[30*th April*, 1846.]

The Right Honble. John Hamilton Dalrymple, Earl of Stair, *Appellant*.

William Read King, Esq., of Serjeants' Inn, London, *Respondent*.

Tailzie.—Part and Pertinent.—In order to make an entail, duly registered so as to be binding against creditors of lands, which had originally been acquired as a separate tenement, it is necessary either that the entail embrace them by name or that they should be shown to have been actually possessed as part and pertinent of other specific lands *nominatim* embraced, by the entail, for the prescriptive period prior to the making of the entail; and for the purpose of showing such possession the mere fact of possession of other contiguous lands upon titles with part and pertinent, and a statement, in the titles made up from time to time, that the lands, alleged to have been possessed as part and pertinent, were embraced by the entail, was not held sufficient.

In the year 1677, John Lord Bargeny, who was infeft in the property and superiority of the lands and isle called Inch, and in the property only of the lands of Cults, executed a disposition of both parcels of lands, along with a variety of other lands, in favour of Sir John Dalrymple, by a conveyance to Sir John "and his "nearest and lawful heirs male," giving them the following description:—"All and Haill the lands and isle called the Inch, "with the mannor within the said isle, with the lochs and fish-"ings within the said lochs, and castle betwixt the said lochs, "with their pertinents, &c., &c. And sicklike, All and Haill the "thrie-pund land of Cults, with houses, biggings, yairds, woods, "fishings, pairts, pendicles, and pertinents therof whatsumever,

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" lyand within the said parishin of Inch, and sheriffdome of " Wigtoune forsaid, and that be way of excambione and permu- " tation of the fyve-merk land of Meikle Largs, Auchmantle, " Polteriar, and Auchinvan, which are pairts and pertinents of " the said fyve-merk land of Meikle Largs, with houses, " biggings, yairds, woods, fishings, pairts, pendicles, and perti- " nents therof, lyand within the said parichin of Inch, and " shirriffdome forsaid, quhilks pertainit to umq[l]. John, Earle of " Cassills, ffather to John, now Earle of Cassills, for the saids " lands of Cults, with the pertinents, whilks pertainit to umq[le]. " Fergus Lyne of Little Largs, with this provision and condi- " tion alwayes, that if it should happen the saids lands of Cults, " with the pertinents, to be evicted from the said umq[le]. Earle " of Cassillis, his aires or assigneys, or the saids lands of Meikle " Largs, and others forsaids, with the pertinents to be evicted " from the said umq[le]. Fergus Lyne, his aires or assigneys, that " then and in that case the said umq[le]. Earle, and his forsaids, " and the said umq[le]. Fergus Lyne and his forsaids, ffra whom " the said lands should happen to be evicted, should have full " and free regress in and to the respective lands abovewritten, " disponed by them to others in manner mentionat in the origi- " nall rights and infeftments therof." The disponee in this conveyance made up his title to Inch and the other lands, with the exception of Cults, by expeding a crown charter upon the procuratory in his disposition.

In 1699, William Linn, (*Lyne*,) the superior of the lands of Cults, executed a disposition in favour of Sir John Dalrymple, then Viscount Stair, " and his aires and assigneys whatsomever," of " all and haill y[e] superiority of the lands of Cults, lying " within the parochin of Inch, and shriffdome of Wigtoun, " holden be him of me in ffew."

For some reason or other the disponee, in this conveyance, afterwards first Earl of Stair, did not, in his lifetime, make up a title, either to the property of the lands of Cults under the

disposition of 1677, or to the superiority of these lands under this disposition of 1699.

The *first* Earl died in 1707 and was succeeded by his son John, the *second* Earl, who, in that year, expede a special service "as eldest lawful son, and lawful and nearest heir male of line, "tailzie and provision," to the first Earl, in a variety of lands forming the family estate particularly enumerated, Cults not being of the number. After this enumeration, the retour of this service continued in these terms:—"Et similiter in totis "et integris quinq. mercat. terrarum de Meikle Largs Auchin- "mantle Polteriar et Auchinvan quæ sunt propriæ partes et "pertinen. dict. quinq. mercat. terrarum de Meikle Largs cum "domibus edificijs hortis molendinis silvis piscariis partibus "pendiculis et pertinen. earund. jacen. infra parochiam de Inch "et vic. de Wigtoun antedict. una cum summa decem librarum "monetæ hujus regni annuæ feudifirmæ dict. demortuo Joanni "Comiti de Stair de ijsd. solut. et debit. et hoc pro compensa- "tione talis summæ decem librarum annuæ feudi divoriæ per "illum solut. et debit. de tribus. librat. terrarum de Cults "jacen. infra dict. parochiam de Inch et Vic. de Wigtoun ante- "dict. quæ datæ erant in excambionem et permutationem dict. "quinq. mercat. terrarum de Meikle Largs cum dict. terris de "Auchmantle Polteriar et Auchinvan quæ sunt partes et perti- "nen. earund. modo et forma particulariter mentionat. in dispo- "sitione per Joannem Comitem de Cassills Joanni Domino "Bargany fact. et concess. ad quam dict. demortuus Joannes "Comes de Stair jus habuit, &c. &c." Upon this retour his lordship expede a Crown charter of resignation, which, after enumerating the lands specified in the retour, contained the same clause that has just been quoted.

