs JEAN WELSH MAXWELL, of Steelston, and Lieut.-Colonel WILLIAM NEWALL, her Husband, - - - - *Appellants.*

ALEXANDER WELSH, Esq., of Scarr, - - *Respondent.*

House of Lords, 29th July 1814.

ENTAIL—NEGATIVE PRESCRIPTION—POSSESSION ON TWO TITLES —NON VALENTES AGERE.—An entail was made of the estate of Scarr, which, after being recorded, remained personal, without any title being made up under it. The institute, who was also the entailer's heir of line, possessed on apparency for twenty years. The entailer having left some debt, the son of William Welsh, a substitute under the entail, attempted to carry off the estate as a fee simple estate, by obtaining an assignation to these debts, and adjudging upon these, charter was obtained upon this adjudication,

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but no infeftment was taken until 1793. He continued to possess until his death without making up any other title, but left a disposition of his estate in favour of the appellant. In a reduction of that right, brought by the respondent, the next substitute; held that the entail had not incurred the negative prescription, and that the possession of William Welsh and his son John, was to be ascribed to the entail, and not to their unlimited title as heirs of line.

In 1748 Alexander Welsh died, possessed of the lands of Scarr, of which he was unlimited proprietor, but leaving an entail executed many years before his death.

At this time the rental was only £35, 8s. 8d. per annum, and it was burdened with a liferent locality of £15, 8s. 8d., provided for his widow, who survived him. He left, besides, heritable debts to the amount of £333, 6s. 8d., and £280, 1s. 8d. of moveable debts. His nephew, William Welsh, the institute in the entail, succeeded. He was also heir of line, and chose to possess on apparency, without making up his title in either capacity. Sometime thereafter an adjudication was led, including therein all these debts, and decree obtained in name of David Newall, in trust for behoof of John Welsh Maxwell, the son and heir of William Welsh. It was alleged that this was an attempt to carry off the estate as a fee simple estate.

John Welsh Maxwell having thus acquired adjudication and grounds of debt, he afterwards expede a charter of adjudication of the lands of Steelston, Scarr, and others, and was

Dec. 10, 1793. infeft of this date, but decree of expiry of the legal of the adjudication did not appear to have been obtained.

Afterwards he executed a disposition by which he gave, granted, and disponed "to, and in favour of the said Jane "Maxwell (the appellant), and Anne Welsh (her sister), "equally between them, and their heirs, and successors, and "disponees, all lands and heritages belonging, or which shall "belong to me at the time of my death, with the whole writs "and evidents thereof, conceived in favour of me, or my pre-"decessors and authors."

Anne Welsh having died, the female appellant was served heir to her, and entered into the possession of the estate.

After the female appellant had been in the undisturbed possession for upwards of sixty years, it was found that Alexander Welsh, who died in 1748, had, before his death, made an

Sept. 16, 1742. entail of the estate of Scarr, and which was duly recorded in the same year, but no infeftment followed thereon, the right

under the entail remaining personal. By this deed William Welsh was taken bound, as a condition of his succeeding, to pay off all his debts, &c. William Welsh and his son, John Welsh Maxwell, were both of them the nearest heirs of tailzie nominated in the entail. They were also the deceased's heirs of line, and they were also the acquirers of the separate title to the estate by the adjudication above recited. After them the next substitute was the respondent's father, Mr Hamilton, married to the entailer's sister, and then, after him, the appellant.

An action of reduction was brought by the heir of entail to set aside the appellant's right, the value of the estate and of the land having risen greatly in the interval.

The defences set up by the appellant were, 1st, That the entail upon which the pursuer (respondent) founded his claim, was cut off and excluded by the negative prescription; 2d, Even were this not the case, she was entitled to keep possession of the subjects until she received payment of the debts contained in the adjudication.

The answer made by the respondent was, 1st, That he and his father were in the predicament of *non valentes agere cum effectu;* and that in three respects, 1st, Neither he nor his father had any right, during the lives of William Welsh, and his son, John Welsh Maxwell, to compel either of them to complete the investiture pointed out by the entail, by expeding a charter in terms thereof, and taking infeftment upon it; 2d, Neither he nor his author had any interest to pursue such an action, till the death of John Welsh Maxwell, in the year 1801, because William Welsh, and his son, John Welsh Maxwell, were not only heirs of entail in the tailzie, but the nearest heirs of entail, as well as heirs of line, and therefore the respondent could not have demanded possession, as long as either of them lived. And lastly, he maintained that their possession was to be imputed, not to the apparency under the old investiture, but to the personal right contained in the disposition and tailzie.

But the chief reply of the respondent was, that the prescriptive possession pleaded, was a possession of persons who were the nearest heirs of tailzie under the entail, and therefore that the possession of William Welsh, and his son, John Welsh Maxwell, must be ascribed to the entail, and not to the unlimited title subsequently acquired by them.

