1782. *March* 1.

GEORGE EARL of DALHOUSIE, as Administrator-in-law for the Honourable WILLIAM RAMSAY-MAULE, his second Son, *against* Lieutenant THOMAS MAULE.

No 176.
Prescription, positive and negative, whether effectual against an entail of lands, when the prescriptive title is anterior, and when posterior, to the entail; against an entail of a personal bond; and of leases.

A COMPETITION of brieves occurred between the Earl of Dalhousie, as administrator-in-law for his son, and Lieutenant Maule; each of them claiming the right of service as heir to the late William Earl Panmure, in certain entailed subjects, which had belonged to his Lordship's uncle, James Earl of Panmure, who was attainted of high treason for his accession to the Rebellion in 1715; or of which Mr Harry Maule, brother of the latter, his Lordship's father, had been proprietor. Of these subjects, together with the manner in which they came into his Lordship's person, the following is an account:

In 1713, James Earl of Panmure granted a bond for L. 10,000, in favour of the Countess, his Lady. This bond, in 1723, she assigned to Mr James Maule, eldest son of Mr Harry Maule; who, at the same time, came under an obligation to create a substitution, on the failure of heirs-male of his own body, in favour of his immediate younger brother William, afterwards Earl Panmure, and the other heirs-male of the body of Mr Harry Maule. Upon the death of James in 1729, William, having served heir in general to him, completed a title to this bond.

In 1724, the Countess obtained from the York-Buildings Company, then in the right of the estate of Panmure, a lease of the house and parks belonging to this estate, for the endurance of 99 years. This lease, in the same manner, she assigned to Mr Harry Maule.

Of the house and parks of Brechin, her husband being then dead, she enjoyed a liferent-right by her contract of marriage; and these the Company, at the same time, set in lease to Mr Harry Maule himself for 99 years, to commence at the Countess's death.

Mr Harry Maule was likewise proprietor of the estates of Kelly and of Ballumbie. In 1727, he disponed the latter to James his eldest son; after whose death, William, in 1729, served himself heir in special, of tailzie and provision to him, in this estate, and was infeft upon a precept from the Chancery. The estate of Kelly was conveyed to William, by a deed of entail, of the same nature with that of several other settlements, material to the present question; the particulars respecting all which are, therefore, now to be mentioned.

In 1730, the family of Panmure seemed to have united in the purpose of preserving the succession to their whole property in the male line. On 14th April, accordingly, Mr Harry Maule, with the advice and consent of William, above mentioned, his eldest son, and of another son, John, afterwards one of the Barons of Exchequer in Scotland, executed a deed of entail of his lands of

No 176. Kelly, 'in favour of himself, of William his eldest son, of John his youngest 'son, and of Dr Henry Maule, Lord Bishop of Cloyne, in the kingdom of Ire-'land, his next heir-male, and the heirs-male of his body.' This deed contains the usual prohibitions against altering the course of succession.

Of the same date, an obligation was executed by William; by which he engaged himself to bestow L. 9000 of the sum recovered upon the L. 10,000 bond above mentioned, in the purchase of lands, to be secured in favour of the same series of heirs, and under the same limitations; or, otherwise, to grant a disposition in their favour of the sum itself.

On the 24th April 1730, being then in the right of the estate of Ballumbie, he, with consent of his brother John, executed a similar entail of this estate.

Upon 8th June 1730, Mr Harry Maule granted an assignation of the lease of Brechin, in favour of the same series of heirs, and under the same prohibitions. And, in October following, the Countess and Mr Harry Maule concurred in a similar deed, respecting the lease of Panmure.

Of the entails of Kelly, of Ballumbie, and of the leases, two duplicates were signed.

Previously to the above mentioned deeds of entail, William stood vested in the right of the bond, and of the estate of Ballumbie. On his father's death in 1734, he made up a title to the estate of Kelly, as his heir-male, of line and provision, according to the destination contained in Mr Harry Maule's investitures, dated as far back as 1687.