In the same year the *second* Earl expede a general service as heir male and of line to his father.

In 1707, and also in 1739, the *second* Earl executed two several bonds of entail of a great variety of lands, Cults not

being mentioned further than by a repetition in each of the entails of the words which have been quoted from the retour of his lordship's special service. The entail of 1739, however, contained an obligation in these terms:—"And farther, we do "hereby bind and oblige us and our heirs, as well male, tailzie, "conquest and provision, as heirs general and of line, and "successors whatsomever, renouncing the benefit of discussing "our said heirs in order of priority, to obtain ourselves duly "and lawfully infeft and seased in the lands, teinds, baronys, "and others hereafter mentioned, and all other lands, teinds, "and estate pertaining to us wherein we are not as yet infeft, "and that in such way and manner as shall be most agreeable "to the laws of this kingdom; and being so infeft and seased, "to make due and lawful resignation thereof in the hands of "our immediate lawful superiors of the samen, or their com-"missioners in their names, having power to receive resigna-"tions thereof, and to grant new infeftments thereupon, in "favours and for new infeftments of the same, to be made, "given, and granted to ourself, and the heirs-male lawfully "to be procreate of our body; whom failing, to the other heirs "of tailzie and provision before and after mentioned."

On the 20th March, 1746, the second Earl executed another bond of entail and a procuratory upon the narrative that various changes among the heirs called to the succession by the deeds of 1707 and 1739, had determined him to revoke the same "with regard to my lands and estate." This deed set out with disponing "all and whole my lands, baronies, milns, "fishings, teinds, patronages, and other heritages whatsoever, "presently pertaining and belonging to me, or that shall "happen to pertain to me at the time of my decease;" and after enumerating lordships and baronies, embraced numerous parcels of land by their several descriptions, many of them stated to be lying "within the parish of Inch and sheriffdom "of Wigton." Among the rest it contained the following

description :—" And sicklike, " All and Haill the five-merk land " of Meiklelarg, Auchmantle, Poleregan, and Auchinvian, which " are proper parts and pertinents of the said five-merk land of " Meiklelarg lands of Glenterrow and Craigochs, with houses, " biggings, yairds, woods, fishings, parts and pendicles of the " same, lying within the parish of Inch and sherriffdom of " Wigton, together with ten pounds Scots of few-dewtie, and " payable out of the same to the Earl of Stair yearly, and that " in compensation of the like sum of ten pounds Scots of " few-duty yearly, due and payable out of the three-merk land " of Cults, with the pertinents, which were given in exchange " and permutation for the foresaid five-merk land of Meiklelarg, " Auchmantle, Poleregan, and Auchinvian, as is more parti- " cularly mentioned in the disposition of the same, made " and granted by John, Earl of Cassils, to the deceast John, " Lord Bargeny, and to which the Earl of Stair has right;"— " And likewise, All and Haill the lands and islands commonly " called the Inch, with the mannor-place within the said " island, with the lochs and fishings in the said loch and " castle within the said loch commonly called Castle Kennedy, " and haill pertinents of the same;" but further than this it was altogether silent as to the lands of Cults, either by particular name or by description. The dispositive clause concluded with the following general words, " together with " teinds, parsonage and vicarage, of the lands, lordship, bar- " ronys, and others above written, and all right, title, interest, " claim of right, property, and possession, as well petitor as " possessor, which we or our predecessors or authors had, " have, or any ways may have, claim, or pretend thereto, or to " any part or portion thereof, in time coming, and all other " lands and heretages presently belonging to me, or that I shall " hereafter acquire during my life, together with all right, title, " interest, claim of right, property and possession which I " have, or any ways may have, claim, or pretend thereto in " time coming."

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In July, 1746, the Earl expede a Crown charter upon the procuratory, in the last-mentioned entail. He did not, however, take infeftment on this charter, but assigned it to his nephew, Captain Dalrymple, and the other heirs of entail. In November, 1747, Captain Dalrymple completed his titles, under the entail of 1746, by taking infeftment in the lands contained in the Crown charter; and in the same month, he put the entail and assignation of the procuratory upon the register of entails; and in September, 1752, he expede a general service, as heir of tailzie and provision to his uncle, who had died in May, 1747.

After the second Earl's death, he was succeeded in his titles by two successive Earls of Dumfries—the *third* and *fourth* Earls of Stair. Upon their deaths, Captain Dalrymple became the fifth Earl of Stair.