This interlocutor was finally pronounced, "The Lords alter Jan. 23, 1807.
"the interlocutor of the Lord Ordinary reclaimed against, and

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"in the process of reduction, repel the defences of the negative prescription and all other defences pleaded for Mrs Jane Maxwell and husband, defenders; sustain the reasons of reduction, and reduce, decern and declare in the terms of the conclusions of the reduction libelled; also in the process of multiplepoinding prefer Alexander Welsh the pursuer, upon the interest produced for him to the sum in the hands of the raisers of the multiplepoinding, and remit to the Lord Ordinary to proceed accordingly."

On reclaiming petition, the Court pronounced this interlocutor, June 22, 1808.—"Adhere to their interlocutor reclaimed against, in so far as it repels the defence of the negative prescription, but recall the same, *quoad ultra*, and remit to the Lord Ordinary to hear parties upon the other defences pleaded for Mrs Jane Maxwell and husband, and to do as he shall see cause." *

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* Opinions of the Judges :—

LORD HERMAND—"I am for altering. The party did all he could to free the tailzie. The limitations confessedly are worked off. I cannot enter into the notion of the destination being entire. No such thing found in the Durham case; the principle there was, that both destinations were unlimited. There is no need of a contrary act by the possessor. The substitutes were *valentes agere*. They had an interest and a title to preserve their right. It is the negative prescription that applies here; there is no need of a title, as recognised in the Inverleith case."

LORD NEWTON.—"I am for adhering. This man, by possession, could not work off the destination, though he might the fetters. The entail was the *lex feudi* till a new settlement was made. But the main ground of our judgment was this, that the tailzie imposed no special obligation to possess on that title. If it had been challenged, his answer would have been good, that he had not made up any other title. True, if he had followed up the advice he got, and got charter of adjudication and sasine, that would have done; but he did not. Further, he cannot plead the positive prescription. See the case of Porterfield." Dec. 6, 1771, Mor. p. 10698.

LORD JUSTICE CLERK (HOPE).—"The petitioner's plea fails in point of fact. There is no *evidence* or *indication* that he possessed as heir of line. This is not to be presumed, and the thing is not shown."

LORD MEADOWBANK.—"I see no ground on which to dispute that he possessed on both titles. He did nothing to prefer the one title to the other. By possessing as he did, he became personally liable to fulfil the tailzie. If so, there was no *valentes agere cum*

From these interlocutors, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—Any claim which the re-

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effectu, for inhibition would have been competent at the instance of the substitutes to secure the obligation. I am thus for adhering on this ground, that he was possessing on both titles, and had done nothing to attribute his possession to the unlimited tail title."

LORD ARMADALE.—"Can there be a negative prescription without a positive? I think there may. An *obligation* to make an entail may prescribe. It has been found expressly that both applied. I think that the negative applies in this instance, which is partly (and such often occurs) a deed of tailzie, and partly an obligation. 2d. Has there been possession here on the tailzie? It is said that a party is held to possess on *all* his titles. True; in order to defend his right, he is allowed to plead all his titles. But it is quite otherwise where the titles are of different degrees of benefit. The same favour of possession entitles him to ascribe his possession to the most advantageous title, where the question comes to be about the condition of his right, provided he has done nothing repugnant to it. Now, here there is no use made of the tailzie, by service or otherwise, to fix him down to the tailzie, and law will not, by prescription, hold the contrary. That he is contravening his predecessor's will is no reason why he should be held to do so. As to *non valens agere*, for want of a special clause obliging to possess on that title, such clauses are new things, and not *necessary*, for the obligation attaches of itself, and the heirs of law succeeding without such clause, could compel him to make up a title on it. It would not have been a good answer that he was possessing on a personal deed. The substitutes had a right to insist for investiture. I cannot go into the notion that the deed subsists as to succession and not as to limitations. My notion is, that he possesses as heir, and not on the deed at all."

LORD CRAIG.—"I agree with Lord Armadale. The entail is worked off by the negative prescription simply. In one sense he possesses on all his titles; but, in another, on the most beneficial only."

LORD BANNATYNE.—"There are situations where the positive and negative prescription concur. But that is not universally true nor applicable here. If I have a right to my estate, all matters of obligation are worked off by the negative only. Such is the obligation to effectuate this tailzie. Substitutes were *valentes agere*. For they might have compelled him to invest on the tailzie. There is no need of an express clause to that purpose. Trust *de jure* from the nature of the thing."

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spondents pretend to have under the entail 1742, is completely cut off by the negative prescription introduced by the statute 1469, c. 28, which enacts, "That any party having interest

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LORD GLENLEE.—"Where both titles remain *in nudis finibus*, and nothing done in pursuance, or towards implement of either, I see no grounds on which to ascribe the possession to one title more than to another. I must ascribe it to both, because it is a case of indefinite possession."

LORD MEADOWBANK.—"I consider, further, that the only right and lawful title was the tailzie. Are we, then, to ascribe possession to an improper and unlawful title?"

