1808. *June* 21.

ALEXANDER WELSH MAXWELL, *against* JEAN WELSH MAXWELL.

NO. 8.

Successive heirs in whom co-existed the character both of heir of line and institute, and heir of entail, having possessed for more than 40 years, without making up a udal title in any of these characters,—the entail was not extinguished by the negative prescription.

BY a deed of entail dated 16th September 1742, Alexander Welsh "Alie-" nated and disponed the lands of Skarr, &c. from him, his heirs, and suc-" cessors, in favour of William Welsh his dephew, son to the deceased " John Welsh in Roughmerkland, his brother-german, and the heirs-male " lawfully to be procreated of his body; whom failing, to William Welsh, " chirurgeon in London, and the heirs-male lawfully to be procreated of " his body; whom failing, to Robert Hamilton, son lawfully procreated be-' tween the deceased Robert Hamilton of Macwhirn, and Elizabeth Welsh " his (the entailer's) third lawful sister, and the heirs-male lawfully to be " procreated of his body;" and after them to a long series of heirs. By the deed of entail it was further "Provided and declared, that the said " William Welsh my nephew, (the institute) and the heirs-male of his " body succeeding to the said lands and estate, shall be bound and obliged, " as, by acceptation hereof, they bind and oblige themselves to make pay-" payment of all my just and lawful debts, and expences of my funeral," &c. But there was no clause obliging the institute to complete titles under it within a specified time. On the 6th November 1742, the deed was recorded in the register of tailzies.

In the year 1748, Alexander Welsh died, and was succeeded by his nephew William Welsh a pupil. William Welsh having a personal right to the lands as institute, or disponee, under the deed of entail, and being also apparent heir under the preceding investiture, continued to possess till the year 1762, when certain steps, by means of a trust-adjudication, were taken with the view of vesting in him a feudal right, and perhaps of defeating the entail. Certain debts due by the entailer were acquired in the name of John Coltart, the trustee, for this purpose. A decree of constitution, and afterwards (24th November 1773) a decree of adjudication were pronounced in his favour.

Before having obtained a reconveyance from Mr Coltart, or having expede any titles under the adjudication, William Welsh died. William Welsh was succeeded by his son John Welsh Maxwell. The decree of adjudication and grounds of debt were (19th June 1786) conveyed by Coltart to David Newal, writer in Dumfries in trust; and were (21st January 1788) transferred by Newal to John Welsh Maxwell himself. On this title by adjudication John Welsh Maxwell (3d January 1789) expede a Crown-charter, and (10th December 1793) was infeft thereon.

On the 16th December 1800, John Welsh Maxwell died, and was succeeded by his brother William, who survived a short time.

NO. 8.

Till this period, the successive possessors of the estate had united in their persons the title under the entail, and that of apparent heir of line of the entailer, to which the feudal title under the charter of adjudication was added at a late period.

After the death of the last William, the character of heir under the entail, and that of heir of line of the entailer, separated and devolved on different persons. A competition ensued between Mrs Jean Welsh, wife of Lieutenant-Colonel Newal, sister of the last William Welsh and the heir of line of the entailer, and Alexander the son of Robert Hamilton of Macwhirn, the second special substitute of the entail.

Alexander Hamilton expede a general service as heir of tailzie and provision to William Welsh the institute; thus acquiring right to the unexecuted procuratory in the deed of entail, and obtained a Crown charter of resignation, on which he was infeft. Having invested himself with this title, he raised a reduction of the decrees of constitution and adjudication, and the titles following thereon; and as Mrs Jean Welsh, in virtue of these titles, claimed right to the estate, a process of multiplepoinding in name of the tenants was raised, and conjoined with the reduction.

The defenders maintained, *1st*, That the entail founded on was cut off by the negative prescription; and *2dly*, That even were this not the case, she was entitled to retain possession of the estate till the debts contained in the adjudication were paid.

The Lord Ordinary, (Armadale,) pronounced the following interlocutor (15th January 1805): "Sustains the defences of the negative prescription "pleaded by the defender Mrs Jean Welsh Maxwell, as heir of line of "Alexander Welsh her granduncle, against the personal deed of tailzie "executed by the said Alexander Welsh in 1742."