The *fifth* Earl, upon the death of his uncle, and before he succeeded to the title, entered into possession of the whole lands which had been possessed by the *first* and *second* Earls, the lands of Cults being of the number, and he continued in the enjoyment of this possession until his death, which happened in the year 1789. During this possession, he, in the year 1786, executed an entail, which will be mentioned afterwards, but need not be set forth.

John, *sixth* Earl, expede a general service, as only lawful son and nearest heir male, and heir of taillie and provision to the *fifth* Earl, his father. Upon the retour of this service, and the procuratory in the conveyance of the superiority of the lands of Cults, by Linn in 1699, which had never before been executed, he expede a Crown charter of resignation, which conveyed a variety of lands:—"Et similiter terras et insulam vulgo vocat. The Inch " cum maneriei loco intra dict. insulam cum lacubus et pisca- " tionibus intra dict. lacus et castro intra dict. lacum vulgo vocat. " Castle Kennedy et integris pertinen. earund, &c. Ac etiam " totas et integras terras de Cults cum pertinen. jacen. intra

" parochiam de Inch et vicecomitatum de Wigton. Quæquidem " Comitatus Dominium terræ decimæ aliaque prædict. content. " sunt in dispositione et literis talliæ execut. per dict. demor- " tuum Joannem secundum Comitem de Stair de data vigesimo " die Martii anno millesimo septingentesimo quadragesimo " sexto."

In the quæquidem clause of this charter, the title to the lands of Cults was thus deduced:—" Et dict. terræ de Cults " virtute procuratoriæ resignationis content in dispositione " earund. fact. et concess. per dict. Gulielmum Lin ad et in " favorem Joannis primi Comitis de Stair inibi designat. Joannis " Vicecomitis de Stair ejusque hæredum et assignatorum quo- " rumcunque de data vigesimo die mensis Aprilis 1699 et " registrat. in libris Sessionis vigesimo nono die mensis Augusti " 1785 cui dict. Joannes secundus Comes de Stair jus habuit " tanquam hæres generalis servitus et retornatus dict. demortuo " Joanni primo Comiti de Stair patri secundum generale servi- " tium expedit. coram clavigeris Curiæ Sessionis decimo die " mensis Maij 1707. Et ad quamquidem dict. Joannes ultimus " Comes de Stair jus habuit per dict. dispositionem et obliga- " tionem talliæ concess. per dict. demortuum Joannem secundum " Comitem de Stair de data vigesimo die mensis Martij, anno " Domini 1746, et generale servitium dict. Joannis ultimi " Comitis de Stair tanquam hæredis talliæ et provisionis " dict. Joanni secundo Comiti de Stair ejus patruo secundum " dict. dispositionem et obligationem talliæ, expedit. coram " Vicecomite Edinburgensi vigesimo secundo die mensis Sep- " tembris, 1752. Et ad quamquidem dict. Joannes nunc " Comes de Stair jus habet tanquam hæres talliæ et pro- " visionis servit. Joanni Comiti de Stair ejus patri in dict. " Tallia secundum generale servitium expedit. coram balivis " Edinburgensibus primo die mensis Julij 1790." In this charter there was a several and distinct *reddendo* for the lands of Inch and the lands of Cults.

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The title under this charter was duly made up by infeftment of date 5th October, put upon record 15th November, 1791, which thus described, among others, the different parcels of land:—

"Totum et integrum Comitatum de Stair dominium et "baroniam de Dalrymple comprehenden. terras baronias mo- "lendina decimas piscationes officia aliaq. postea mentionat. "viz. &c.

"Et similiter terras et insulam vulgo vocat. The Inch cum "maneriei loco intra dictam insulam cum lacubus et pisca- "tionibus intra dict. lacus et castro intra dict. lacum vulgo "vocat. Castle Kennedy et integris pertinen. earundem, &c.

"Ac etiam totas et integras terras de Cults cum pertinen. "jacen. intra parochiam de Inch et Vicecomitatum de Wigton. "Quæquidem comitatus dominium terræ decimæ aliaque præ- "dict. content. sunt in dispositione et literis talliæ execut. per "dict. demortuum Joannem secundum Comitem de Stair de "data vigesimo die Martii anno millesimo septingentesimo "quadragesimo sexto, &c."

The *sixth* Earl under this title entered to the possession of all the lands, Cults included, and continued in the enjoyment of such possession until his death in 1821.

