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occupied by him, and that the greatest part of it has been enclosed by him without molestation. Supposing the respondent to have proved a right of pasturage on the said Ness, which he has not done, this being a mere servitude, would not confer a right to the kelp shores.

Pleaded for the Respondent.—The question here depends solely upon immemorial possession, and the proof of that possession. The lands of Windbreck form a part of the town of Braebuster. To this town the kelp shores have been immemorially attached, and have been possessed by the respondent in proportion to his interest in the town. The lands in Orkney held by udal tenure have never been feudalized, so that the possessors are not required to exhibit written titles to instruct their right; but the overwhelming amount of evidence as to the respondent's possession, places this case beyond all doubt.

After hearing Counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed with £50 costs.

For the Appellant, *Sir Saml. Romilly, J. P. Grant.*

For the Respondent, *Fra. Horner, R. Jameson.*

NOTE.—Unreported in the Court of Session.

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v.
LUMSDAINE.

[Fac. Coll., vol. xvi., p. 299].

JOHN BALFOUR of Balbirnie, . . *Appellant;*

Major JOHN LUMSDAINE of Lathallan, . . *Respondent.*

House of Lords, 14th March 1816.

ENTAIL—PRESCRIPTION.—The heirs under a certain entail were also heirs of line, and, on succeeding, possessed on titles as heirs of line, and not under the entail for thirty years, and on apparency for a period beyond the negative prescription. A party having succeeded under this title, but who was excluded by the entail, an heir of entail raised the present action to set his right aside. Held that the negative prescription did not cut off the entail, there being no conflicting infeftments.

1753.

John Lumsdaine, W.S., was unlimited proprietor of the estates Blanerne and of Lumsdaine. In 1753, he executed an entail of these estates, "to and in favour of the said James "Lumsdaine, my eldest son, and the heirs male or female to "be procreate of his body, and the heirs of their bodies, whom

" failing, to John Lumsdaine, my second son, and the heirs " male or female to be procreate of his body, and the heirs " of their bodies; whom failing, to Andrew Balfour, third " lawful son of Robert Balfour Ramsay of Balbirnie, only " lawful son procreate betwixt the deceased George Balfour " of Balbirnie, and Agnes Lumsdaine, my sister German, " and the heirs whatsoever of the body of the said Andrew " Balfour," whom failing, to other substitutes, until it came to the respondent, and other Lumsdaines after him.

The entail contained strict prohibitory, irritant and resolutive clauses against altering the order of succession.

It also contained an exclusion of Andrew, Robert, and James Balfour, in case they came to succeed to their family estates of Balbirnie and Whitehill.

March 5, 1756.

The entail was duly recorded. The maker of this entail died in 1758. He was succeeded by his eldest son, James Lumsdaine, the first heir of entail.

1758.

He made up no titles to the estates, and died unmarried in 1764, in a state of apparency.

1764.

Upon his death, John Lumsdaine, late of Blanerne, the second son of the entailer, succeeded to the estates. In 1769, he entered into a post-nuptial contract of marriage, in which he granted a procuratory for resigning the whole lands for new infeftments thereof, to be granted to himself and the heirs male of his then marriage; whom failing, to the heirs male of his body of any subsequent marriage; whom failing, to the heirs female of his then marriage; whom failing, to his heirs female of any subsequent marriage; whom all failing, to his own nearest heirs and assignees whatsoever.

1769.

1776.

Afterwards he made up titles in 1776, as heir of line, and was served heir in general of line to his father, taking no notice of the entail of 1753. He thereupon obtained precept of clare from the superior, and was infeft in December of the same year.

1803.

He died without issue in 1803, and the appellant, also passing by the entail, served heir of line to him, by a general service, and was infeft 12th March 1804.

1804.