The case then came before the Inner-House by petition and answers.

Argument for Mrs Jean Welsh Maxwell.

By the statute 1469, C. 28. introducing the negative prescription, renewed and explained by statute 1474, C. 54. and by that part of the statute 1617, C. 12. which relates to the negative prescription, it is enacted, that "The party to whom the obligation is made that has interest therein, "shall follow the said obligation within the space of forty years, and take "documents thereon, and gif he does not, it shall be prescribed and be of "none avail; the said forty years being running and unpursued by the "party."

To determine whether the entail has been cut off by the lapse of negative prescription, the first enquiry is to ascertain to which of the titles, existing in the person of the heirs, possession is to be ascribed, whether to their title as heirs of line, or that under the entail. On this point the rule of law is fixed, that where two unlimited titles co-exist in the person of the

No. 8. possessor in apparency, the possession is to be attributed to both, and prescription cannot be pleaded on the one against the other. But if one of the titles be limited, and the other unlimited, if by one of the titles the property may be taken up in fee-simple, and by the other, under a strict entail, the possession, by presumption of law, is to be ascribed to the unlimited and more favourable title. This principle of law is stated in the introductory remarks of Lord Kilkerran to the case of Bogle and Smith against Gray, No. 89. p. 10803.; and is unquestionably sound. In this case, as well as in that of Durham against Durham, 24th November 1802, No. 394. p. 11220.; it was found that where two unlimited titles co-exist in the person of the heir, and where infeftment has been taken on one of them, yet as apparency is a good title of possession, the positive prescription does not establish the one, nor does the negative prescription cut down the other, but the heir is held to have possessed on both.

If, however, the case had been that of the two titles, and one had been a limited title, the other an unlimited one, and that infeftment had followed on the latter, there can be no doubt but that the unlimited title would have been established, to the exclusion of the other, by the positive prescription, because of the two titles, the law presumes that the possession was held on the most favourable, Macdougal, No. 172. p. 10947., with the concluding observations thereon. On the same principle, possession must, in the present case, be ascribed to the unlimited title of heir of line; and the entail having been latent, and no document having been taken on it by the heirs, in whom it created a *jus crediti*, it has perished by the operation of the negative prescription.

That the heirs had a *jus crediti* under the entail, that they were *valentes agere* to the effect of compelling the heir to make up titles under the entail, and that therefore there were *termini habiles* for the currency of the negative prescription, is equally clear. Till infeftment was taken on the entail, the substitutes were not safe; and although the entail contained no special obligation to make up titles under it, and the heir had done nothing in contravention so as to sanction an irritancy by which the succession would be brought nearer to the substitutes, yet either under the act 1685, or at common law, an action would have been competent, to place the estate under the protection of the entail. Thus an action to compel the heir to register the entail, although it contained no obligation to that effect, would have been competent. The possessor could not have effectually answered that he possessed on the personal right under the entail, because he is contradicted by the legal presumption, and because he is bound to secure the estate in terms of the settlement.

But in questions of negative prescription, the conduct of the creditor, and not that of the debtor, in the right, must be the rule. If, having a

proper *jus crediti*, the creditor has not taken document thereon for forty years, the right perishes by the negative prescription, whether the debtor has counteracted the obligation or not. But if the debtor has contravened the obligation, and the creditor acquiesces in it, the debtor secures himself by the positive prescription. These, however, are distinct matters; the one being a *modus amittendi dominii*, the other a *modus acquirendi dominii*, which have a distinct and independent operation. Nay, the argument is strengthened and illustrated by the terms of the statute itself; for it appears from these terms, that if rights of reversion, the strongest with which a disposition can be qualified, had not been excepted, they would have perished by the negative prescription. NO. 8