In November, 1821, John William Henry, the *seventh* Earl, made up his title to the family estates by expeding a special service as heir under the entail of 1746. The retour of this service expressed that the preceding Earl had died vest and seised "in feodo totarum et integrarum comitatus dominii "baroniarum terrarum molendinorum decimarum et aliarum "hæreditatum postea specificat. viz. totarum et integrarum "Comitatus de Stair, &c. Et similiter terras et insulam "vulgo vocat. The Inch cum maneriei loco intra dict. insulam "cum lacubus et piscationibus intra dict. lacus et castro intra. "dict. lacum vulgo vocat. Castle Kennedy et integris pertinen. "earundem Totas et integras quinque librat. terrarum de Kil-

" lorpottie, &c. Ac etiam totarum et integrarum terrarum de " Cults cum pertinen. jacen. intra parochiam de Inch et vice- " comitatem de Wigton. Quæquidem Comitatus dominium " terræ decimæ aliaque prædict. content. sunt in Syngraphá " Talliæ execut. per dict. demortuum Joannem secundum " Comitem de Stair de data vigesimo die Martii anno millesimo " septingentesimo qradragesimo sexto: Et similiter totarum et " integrarum terrarum et Baroniæ de Kilhilt comprehenden," &c.

The *seventh* Earl took sasine in the various parcels of land under this retour, and throughout his life enjoyed possession of the whole family estates upon this title.

In making up this title, his lordship had conceived that he derived his title to the lands of Cults under the entail of 1746, and for some time afterwards he continued under the same impression, as he expended large sums of money on improvements of the estate, and upon the lands of Cults among others, which he made a burden upon the succeeding heirs of entail, by proceedings adopted under the Statute 10 Geo. III.

Subsequently, his lordship's pecuniary embarrassments induced him to take another view of the matter, and to endeavour to make a title in fee simple to the lands of Cults. Accordingly he first, in 1822, expede a general service as heir male to John, the *first* Earl, in these lands, and took infeftment in them, omitting in his seisin, all mention of the fetters of entail; but, discovering a defect in this title, by reason of the second Earl having expede a general service as heir male to the first Earl, he, in 1823, expede a second general service and infeftment, as heir male to the second Earl.

After this, his lordship, in 1835, executed a voluntary trust conveyance in favour of Ranken, a solicitor in London, for behoof of his creditors. This conveyance embraced the lands of Inch and Castle Kennedy, and the lands of Cults, by separate and distinct description; and, after enumerating the

different parcels of land, continued thus:—"Which earldom, "lordship, lands, teinds, and others aforesaid, are contained in "a deed of taillie executed by the said John Earl of Stair, "dated the 20th day of March, 1746," &c.

"And in which earldom, lordship, baronies, lands, mills, "teinds, and other heritages before specified, I, the said John "William Henry Earl of Stair, stand duly and legally vested "and seised, in terms of the taillie of Stair, as heir of line, "taillie, and provision therein, to John, last Earl of Stair, my "cousin-german, conform to the several infeftments thereof in "my favour, and all and sundry other lands and heritages what-"soever pertaining and belonging to the Earl in Scotland, or "to which in any way he had right with the whole writs and "title deeds thereof."

Ranken was about to avail himself of the general words of conveyance and the title in fee simple, which had been made up by the *seventh* Earl, as giving him a title to the lands of Cults, and of the power to sell them for behoof of his lordship's creditors, when he was interrupted by an action, at the instance of the present appellant, then the first substitute under the entail of 1746, against himself and his author, asking as its first conclusion, to have it declared that the lands of Cults, "both as "to the superiority as well as the property or *dominium utile* "thereof, are included or comprehended in, and have been "effectually and well and validly entailed by the foresaid deeds "of entail of 20th March, 1746, and 6th October, 1786, the "respective transmissions thereof, the foresaid charter of 5th "July, 1790, and the infeftment thereon dated 5th October, and "registered 15th November, 1791, and the possession follow-"ing thereupon by the said deceased John, sixth Earl of Stair, "and the defenders, the said John William Henry Earl of "Stair, their predecessors and authors, and generally by the "various deeds, instruments, proceedings, and others before "narrated, and the possession following thereupon; and that

" the said lands of Cults and pertinents, both superiority and " property, have been, are, and must be still held by him, and " the heirs and substitutes of entail therein, under and by " virtue of the said tailzies, and the transmissions and investi- " tures thereof, and subject to the conditions, provisions, restric- " tions, reservations, clauses irritant and resolutive, and others " therein contained, and by no other right or title."

The defenders to that action pleaded that Cults was not contained in any registered entail, and that as to the *dominium utile*, there had never been a tailzied infeftment expede therein. Earl William Henry (*seventh* Earl) died during the dependance of this action, and was succeeded to in his titles and estates by the appellant, the *eighth* Earl of Stair.

On the 10th of March, 1841, the Court (vide 3 *D.* & *B.* 837) repelled the defences, and found " that the title made up " by the late Earl to the lands of Cults in fee simple was inept, " and therefore reduce the writs called for and the disposition " to Mr. Ranken, so far as regards the fee of the estate of Cults, " and under this qualification reduce, decern, and declare in " terms of the reductive conclusions of the libel: farther, declare " in terms of the first declaratory conclusion of the summons; " find that Mr. Ranken has not a sufficient title to maintain the " rights of the creditors under the disposition libelled on and " infeftment following thereon against the estate of Cults."