Soon after the execution of these deeds of entail, that of the bond, and a duplicate of each of the others, were put into the hands of John, the first nominee after William; one of each of the other duplicates remaining in Mr Harry Maule's custody, and of which, after his death, William allowed John to keep possession.

From 1745 downwards, however, William, then Earl Panmure, made settlements, or renewed the investitures of his estates, free from the limitations of the entails. In 1775, he executed a new settlement of the whole, 'in favour 'of himself and his brother John, then a Baron of Exchequer, and of George 'Earl of Dalhousie, his nephew, in liferent, and his second and other sons, in 'their order, in fee.'

Mr Baron Maule died in July 1781; when, in his repositories, a codicil was found, by which 'he bequeathed to Lieutenant Maule, under the denomina-'tion of Thomas Maule, Esq. grandson to the deceased Dr Henry Maule, Lord 'Bishop of Meath, in the kingdom of Ireland, the whole of the above deeds 'specially mentioned, of which he retained the custody.'

There were likewise lying in his repositories, the duplicates of which Mr Harry Maule had had the possession; and, alongst with these a memorandum, expressing the above particulars respecting them.

Lord Dalhousie, as administrator-in-law for his son, the Honourable William Ramsay, obtained a brieve, directed to the Macers of the Court of Session, for

serving his said son heir of tailzie and provision to Lord Panmure, in virtue of the deed of settlement last mentioned. Lieutenant Maule, on the other hand, procured one, directed to the Sheriff of Edinburgh, for serving him likewise heir of tailzie and provision to Lord Panmure, in terms of the aforesaid several deeds of entail. This brieve, which was advocated to the macers, at Lord Dalhousie's instance, they, with advice of their assessors, adjourned, until the determination of the claims of the parties by the whole Lords; and appointed informations upon the matters in controversy: After which, a hearing in presence was ordered by the Court; when it was No 176.

Pleaded for the Earl of Dalhousie; The different deeds on which Lieutenant Maule founds his claim, are not to be considered as having ever been effectual settlements. From their dates, to the death of Mr Baron Maule, they remained in obscurity, without having been applied to any use whatever. Though they may evince that a design had existed in speculation, of carrying them into execution; yet it is certain that no effect has been given to them.

But, supposing them once to have been effectual, it is clear, that, having been framed in 1730, and lain dormant till 1781, they are now all extinguished by the negative prescription; and the subjects of them, the bond excepted, having been, during the whole, or a sufficient part of the intervening period, possessed on other titles, are now secured by the positive. For, that prescription, whether positive or negative, has the effect to exclude the limitations or irritancies of an entail, is apparent from the scope of the statutes which have introduced these prescriptions. With respect to the negative, an entail is to be viewed as creating an obligation on the heir possessing the estate, in favour of the subsequent heirs entitled to the succession; and such an obligation is precisely the subject of the statute on which this prescription is founded. The application of the other statute requires no explanation. This doctrine accordingly is established, by the decisions of this Court and of the House of Peers: Of this Court, in the cases of Macdougal of Mackerston, 10th July 1739, No 172. p. 10947.; of Porterfield against Porterfield, in 1771, No 15. p. 10698.; and Pollock against Lockhart of Lee, in 1778, No 17. p. 10702.—Of the House of Lords, in that of Ayton against Monypenny, 31st July 1756, No 174. p. 10956.—And of both Courts in those of Douglas of Kirkness, in February 1753, No 173. p. 10955; of Bruce Carstairs against Miss Anne Bruce, in 1770, No 90. p. 10805.; of Leslie Grant against Gordon, 25th January 1769, *voce* TAILZIE; and of the Duke of Hamilton against Mr Douglas, in 1776, see APPENDIX. (See No 175. p. 10962.)

