could not thereafter confer on the appellants the salmon fishings adjacent to the Island of Sleepless, because where a salmon fishing is granted by the Crown upon a river, without limiting it to a particular part, where his nets are to be drawn, the whole salmon fishing is granted, and the grantee may draw his nets on both sides of the river. The respondents have had immemorial possession conform to this extent and measure of their right, without dispute, and have therefore acquired a prescriptive title.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is hereby declared, that the appellants are entitled to an alternate right of fishing upon that part of the river in question, and it is therefore ordered that their defence be sustained, and that they be assoilzied.

For Appellants, *C. Yorke, Al. Wedderburn.*
For Respondents, *R. Dundas, Al. Forrester, Fred. Campbell.*

Note.—Unreported in the Court of Session.

[M. 10956.]

Mrs MARY MONYPENNY, widow of John Ayton younger, and MARY and JEAN their daughters; and JAMES AYTON (formerly Monypenny) - } *Appellants.*

THOMAS AYTON, second son to John Ayton the elder, and brother to John Ayton the younger, - } *Respondent.*

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House of Lords, 11*th May* 1757.

PRESCRIPTION OF ENTAIL—MINORITY.—An entail was executed of an estate, but allowed to lie dormant for eighty years, during which the succeeding heirs had possessed on a different title in fee-simple. Held that the limitations in the entail were worked off and prescribed by the forty years' possession had on this absolute title, and that the minority of heirs substitutes of entail did not interrupt the prescription.

1672. SIR JOHN AYTON executed a deed of tailzie in 1672, in favour of his nephew John Ayton, and the *heirs male* of his body, containing the usual prohibitive, irritant, and resolutive clauses of a strict entail, directed against alienating, impignorating, or disponing, or altering the order of succession.

This entail was never recorded, and lay in the maker's repositories for a period of eighty years dormant, without having been made use of as a part of the title to the estate.

April 30, 1676. On Sir John Ayton the maker's death, his nephew disregarding this entail entirely, and taking up the estate as heir of line, completed his title by a service as nearest and lawful heir of the deceased Sir John, and was thereupon infeft.

This John Ayton had three sons, John, David, and Thomas. On John the son's marriage with the appellant Mary Monypenny, the estate was disponed

March 18, 1709. "to the said John Ayton the younger, and the *heirs* "*male* of his body." Of this marriage there were Alexander, David, and the appellants Mary and Jean. Upon their father's and grandfather's death, Alexander succeeded to the estates, and made up his title by general service, as nearest and lawful heir to his father, and was infeft. He thereafter made a settlement of the estate in favour of "himself

" and the heirs of his body; whom failing, to David " Ayton his brother-german, and the heirs of his " body; whom failing, to the appellant, James Mony- " penny, and the heirs of his body;" thus cutting off from the succession his own sisters Mary and Jean.

On his death without issue, and also on the death of David his uncle (elder brother to the respondent) and also on the death of his own younger brother David (nephew to the respondent) without issue, Thomas Ayton, the respondent, was heir-male and the next substitute entitled to succeed to the estate by the entail. Having discovered the entail of 1672, he raised the present action of declarator, to have it found that Alexander Ayton had contravened the prohibitions of the entail, and to have his right to succeed to the estate under it declared. The defence was, that the maker never intended this deed to be a proper entail—that it was a mere temporary arrangement; but having been neither recorded nor used as a title, it must be presumed to have been laid aside. At all events, supposing the entail unexceptionable in all respects, the deed, and the whole interests and obligations thereon, having been neglected for eighty years, was now become void, and prescribed by the act 1469, which sets forth that unless the said obligation be followed furth within the space of forty years, the same shall prescribe. But the appellant's right is further established by the positive prescription introduced by the statute 1617. It was answered, That the minority of the prior substitute heir of entail (David) interrupted the prescription. It was replied, that the minority of substitute heirs of entail, and more especially of a prior substitute, could not, in law, be deducted from the currency of the pres-

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cription. That the respondent was not a minor,—that the plea of minority was personal to those entitled to plead it—that he was of age himself fifty years ago, and was not entitled to plead the minority of the substitute heir prior to him.