In April, 1841, the respondent, as executor of a bond-creditor of the *seventh* Earl, brought an action against the appellant, as heir, served and retoured to John William Henry, the *seventh* Earl, concluding for payment of the bond debts due to his testatrix, upon the ground that the lands of Cults were held in fee simple, and that the defender was liable for the debts of his ancestor *in valorem* of these lands.

The appellant, in addition to other defences preliminary and upon the merits, pleaded as his *third* defence:—" The defender " not being the general representative of the late Earl of Stair,

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" but representing him only as heir of entail, and to no further " extent, cannot be made liable for his debts and deeds."

This defence he enlarged in his plea in law by a plea in these terms:—" The lands of Cults having been validly com- " prehended and disponed, as part and pertinent of the Stair " estates, under the broad terms of the conveyance in the entail " executed by John the second Earl, in 1745–6, and that entail " having been afterwards duly recorded in the Register of " Taillies, the said lands were thereby effectually protected " against the diligence of creditors, and the registration once " made was not rendered inoperative by the title subsequently " completed in the person of John the sixth Earl, in 1790."

The Lord Ordinary, (*Cockburn*,) on the 2nd of February, 1842, sustained " the third defence, viz., that the defender not " being the general representative of the late Earl of Stair, but " only a succeeding heir of entail, is not liable for his debts or " deeds," and assoilzied. To this interlocutor his Lordship added the following note: " The Lord Ordinary considers the " facts and principles on which this defence rests to be all " fixed by the case of Dalrymple *v.* Stair, 10th March, 1841. " Among other things, he holds Cults to have been held and " possessed as a part of the general entailed estate."

The respondent reclaimed, and the Court, before answer, " and for the purpose of having the opinions of all the Judges " on the question raised by the Lord Ordinary," appointed the parties to put in minutes of debate, which was accordingly done, and very elaborate opinions were then delivered by the consulted Judges.

Thereafter, the Court, in conformity with the opinions of the majority, on the 28th February, 1844, " recalled the interlocu- " tor of the Lord Ordinary, repelled the third defence pleaded " by the defender, and remitted to the Lord Ordinary to " proceed farther in disposing of the other points of the cause " as to Lordship should seem proper."

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The appeal was taken, by leave of the Court below, against this interlocutor.

Mr. Rutherford and *Mr. Bethel* for the Appellant.—Although by the disposition of 1699, from Lord Bargeny to the first Earl of Stair, the lands of Cults were conveyed, along with the lands of Inch and Castle Kennedy, as a separate tenement, it was perfectly competent for the disponee to hold them, and to acquire a title to them, as part and pertinent to these lands; there was nothing to prevent this, either in the circumstance of their having been originally separate tenements, or in the relative greater magnitude of Cults to these lands. Fife's Trs. *v.* Cuming, 8 *S. D. & B.* 326, *Stair* II. 3, 73, *Ersk.* II. 6, 3. Young *v.* Carmichael, *Mor.* 9636. Moray *v.* Wemyss, *Mor.* 9636. Magistrates of Perth *v.* Wemyss, 8 *S. D. & B.*, 82. *Craig de feudis, lib.* II. dieg. 3d sect. 24. Until 1699, therefore, when Linn, the superior of Cults, conveyed the superiority, the *property* of Cults was possessed as pertinent to the other lands, and after 1699, both the property and the superiority were possessed in the same way. The possession continued the same at the date of the entail of 1746, and having done so for more than forty years prior to that deed, these lands had become annexed to and incorporated with the general family estate, and were feudally vested by prescriptive title, as part and pertinent to the other lands.

Such being the state of the title and of the possession of the lands of Cults in 1746, the entail executed in that year, when it specified the lands of Inch and Castle Kennedy, by express description, was sufficient to embrace Cults, as part and pertinent to Inch or Castle Kennedy, without any particular express description of the former; at all events, it was sufficient to embrace them by the words of general conveyance.

The charter expede by the *sixth* Earl in 1790, upon the procuratory in Linn's disposition of 1699, was expede only

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ob majorem cautelam, and did not operate any change upon the title; not only was Cults incorporated as part and pertinent of Castle Kennedy, prior to the entail of 1746, but under that deed a second course of prescription had run, before this charter of 1790 was expede. The expeding of that charter, therefore, was a mere superfluity, a corroborative and supplementary title, which itself stated Cults to be contained in the entail of 1746, and could in no degree weaken the title under that entail.