Nor ought the objection of *non valentia agendi cum effectu* to be urged by Lieutenant Maule. Though the substitute heirs could not by any action have attained possession of the entailed subjects; yet they had an interest and a title to maintain every proper suit for making the tailzies effectual, and for obliging the heir in possession to hold it under them; Erskine, B. 3. Tit. 7. § 37.; and

No 176. Decis. *sup. cit.*; notwithstanding that, from two old decisions, reported by Fountainhall and Harcarse, a contrary principle seems to have been formerly admitted. (Mentioned below.)

Neither can it be reasonably said, that, while the same person is heir on different titles, he is not to be supposed, by setting up one in opposition to the other, to prescribe against himself. If both titles were equally unlimited, the observation might be just; as in the case of Smith and Bogle against Gray, 30th June 1752, No 89. p. 10803.; because then nothing would be acquired or lost. But an immunity from the fetters of an entail, is a very substantial interest to be the subject of prescription, positive or negative. Both prescriptions, therefore, have operated equally to extinguish those limitations contained in the above mentioned deeds; all but the bond, cut down by the negative alone, not being susceptible of the positive.

Answered for Lieutenant Maule; The tailzie of the bond, and duplicates of the other deeds, were found in the custody of Mr Baron Maule, the person immediately interested to receive them; and it is to be presumed, agreeably to his own declaration, that he obtained them by means of a fair delivery. Duplicates, accordingly, of those deeds, which it was necessary to retain as titles of possession, were made, in order that the possessor, and the next heir, might each of them hold one; whereas, that relative to the bond, affording a right to none but the creditor, did not require any duplicate. Thus the plea of latency appears to be without any foundation.

That of prescription seems likewise to admit a satisfactory answer. With respect to the negative, it is not to be urged against a person for not having brought upon his right a suit from which he could not derive any benefit. Baron Maule was not only heir in the entails, but also in the prior investitures. Lord Panmure, too, was either institute or maker of the entails. From no action, therefore, relative to those settlements, could they receive any advantage; and thus, *quoad* them, the negative prescription could have no place, as they were evidently *non valentes agere cum effectu;* and having no effect against them, as little could it have against the posterior substitutes; agreeably to the decisions of the Court, 22d November 1687, Somerville against Ingleston and Tennent, Div. 13. *h. t.*; 31st December 1695, Innes against Innes, Ibidem. Nor could any of the substitutes have obtained a declarator of irritancy, because the deeds of entail conferred not that power; and though a compulsatory upon the heir in possession, to make up titles under those deeds, might have bettered the condition of the substitutes, even that was impracticable with regard to the leases, as it was not necessary to have possessed these by any other title than apparency alone. The *non valentia*, therefore, respecting them, is even somewhat stronger than it is as to the other subjects.

With regard to the positive prescription, it is to be remembered, that the late Earl Panmure either made, or consented to the making of all the entails; and it would be an inconsistent idea, to imagine that the possession held by

himself were in opposition to his own deeds; though, no doubt, his possession might have prevailed against the deeds of another; whence arises the distinction between the present and all the cases quoted by the Earl of Dalhousie. Besides, as to Ballumbie in particular, the title in the person of the Earl being prior to the tailzies, and, therefore, not a contravention of those settlements, no inconsistency would occur from barely continuing his former possession. With respect to the leases, though these might have been possessed under apparency alone, if no more complete title had existed in the possessor; yet, as such a title was contained in the entail of this subject, so to that the possession must be ascribed; and, of course, the claimant's right be so far admitted. No 176.

The unanimous opinion of the Court was, That the entails were not to be considered as latent, but as delivered deeds, which had once been effectual; but that as it was a position firmly established by the decisions above quoted, that the fetters of an entail may be cleared off by the course of prescription, either positive or negative; so in this case, the entail of the bond had been extinguished by the negative prescription, not admitting the positive, as that of Kelly had been by both prescriptions.

The general opinion of the Lords was the same with regard to the entail of Ballumbie; some of them, however, adopting the distinction founded on the priority of the prescriptive title; but it was different respecting the leases, against which prescription was not deemed effectual.

