

“ I therefore move to reverse :—

“ It was ordered and adjudged that the interlocutors of the Lords of Session of the 19th June, the 10th of July, and 27th of November 1792, complained of be *reversed*. And it is further ordered and adjudged, that the interlocutor of the Lord Ordinary of the 16th of December 1791, and also the interlocutor of the said Lord Ordinary of the 10th of Feb. 1792, in so far as the same affirms the said interlocutor of the 16th Dec. 1791, be affirmed.”

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For Appellant, *Wm. Grant, Geo. Ferguson, Jas. Allan Park.*

For Respondent, *Sir J. Scott, R. Dundas.*

[M. 10971.]

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| WM. BLACK and ISAAC GRANT, W. S. | <i>Appellants ;</i> |
| GEORGE GORDON and Others, Creditors on the Estate of Kincaraigie, | } <i>Respondents.</i> |

House of Lords, 5th Feb. 1794.

DECREE OF SALE—ENTAIL—PRESCRIPTION — SUBSTITUTE—MINORITY.—Circumstances in which held that an entail having lain dormant for more than forty years, was prescribed ; and that the minority of a substitute heir of entail did not elide the plea of prescription. Also that the decree of Sale connected with the adjudications led by the creditors against the estate, was a good title to the purchaser thereof.

Alexander Auchyndachy of Kincaraigie was heir of entail, under a deed executed by his grandfather, and also entitled to take up the estate of Kincaraigie as heir of line. He had made up no title to the estate, but possessed on apparency more than forty years. Having contracted debts, adjudications were led at the instance of his creditors, and a process of ranking and sale was brought, in consequence of which, the estate was judicially sold in 1786 to Mr. Byres, the purchaser.

Various attempts were made by Mr. Auchyndachy to overturn this decree of sale ; and in particular a reduction was brought in his own name, and that of his sister Sarah Auchyndachy, as being the next heir of entail, concluding that the decree of sale should be set aside, as contrary to

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the limitations of that entail. No appearance being made by the pursuers to support this action, judgment was pronounced, assoilzing the defender Mr. Byres; but, in order to test the validity of his title, under the decree of sale, he brought a suspension and reduction. Appearance being made for the creditors, they pleaded, 1. That the entail never having been recorded, was not good against creditors who expedite adjudications on the estate; 2. That the entail was lost, and cut off by prescription, having lain dormant for more than forty years. Answer to the second plea was, the minority of Sarah Auchyndachy was to be deducted from the years of prescription. Replied, Sarah Auchyndachy being only a substitute in the entail, her minority could not be deducted.

Jan. 31, 1792. The Court pronounced this interlocutor: “ Find that the
 “ tailzie contained in the late George Auchyndachy’s con-
 “ tract of marriage, is cut off by prescription; and also find
 “ that the decret of sale in favour of Robert Byres, con-
 “ nected with the adjudications which were led prior or
 “ posterior thereto, is a good and valid heritable and irre-
 “ deemable right to the lands of Kincaigie, and others
 “ therein mentioned, purchased by him; and therefore they
 “ refuse the petition, assoilzie the defenders from the whole
 “ conclusions of the reduction.”*

Feb. 17, — On reclaiming petition the Court adhered.
 Against these interlocutors the present appeal was brought.
Pleaded for the Appellants.—1. Though the entail was not

* Opinions of Judges :

LORD PRESIDENT CAMPBELL.—“ This is an objection stated to a decree of sale, and the question is, Whether a latent entail of the estate sold, was worked off by the negative or positive prescription?

“ Auchyndachy’s father was infeft upon a disposition from Duff of Hutton in 1728. The entail was made in 1738, and he died in 1741. The son expedite a general service as heir male and of provision upon the disposition of 1728, and afterwards got precept of clare from the superior; but no infeftment appears to have been taken; Ergo, he remained apparent heir in the feudal investiture of 1728. He is then charged by creditors to enter heir in special to his father, and the lands are adjudged from him. Suppose the creditors complete this right by charter of adjudication and infeftment, will his intermediate possession be counted to make up the positive prescription? Or will the negative prescription operate against the latent entail; and further, will the creditors be considered as bound by the latent entail, in respect that his right was *personal*, or rather incomplete? or will the charge against him, as apparent heir in his

recorded in the record of tailzies, yet as it remained personal, and as the creditors cannot pretend to have relied on the face of the records, so they are not entitled to avail themselves of a provision meant for the security of purchasers, resting upon that security, which the creditors in this case most certainly had not done, since they led their adjudications in the idea that Alexander Auchyndachy was infest in the lands, which, had they looked at the register, they never could have entertained. 2. The entail is not cut off by the negative prescription. The minority of Sarah Auchindachy completely interrupts it.

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Pleaded for the Respondents.—All the diligence by adjudication, &c., which led to the decree of sale having been regular and valid, and the estate itself not being protected against creditors by the entail in question, this entail not having been recorded, the title, under that decree of sale, is unimpeachable. The entail is, besides, prescribed, it having lain dormant for more than forty years. Nor can the heir substitute plead her minority in bar of this prescription, because, according to a long train of decisions, the minority of substitute heirs of entail cannot be deducted.

After hearing counsel, it was ordered and adjudged that the interlocutor be affirmed.

For Appellants, *W. Grant, W. Dundas.*

For Respondents, *Sir J. Scott, Alex. Wight.*

father's infestment, be held equivalent to a feudal right in his own person?

“ If there be no room for the positive prescription, will the negative prescription operate? Vide case of *Aiton v. Monypenny* in Ante, vol. i. 1756, case of *Porterfield v. Porterfield*, Sess. Papers, vol. xix. No. p. 649.

71. The Court found in these cases, that no document having been taken upon a latent bond of tailzie for more than forty years, the same was cut off by the negative prescription.

“ The minority of substitute heirs of entail cannot be allowed as a deduction, otherwise tailzies would never prescribe. The whole heirs are a collective body. The succession opened in 1741, and consequently, *valens agere* from that period.”

LORD JUSTICE CLERK.—“ Every personal right is affected by the personal conditions and provisions; but, he is heir apparent under the investiture, which is unlimited. The entail is no bar. Case of Tailzie of Kilhead—Estate of Cromarties, about twenty years ago.” *Stewart v. Douglas, Mor. 15616.*

LORD DREGHORN.—“ Of same opinion.”

“ Court of opinion that the latent entail was cut off by prescription.”