Even if the charter of 1790 formed a separate independent title, a party is not bound to ascribe his possession to any particular title, when he has more than one in his person. He may ascribe it to whichever he prefers; and in this instance, all omission of Cults, by express description in the different titles made up, while in several of them these lands are mentioned as being contained in the entail of 1746, shows the intention of the family to ascribe their possession to title as part and pertinent. But in any view, as the disposition by Linn, was of the superiority of Cults alone, the charter expede under that disposition, could not affect the *dominium utile* of these lands, which was a separate estate, and thus, on the argument of the respondent, the *dominium utile* still remains upon the personal title, unfeudalized, and in that condition it is not attachable by creditors.

If the title, as part and pertinent, was complete, and if the entail of 1746 was sufficient in its terms to embrace the lands of Cults, as was found by the decision in 1841, what deed, other than that entail, could have been put upon the register, so as to make an effectual registered entail of these lands. That deed was found to be an effectual entail, under which the Earl was bound to possess the lands of Cults. It was duly registered, and it would have been utterly useless to have put upon the register any of the deeds of transmission following upon it. All that the Statute 1685 requires is the registration of the deed or deeds constituting the entail; this done, the statute is satisfied.

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Mr. Robertson and *Mr. Anderson* for the Respondent.—The original conveyance by Lord Bargeny, in 1674, disponed the *property* of the lands of Cults, as a separate and distinct tenement to the first Lord Stair and his *heirs male*. In 1699, Lynn, the superior, disponed the *superiority* of the lands to the same party and his *heirs and assignees* whomsoever. Prior to and at the date of the entail of 1746, these two destinations of the property and the superiority of the lands, to two distinct classes of heirs, remained unfeudalized, as no infeftment had been taken upon either of the conveyances.

The entail of 1746, although it contained a reference to the lands of Cults, did not dispone them by name. It did however contain a general clause of conveyance of all lands to which the maker was entitled, and a general assignation of writs and evidents. These clauses were sufficient to pass the personal right to both property and superiority of the lands, and to the procuratory and precept in the titles. *Inter hæredes* this might be good as an entail, and so the judgment of the Court below found in the question with Mr. Ranken, but that judgment did no more. The question, how far the entail of 1746 was effectual as against creditors and purchasers, was left untouched: as against them it plainly was ineffectual, because no infeftment in the lands of Cults by name, was ever taken or put upon the register either of sasines, or of entails, and nothing short of such express mention upon the register will satisfy the Statute 1685. The entail of 1746, therefore, was ineffectual to comprehend the lands of Cults, unless they had been possessed as part and pertinent to other lands, and at the date of the entail had already been absorbed in them, and become feudally vested in the maker of that deed, by prescriptive possession as such part and pertinent.

Lands to be possessed as part and pertinent must necessarily be adjoining those to which they are said to be appurtenant. Here, the only lands adjoining to Cults were Inch and Castle Kennedy, but both of them were greatly inferior to Cults in

extent, so that the notion of absorption—that a larger could be swallowed up by a smaller—is out of the question. With regard to the solitary authority from *Craig*, that discontiguity does not prevent possession as pertinent, the titles to the lands there mentioned, two of which are Nos. 97 and 105 of *Thomson's Retours of Berwickshire*, show that the lands of *Kimmarghame* were not discontiguous to, but were *within* the Lordship of *Preston* and *Bonkill*, and that that lordship was vested in the Earls of Angus. These titles, therefore, deprive *Craig's* doctrine of the authority upon which it is rested, and show that that learned feudist had not referred to the case which he professed to quote.

But if the relative position and extent of the lands had admitted of the plea of pertinent, it is altogether excluded by the acts of the possessors, which negative the notion of any intention on their part to ascribe their possession to such a title. However doubtful it may be which title the *fifth* Earl and the heirs prior to him intended to ascribe their possession to, the acts of the *sixth* Earl, in 1785, in registering Lynn's disposition of 1699, and in 1790 in expeding a charter upon the procuratory in that disposition, which, in the *quæquidem*, stated in terms that the lands had been last vested in Lynn, and as a necessary consequence negatived the idea of their having been vested in the Earls of Stair, as part and pertinent, put it beyond doubt that he intended to ascribe his possession to this separate title. This charter, therefore, with the infeftment upon it, vested Cults as a separate distinct tenement by its own name, for which a specific *reddendo* was made payable and has ever since continued to be paid to the Crown, and the special retours of both the *seventh* Earl and the appellant vested it in them in the same form as a separate tenement. It is evident, therefore, that posterior at least to 1785, the notion of possessing this estate not upon an express title, but as part and pertinent of other lands, was not entertained by any of the possessors, nor

even by the appellant himself, and it would not have been entertained by him now, unless with the hope of defeating this action.