On this point the following observations were made:—Leases, though none of the objects of the act 1685, may yet be settled by entail; of which, however, very few instances have occurred. They are likewise capable of prescription; but to the present case, prescription is not applicable. No man is bound by law to institute any action where there is nothing to be the object of it, but merely that of interrupting prescription. He is then *non valens agere*. A substitute heir of entail has, indeed, a *jus crediti* to entitle him, and he has an interest to oblige the heir in possession to expede charter and sasine upon the entail, and to possess under these; but as, in the present case, the assignment alone formed a sufficient title, and admitted no farther completion, there was nothing to be the subject of an action at the instance of any of the substitute heirs. If then, in this case, the course of prescription could not by any action have been stopped, it would be a solecism to denominate these substitutes *valentes agere cum effectu*.

"THE LORDS found, that the deed of tailzie, executed by the deceased Mr Harry Maule of Kelly, with consent therein mentioned, in the year 1730, of his lands and estate of Kelly, and also the deed of tailzie, executed by the late William Earl Panmure, in the aforesaid year, of his lands and estate of Ballumbie, are cut off by the positive and negative prescription; and that the obligation for employing L. 9000 Sterling, executed by the said William Earl Panmure in the aforesaid year, is cut off by the negative prescription: That the said William Earl Panmure had full power to make the deed of tailzie,

No 176. executed by him in favour of the said Mr William Ramsay Maule, and his administrator-in-law: That the said Mr William Ramsay Maule was entitled to be served heir of tailzie and provision to the said deceased William Earl Panmure, his grand-uncle, in virtue of the foresaid deed of tailzie in his favour; and remitted to the Macers to proceed in his service accordingly, on the brieve brought before them by him and his administrator-in-law: They farther found, that the said Lieutenant Thomas Maule had right to take up the leases of the house and parks of Panmure, and house and parks of Brechin; and remitted to the Macers to proceed in his service, in so far as regards these two leases; but that he was not entitled to be served heir-male of tailzie and provision to the said William Earl Panmure, in virtue of the deed of tailzie of the estate of Kelly, executed by the said Mr Harry Maule, nor in virtue of the deed of tailzie of the estate of Ballumbie, executed by the said William Earl Panmure; and that his service on the brieve taken out by him could not proceed with regard to the said estates of Kelly and Ballumbie; and remitted to the Macers to dismiss the same accordingly, in so far as concerned these two estates."

For the Earl of Dalhousie, *Solicitor-General, Ilay Campbell, Elphinston.*
For Lieutenant Maule, *Wight, Crosbie, Al. Ferguson.* Clerk, *Robertson.*

S. *Fol. Dic. v.* 4. *p.* 98. *Fac. Col. No* 40. *p.* 62.

1784. *December* 21.

GEORGE-ALEXANDER GORDON *against* JANET GORDON.

No 177.
How far prescription is interrupted by the minority of substitute heirs.

MR GORDON of Whitelay, in 1730, executed an entail of that estate in favour of Alexander his son, and his heirs-male; of Charles Gordon his nephew, and his heirs-male; and of other more remote relations, to the exclusion of Janet his daughter.

In 1737, however, Alexander, who did not make up titles under the entail, took infeftment in the lands, in virtue of a precept of *clare constat*, which he obtained from the superior.

He lived until 1783; at which period, on his dying without issue, the next heir of entail was George-Alexander, the son of Charles Gordon, who had died in 1775, when, it is to be remarked, George-Alexander was only two years of age.

Alexander having thus possessed the estate for more than 40 years, under unlimited titles, his sister and heiress of line, Janet Gordon, on the ground of his having by prescription acquired immunity from the fetters of the entail, claimed the property in preference to the heir of tailzie; while he, on the other hand, *contended*, That, as in 1775, four years preceding the expiration of the statutory period, he became the immediate substitute to Alexander, his minority had