Feb. 27, 1756. The Court, of this date, pronounced this interlocutor, repelling the defences founded on prescription, and finding, "that the prohibitions in the entail were "perpetual and binding on the several substitutes "after the death of the maker." And on reclaiming

July 31, 1756. petition, the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant:—That the deed of entail executed in 1672, was not to be viewed as an entail, or as a subsisting deed, but in law is to be looked on as one of temporary arrangement, and as one in regard to which the maker had changed his mind. This is supported by the whole circumstances of the case, and the power in the deed to revoke. By the non-delivery, therefore, of the deed, and the neglect of every party interested in it for a period of eighty years, during which it lay dormant without being acted on or recorded, the same must now be viewed as void and prescribed under the act 1469, and to have come to an end. The entail is equally cut off by the positive prescription, as the estate has been held under a different title for more than forty years, thus working off the prohibitive, irritant, and resolutive clauses, by force of prescription, under the statute 1617. Nor is it any answer to the plea of prescription to plead the minority of substitute heirs of entail, because in law the minority of substitute-heirs of entail cannot be deducted from the currency of the long prescription, it being settled in the case of Mac-

dougall *v.* Macdougall, that the minority of such substitutes is not sufficient to interrupt. But even if it were otherwise, the respondent cannot plead it, because he himself is not a minor—has been of age for the last fifty years—and as the plea is personal to the minor himself, he cannot plead the minority of a prior substitute.

Pleaded for the Respondent:—The plea of prescription stated against the entail is untenable, because prescription can only operate where there are opposite and separate rights vested in different persons at the same time, which not being the case here, prescription could not and did not run against the entail. But if the plea of prescription is at all pleadable, it is effectually barred by the minority of the substitute heirs of entail. It was the minority of these heirs nearest in succession that led to the entail lying so long dormant, and after these are deducted, it appears evident that prescription has not run. And as to the want of recording, by the statute 1685, entails, whether of date prior or posterior to the statute, are binding on heirs though unrecorded. By the entail in question a permanent settlement of the estate was both made and intended; and the limitations therein are now binding on all concerned, and perpetual; and the settlement of Alexander Ayton on the appellants, being a contravention of the entail, was null and void.

After hearing counsel, it was

Ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is further ordered, that the defences made by the appellants, founded upon the construction of the deed of nomination (entail) of 15*th October* 1672, *and, upon prescription, be*

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sustained, and that the said appellants be assoilzied from the suit.

For Appellants, *Rob. Dundas, Al. Forrester.*

For Respondents, *C. Yorke, Dav. Rae.*

Note.—As to the minority of substitutes in an entail being held not to interrupt prescription, see Macdougall *v.* Macdougall, 12th July 1739. The interlocutor in that case was, "that the minority of Thomas or of William Macdougall could not interrupt the prescription, they being only *substitutes* by the tailzie 1684." M. 10947. Kames designates this case as the famous case, (K. De. p. 165), and it has been a leading case ever since. It was upon the principle of that case that judgment was reversed in the present case of Ayton. The House of Lords further considered the respondent barred, as having been himself major for more than forty years during possession on an adverse title. In the case of Gordon *v.* Gordon, 21st December 1784. *Fac. Coll.*, in giving judgment in a plea of the same nature, the Lord President (Dundas) observed that "he had heard the case of Macdougall judged and revered it. Lord President Forbes, and Lord Arniston, supported the decision. Its principles were afterwards adopted in the case of Ayton by Lord President Craigie, and Lord Justice Clerk (Erskine), who had been of counsel on the losing side in the case of Macdougall; and in the House of Lords the judgment was approved of by Lord Chancellor Hardwicke and Lord Mansfield." This question underwent a more thorough investigation in a subsequent case which was twice before the House of Lords.

Vide Sir Hew Dalrymple *v.* Fullarton, House of Lords, 18th Dec. 1797; and *infra.*

ALEXANDER, EARL of CAITHNESS, - *Appellant.*
MARGARET, COUNTESS OF CAITHNESS, *Respondent.*

House of Lords, 18*th May* 1757.

ALIMENT.—A wife agreed to accept of a separate aliment from her