But such a use of the privilege allowed to a proprietor of ascribing his possession to whichever title he prefers, is altogether without precedent or authority. Where a party has been in undisturbed possession of lands, either without an express title, or upon a defective one, the law in support of that possession which it presumes to be righteous, allows him, if the circumstances will admit of it, to ascribe his possession as part and pertinent to other lands to which he has an unquestionable title. But no instance has ever occurred of anything so preposterous as a party who has an unquestionable express title, asserting a privilege to pass that title bye, and ascribe his possession to the uncertain and vague one of part and pertinent; on the contrary, such a course is expressly opposed by the decision in Gray *v.* Smith, *Mor.* 10803, where it was held that, if by both rights the possessor is unlimited fiar, prescription cannot run by possession upon the one title against the other; and the same principle was recognised in Zuille *v.* Morrison, 17 *F. C.* 251. The privilege of ascribing possession to whichever title the possessor prefers, however, has only been allowed in questions with parties seeking to evict upon an alleged preferable title not before asserted, and for the quieting of possession, but was never permitted for the purpose of defeating just creditors—the object in the present case,—the policy of the law being rather to protect their interests.

Moreover, in order to make a title by possession as part and pertinent, the possession must be shown to have been such. This must not only be alleged, but proved. Here there is no allegation on the record, whereby the possession is ascribed to part and pertinent of Inch or Castle Kennedy, rather than to the express title, and there is as little evidence of the fact if it had been alleged; on the contrary, the documents distinctly negative such a title.

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If Cults was absorbed as part and pertinent of the other lands, the absorption, in order to make the entail of 1746 cover it, must have been complete at that date, but the time elapsed did not admit of this as a possibility. In order to acquire a title to land without charter and seisin, by possession of them as part and pertinent to other lands, it is indispensable that there have been charter and seisin in these other lands. In the present case the first charter which was made after the superiority of Cults came into the family, was in 1707, and betwixt that time and the date of the entail in 1746, forty years had not elapsed, and during the whole period prior to 1746, the lands of Inch and Castle Kennedy were held under a destination to *heirs male*, while the superiority of Cults was destined to *heirs whatsoever*.

LORD CAMPBELL.—My Lords, it has been a source of great satisfaction to me, that this case has been argued by Scotch counsel of great learning and ability, who are most intimately acquainted with the subject. We are quite sure, consequently, that everything has been brought before us that could assist us in coming to a right decision. Having heard the arguments addressed to us, at length, attentively and with the respect that was due to the ability and learning they displayed, and which the case itself certainly merited, I cannot but think that our course is a very clear one.

My Lords, we have to deal with this third defence, "The "defender, not being the general representative of the late Earl "of Stair, but representing him only as heir of entail, and to no "further extent, cannot be made liable for his debts and deeds."

Lord Cockburn, Ordinary, sustained that defence. The Second Division of the Court of Session reversed his interlocutor, and repelled that defence. Therefore, what we have to consider is, whether upon the arguments and proofs before us, that defence is sufficient or insufficient.

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Now, my Lords, I conceive that the question which that defence raises, is, whether there has been a good registered entail of the lands of Cults. If there has been a good registered entail of the lands of Cults, binding upon creditors, the defence is sufficient; if there has not, the defence ought to be overruled.

The entail that is presented and relied upon, is that of 1746, which does contain words that might constitute a valid entail in general terms *inter hæredes.* But the question is, whether that entail, which was afterwards registered, does contain words that can be considered as a good registered entail, with fettering clauses binding upon creditors.

Now, my Lords, Mr. Rutherford has admitted, as he was bound to do, (and we always have the most candid answers from him, upon which we can implicitly rely), that to make a good registered entail, the lands must be named; that there may be a good entail in general words, without naming the lands; but that to make a good entail that shall be binding upon creditors, the lands must be named.

Now the lands of Cults are not named; but then it is possible that they may be included in other lands that are named, and according to my present view of the law of Scotland, a separate tenement, held under a separate title, may become portion of another tenement, and then by prescription, having become portion of that other tenement under long usage, it would become part of that tenement, either with regard to seisin or with regard to entail. So that a disposition of Castle Kennedy or of Inch, might have carried the lands of Cults, although the lands of Cults were acquired by separate title in 1675 and 1679. But then, my Lords, the party who felt it for his interest to contend that there has been this annexation, or absorption, or mergency, must prove it. He must allege facts, and prove facts, which will show that the one tenement has been occupied, and really, in fact, has become portion of the other, so that the title may apply.

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In this case, my Lords, when the matter comes to be sifted, Mr. Rutherford allows that he has neither alleged nor proved anything to show that in the year 1746, Cults had become portion of Inch or Castle Kennedy. It will not do to talk about the general estate, we must know the particular specific lands to which it is supposed to be annexed. But he says there has been possession. There has been possession, to be sure—but then he might as well say, that it became part of any one of those infinitely various tenements that are enumerated in that deed of 1746. It is contiguous to Inch, but so it is also to various other tenements. Mere contiguity cannot be sufficient to show annexation, or absorption, or mergency.