The case 6th December 1771, Porterfield, No. 15. p. 10698., bears a strong analogy to the present. In that case the negative prescription cut down an obligation to grant a destination, although during its currency the creditor could have derived no advantage from insisting for implement, but that of having the estate secured in terms of the personal obligation, and although the obligation only imported a simple and defeasible destination. That every action founded on the entail is competent to the remoter heir against those in possession, does not admit of controversy; Ersk. B. 3. Tit. 7. § 37. See likewise 10th July 1739, Macdougal, No. 172. p. 10947. From these authorities, it is clear, that the heirs have an unquestionable title and interest to compel the possessor to complete his title under the entail. In the case, 1st March 1782, Dalhousie against Maule, No. 176. p. 10963., it was the unanimous opinion of the Court, that "A substitute heir of entail, "has a *jus crediti* to entitle him, and has an interest to oblige the heir in "possession to expede charter and sasine upon the entail, and to possess un-"der these."

It is by no means indispensable to the operation of the negative prescription, that there should be a simultaneous and correspondent operation of the positive prescription. Cases, no doubt, occur, in which rights are created and transferred by their combined operation. But if a right could not be lost by the expiry of the negative prescription, unless the party pleading could shew that he had gained it by the positive prescription, the former would be redundant and unnecessary. Negative prescription, however, has an independent operation, and is one of the modes *amittendi dominii*, which, without directly creating a right in the person by whom it is pleaded, extinguishes that of his adversary. It is only necessary for the person, by whom it is pleaded, to shew that, on the extinction of his adversary's right, a right will emerge to himself. In the present case, on the extinction of the entail, a complete right arises to the defender, both as heir of line of the entailer, and on the titles obtained on the decree of adjudication. These principles were recognised by the Court in the opinion delivered in the case,

NO. 8. 1st March 1782, Dalhousie against Maule, No. 176. p. 10963.; likewise in Macdougal, No. 172. p. 10947.; 31st July 1756, Ayton against Monypenny, No. 174. p. 10956.; 9th December 1762, Duke of Hamilton against Douglas, No. 175. p. 10962.

If the negative prescription has any application to this case, it must cut down the destination as well as the fetters of the entail. They are inseparable parts of the same deed; and the peculiar destination is in fact and in law one of the most important and interesting fetters. There is no solid ground for authorising a distinction between these two objects of the deed. But to make way for the operation of the negative prescription in any degree, it is nesessary to ascribe the possession of the successive heirs to their title as heir of line, and not to their personal right under the entail; and if this point be conceded, the entail must of necessity have perished *in toto*.

Argument for Alexander Welsh.

The deed of entail does not contain any obligation to make up titles under it within a specified time; and it is admitted that nothing has been done by any of the heirs in contravention of its terms, on which a legal challenge could have been brought by the substitutes. By the conditions of the entail, there was undoubtedly created a *jus crediti* in favour of the heirs called under it; but while this obligation was not violated by the heir in possession, and while nothing is done by him to call for the interference of the substitutes to enable them to "follow the obligation," or to bring an action to implement or enforce the obligation, it is obvious, that the heirs were *non valentes agere cum effectu*.

To render the heirs *valentes agere*, it is certainly not necessary that instant patrimonial advantage should arise from the action; for where the conditions of the entail have been contravened, an action is competent to the most remote substitutes. The rule of law in this and every analogous case, is precise, that wherever there is an obligation, which may be followed and enforced by an action at law, and on which document must be taken for its security, such obligation will be extinguished by the negative prescription, as to all parties to whom it was competent, but who have neglected within the proper period to bring the action, however remote their benefit may have been. On this principle was decided the case of Porterfield, 6th December 1771, No. 15. p. 10698., where an *obligation* to execute an entail perished by the negative prescription.

In the present case, as nothing had been done in contravention of the entail, which it could be the object of the action to vindicate, the only purpose or interest which the heirs could have to insist, would be to interrupt the currency of prescription. But it is an established doctrine in the law, that prescription cannot run against the creditor in an obligation, when all

that the creditor could do for the purpose of interrupting its course, would amount to a mere declaration of his own opinion of his right, without the possibility of compelling the obligant to do any thing towards implement of the obligation. In a word, it is not necessary for the creditor to bring an action against the obligant for the single purpose of interrupting prescription, and when no other purpose is to be accomplished.—Ersk. B. 3. Tit. 7. § 37.; 22d November 1687, Sommerville, No. 385. p. 11211.; 31st Dec. 1695, Innes, No. 386. p. 11212.; 13th June 1761, Belhaven, No. 11. p. 10681.; 1st March 1782, Dalhousie *against* Maule, No. 176. p. 10963. NO. 8.