LORD PRESIDENT (CAMPBELL).—"I observe this person, William Welsh, was institute and disponee under the deed of tailzie. If he meant to have possessed otherwise, he must have been served and been infeft to enable him to provide for his widow and children. He took no step of that sort. At the end of twenty years he advises with counsel how to get rid of it. If he had followed that advice, and obtained charter and sasine, he might have evicted the estate. The question is, Is the tailzie lost by the negative prescription? Such a thing may be; especially in a case of obligation to make a tailzie, but here, where the tailzie is made, and the heir of tailzie succeeds, it is difficult to say that the negative prescription will extinguish it. If persons not called by the tailzie had succeeded and possessed—if things had been done which the tailzie had prohibited, that might have done. But none of these things occur here. There is nothing done at all that is repugnant to the tailzie. The substitutes were not called on to do anything for their interests, as nothing was done against it. I do not, at sametime, rest much on the want of a *special clause*, ordering him to possess on that title. The thing is implied; but as no particular time for making up titles is implied by the law, the substitutes could not have prevailed in any action for that purpose. If such action had been brought, it would have served only to interrupt the negative prescription; and it is settled that a person need not pursue for the purpose of interrupting only. That was the principle of the judgment in Dalhousie's case. On that principle I go here. An action of substitution would have been nugatory. William would have answered well, that he was, at least, possessing on *all* his titles.

Mar. 1, 1782, Mor. p 10963.

"There is a great deal of argument here as to the separation of the destination and the limitations. Such cases do happen, as where an heir of tailzie omits limiting clauses. But there is no need of going into that."

MR BLAIR.—"In truth it was beneficial to William to possess on the tailzie. The estate was over-burdened with debt. He

" in the obligation, shall follow the said obligation, within the " space of forty years, and take document thereupon; and gif " he does not, it shall be prescribed, and be of nane avail, " the said forty years being runnin, and unpursued by the " party." So, in like manner, the statute 1474, c. 54. And the statute 1617, c. 12, provides that all actions competent of the law upon all deeds whatsoever " shall be pursued within " the space of forty years after the date of the same." The action, however, upon the part of the respondent, was not brought until sixty-four years after the date of the deed of tailzie in 1742, and, therefore, no action is now competent, and the entail prescribed.

2. The possession of William Welsh and John Welsh Maxwell, his son, will, according to law, be imputed to their title as heirs apparent of line, and will not be imputed to their title as institute or substitute under the entail; and the respondent cannot truly say that his father, while he lived, or he himself, since his father's death, was, during any period of that possession, *non valens agere cum effectu.* For they, in their order, had a right to compel the heirs successively in possession to make up titles, and complete the investiture prescribed by the entail.

3. It is not necessary, in order to entitle any party to plead the negative prescription, that he should also plead the positive. On the contrary, it is enough if, in the event of the negative prescription being sustained, that party can make up a complete feudal title in his or her person.

Pleaded for the Respondent.—The possession of William Welsh, for a period of more than twenty years, must be ascribed to the entail under which he had a personal right whereon to found his possession; and there was no room for an action at the instance of the substitutes, who could not qualify any act of contravention as matters then stood.

2. The negative prescription is not pleadable by the appellant, Mrs Welsh Maxwell, who, so far from having a title in her person fortified by the positive prescription, is but an adjudging creditor, who must ascribe any possession held by her to an adjudication, the legal of which is still open; and upon which, possession had not followed after the date of the infeftment for a fourth part of the period which the law requires in order to convert an adjudication into a title of property.

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would, by possessing on apparency, have been liable universally. And at that time apparency was a very imperfect title. It also saved him the expense of a service."—*Hume's Session Papers.*

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3. The deed of entail and relative parts of Alexander Welsh's settlement were recognized by William Welsh, and homologated and approved of by him, in such a manner as to cut off all pretence of prescription having commenced, until infeftment was obtained on the foresaid charter of adjudication, 1793.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

"This was an appeal to your Lordships in the cause of Welsh *v.* Maxwell. Upon the best examination I have been able to give to the subject, and the principles to be applied to the consideration of the case, if none of your Lordships should be of a different opinion, it appears to me the judgment in the case ought to be affirmed." *

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, . *William Adam, David Cathcart.*
For Respondent, *Sir Saml. Romilly, Thos. W. Baird.*

NOTE.—Mr Napier, in his Commentaries on Prescription, has some excellent remarks on this case.

(Driving Deer from Common.)

MAJOR-GENERAL ROBERTSON of Lude, - - *Appellant.*

THE DUKE OF ATHOLL and DUNCAN ROBERTSON, sometime his Tenant, - - - *Respondents.*

House of Lords, 1st December 1814.

COMMONTY—RIGHTS OF DO.—The Common of Glentilt and Glenfender belonged in common to the Duke of Atholl and General Robertson, and was let to small farmers as pasture lands, for pasturing cattle, &c. The Duke's forests were in the neighbourhood, and the question arose, whether the Duke had right to give orders to his tenants to drive the deer off the Common, to the prejudice of General Robertson's right of hunting and killing the deer on the Common?—Held that the Duke might do so.

The respondent, the Duke of Atholl, stands heritably infeft "in toto et integro comitatu de Atholl, &c., cum libera fores-

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* From Mr Gurney's Short-hand Notes.