Then what is there in the entail of 1746 to show that the disposition of Inch would have carried Cults? There is nothing, except that they both had been possessed under originally separate titles by the same family. Then in the year 1746, Cults had not become part of Inch—it was still a separate tenement. I would not look to what has since taken place, for if there had been prescription once operated upon, a subsequent dealing with the estate, could not defeat the effect of that prescription. But it is quite clear that Cults was always regarded as a separate tenement, and that it has been so treated down to the present hour.

By some accident, unfortunate for the present Earl of Stair, in the deed of 1746, Cults is not included by name. But not having been included by name, I am quite clear that according to the established and admitted principles of the law of Scotland, there is no registered entail whatever, of the lands of Cults.

Upon that ground, my Lords, I have no difficulty in advising your Lordships to affirm the judgment of the Court below.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend, in advising your Lordships to affirm the

judgment of the Court below. The case is so clear and simple as to dispense with the necessity of troubling your Lordships at any length, with the grounds of my opinion upon it.

I do say, however, that I go along with the position, so completely yet concisely enunciated by Lord Murray, who gave a very clear summary of the arguments, (lying in no very large compass,) of this case. And I go along with the position maintained by my noble and learned friend. I find the learned Judges who reversed the interlocutor unanimous. An able opinion was given by Lord Jeffrey, to which I subscribe, but I particularly refer to Lord Fullerton's judgment which entirely expresses my own opinion upon the case. I might also refer to Lord Wood's opinion; and Lord Robertson's, who concurred with their views, but entered more fully into the case. There is great weight of authority here on both sides, which made it necessary to hear fully the arguments raised. Lord Cunninghame, a Judge of great experience, I may at the same time also remark, going very fully and elaborately into the case, being in favour of the defence and sustaining the interlocutor, other learned Judges also concurring with him.

My Lords, I have looked, in the course of the arguments to-day and on the two former days, to what has been urged, but I can see nothing to shake me in my opinion that there is not a registration of the estate of Cults, either directly by naming Cults, (for it might be done in either way, as is admitted on all hands,) or by reference or by registration of such other estates as are proved, *de facto*, to have comprehended the estate of Cults, or as being sufficient to fix them. It is clear, Cults is not mentioned by name. An intending incumbrancer could have had no notice upon the Registry of Seisins—he could have no notice upon the face of that record—of the name of Cults.

Then is it proved, in point of fact, (for it is totally a question of fact,) that in 1746 there was such an absorption or annexation of the two together, of Blackacre and Whiteacre,

that the Register of Whiteacre meant the Register of Blackacre. That is just where the case is defective; and the learned Judges I have named of the Inner House were unanimous upon it, that it was so defective, (the consulted Judges I have named having given an elaborate judgment). The Lords *Moncreiff*, *Cunninghame*, and *Ivory*, however, sustained the interlocutor. But this is just where they fail. They do not apply to the facts, they go into legal arguments. But the facts fail them. These Judges overlook the importance of the fact that Cults by name is not registered, and deal rather with legal arguments. The question then shortly reduces itself to this—is it registered? That is a question of fact. I do not find that it is. Therefore I entirely agree with my noble and learned friend, in advising your Lordships to affirm this judgment.

LORD COTTENHAM.—My Lords, I entirely agree in the opinions already delivered by my noble and learned friends. I am satisfied that in order to protect this estate against creditors, it must be shown that it was contained in the entail of 1746. Not being distinctly named or described in that entail, the ground assumed is, that it was comprehended in some of the designations to be found in the deed, as part and pertinent of the estate of Castle Kennedy or Inch. That may or may not be. It no doubt is not disputed, that circumstances may have occurred in that year, 1746, to have made Cults somehow included under the general description of Inch, or incident to it, so as to be included in the entail, and protected by the entail, by the denominations of land to be found in the deed. But of that we have no proof; we merely know the fact that the individual member of the family in the possession of the one was in possession of the other. But of any circumstances necessary to show that it was included in the terms to be found in that deed, or that what was so enjoyed is to be considered as part and pertinent of any land described in that deed, there is

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no proof whatever. I therefore entirely concur in the opinion expressed, that the party has failed in showing and establishing that it was affected by that deed of entail.

I cannot but observe, what is admitted on all hands, that the decision in 1841, that Cults was affected by this entail, was entirely rested upon the general words to be found in the end of the deed. It was held to be affected *inter hæredes* under the words, "all other lands and heritages presently belonging to "me, or that shall hereafter belong to me." But if, in 1746, Cults had formed part of those other estates, the entail would not have been held to be a registered entail binding upon heirs, under those general words, it would have been so held as including Cults in the lands named, and it would have been treated as a registered feudal entail.

But these general words were the ground of the decision. The decision was therefore in effect that Cults was not included as being part of the lands called Inch, or appertinent to Inch, but under such general terms as carried only the personal right, and did not make a feudal entail.

I have no doubt, my Lords, in advising your Lordships to affirm the judgment of the Court below.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

RICHARDSON and CONNELL—W. C. KING. Agents.