But although the fetters of the entail might be worked off by the course of the negative prescription, it by no means follows that the destination should also perish. As the destination has never been altered, it must remain in full force, as the regulating law of the descent of the estate, while the conditions and provisions by which the destination is protected, being an *obligation* on the heir not to alter, may have been extinguished. The negative prescription has an exclusive reference to cases where there is a *jus crediti et debiti*,—where there is an obligation which may be the foundation of an action against the obligant. It is not, therefore, like the positive, a mode of acquiring property, but a mode of extinguishing obligations, or removing encumbrances.

The obligations to which negative prescription applies, may relate either to heritable or personal subjects; accordingly, the act 1617, C. 12. did not introduce prescription with respect to heritable subjects, but limited its operation with respect to heritable bonds and reversions. At the date of this statute, the modern entail, with the clauses to secure the permanency of the destination, was unknown; but when entails were introduced, the limitations were considered, by an obvious analogy, as creating a *jus crediti*, or obligation against the heir in possession, in favour of the remoter substitutes. Regarding the fetters of the entail in this view, it follows, that, like other obligations, they might be extinguished by the negative prescription; but that the destination, with which these clauses were incidentally and subordinately connected, could lose its force by the mere lapse of time, or that there could be a negative prescription of infeftments themselves, or of the conveyances of the property of real estates, is not sanctioned by any of the statutes, and would be a virtual repeal of those clauses in them, introducing the positive prescription, by which it is provided, that heritable property can only be acquired by possession on a proper feudal title for forty years.

Following out these principles, it may be further maintained, that the negative prescription cannot be pleaded against a real right of property, and cannot be the foundation of a real right, without the concurrent operation of the positive prescription. Negative prescription applies only to obligations or encumbrances; and the person who propones it is, *ex hypothesi*, in

NO. 8. the real right of the subject to which these obligations attach. Such is the doctrine delivered by the Court, in the case of the Earl of Dalhousie and Maule, No. 176. p. 10963. See likewise 20th July 1725. Paton, No. 19. p. 10709.; 24th December 1728, Presbytery of Perth, No. 34. p. 10723.; Erskine, B. 3. Tit. 7. § 8.

That the possession of the successive apparent heirs must be ascribed to their title as heirs of line, and not to that as heirs of entail, is not warranted either by the circumstances of the case, or by the cases quoted in support of that doctrine. The entail was the paramount and regulating investiture of the estate. It was indefeasible by any operation of the heir in possession; and it was the title under which he was bound in justice, and compellable in law, (if he had attempted to contravene), to possess. It was the title under which it was his duty, and must therefore be his presumed intention, to have possessed.

A majority of the Court differed in opinion with the Lord Ordinary. They considered, that the entail was the *lex feudi*, the only title under which it was lawful, and under which it must therefore have been the presumed intention of the heirs to possess. Their possession must of course be ascribed to their right under the entail. No act had been committed in contravention of its terms, which could authorise the legal interposition of the heirs,—no change even of the destination had been attempted,—and there was no obligation to make up feudal titles under the entail within a specified time. The only object of an action at the instance of the heirs, would have been, to have it formally declared, that prescription was not running, a proceeding which the law did not require.

The Lords (22d January 1807) altered the interlocutor of the Lord Ordinary, and repelled the defence; and (21st June 1808,) on advising a reclaiming petition and answers, "adhered."

Lord Ordinary, *Armadale*. Act. *Tho. Thomson*. Alt. *Monypenny*.
Agents, *J. Cauvin & Alex. Blair*, W. S. Clerk, *Scott*.

J. W. *Fac. Coll. No. 56. p. 209.*