The respondent then brought his action of reduction, improbation, and declarator, in 1808, to have it found and declared, 1st, That the appellant had no right or title to the said lands of Blanerne, as not being called to the succession thereof by the above entail, and that the said lands belonged to the heirs of tailzie and provision. 2d, That the said John Balfour, as proprietor of the estate of Balbirnie, is excluded

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and debarred by personal exclusion and exception in said entail from succeeding to the entailed estate of Blanerne, and that the said James Balfour, now General James Balfour, as next surviving heir of tailzie and provision, and failing the said General and his issue, then the respondent and the heirs of provision substitute to him, are entitled to succeed.

The question, therefore, was, Whether the entail was wrought off by the negative prescription? It will be observed, that those who were called to the succession, had possessed, beyond the period of the forty years' prescription, first, upon apparency, but afterwards for a period much shorter than forty years, upon titles made up by them in fee simple.

The defences stated to the action were, 1st, No title to sue. 2d, His title to insist in the action was cut off by the lapse of forty years, that is, by the negative prescription. It was answered, that the rights of property cannot be lost by the negative prescription, unless it be also accompanied by the positive prescription.

May 31, Signed June 1, 1811.

Mutual informations having been ordered by the Lord Ordinary to report the case to the Court, the Second Division pronounced this interlocutor:—"Upon the report of Lord "Robertson, and having advised the mutual informations "for the parties, the Lords sustain the pursuer's title to "insist in this action; and find that the defender has pro- "duced no sufficient title to exclude, and remit to the Lord "Ordinary to proceed accordingly: Find the defender "liable in the expenses hitherto incurred, appoint an account "thereof to be given in, and remit to the auditor to report "thereon.*

July 4, 1811.

The defender having satisfied the production before the Lord Ordinary, his Lordship sustained "the reasons of reduc- "tion, and repels the defences, and reduces, decerns and "declares in terms of the conclusions of the libel and amend-

Dec. 10, 1811.

"ment thereof." And on reclaiming petition, the Court unanimously adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The appellant's right to the lands in question being established by the positive prescription, the respondent cannot be allowed to disquiet his possession. By the Act 1617, c. 12, it is enacted, "That whosoever

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* The judges were unanimous in holding, that the decision in the case of Welsh, *ante*, p. 65, applied here.

" his Majesty's lieges, their predecessors and authors, have " brooked (enjoyed) heretofore, or shall happen to brook in " time coming, by themselves, their tenants and others having " their rights, their lands, baronies, annual rents, and other " heritages, by virtue of their heritable infeftments made to " them by his Majesty or others, their superiors and authors, " for the space of forty years continually and together, fol- " lowing and ensuing the dates of their said infeftments, and " that peaceably and without any lawful interruption made " to them during the said space of forty years, shall never " be troubled or inquieted in the heritable right and property " of the said lands," " by any other person pretending right " to the same," " provided they be able to show and produce " a charter of the said lands and others foresaid," " with " instrument of sasine following thereupon, or where there " is no charter extant, that they show and produce instru- " ments of sasine one or more, continued and standing together " for forty years, proceeding upon retour or precepts of clare " constat." In the precise terms of this statute, the appellant pleads that he and his predecessors have been in the possession of the lands in question by virtue of charters and sasines standing together for upwards of forty years, dating from the investiture of John Lumsdaine, senior, while no interruption is alleged to have taken place till the present action was commenced in September 1808, long after the forty years' prescription had elapsed.

The respondent objects that the charters and infeftments in the person of Mr Lumsdaine, senior, were altered and done away by the deed 1753; and that the possession of his sons, till the youngest of them made up his titles as heir at law, in 1776, must be ascribed to the deed of entail by which they were called, and in this way forty years have not elapsed at the commencement of this action. But to this the appellant replies, that the deed, in 1753, remained a personal right, which could not be the title to the estate till completed, in opposition to the complete feudal right, and more especially such a deed as this, which was not a conveyance, but merely an obligation to convey, a power to resign the lands and alter the destination which was never executed. The possession of the apparent heir is a continuation of the possession of the ancestor, and on the same feudal title, upon the clear principle of law which considers him *eadem persona cum defuncto*; and the heir's possession on his apparency, is, therefore, to be reckoned in the period of prescription, as was solemnly

Jan. 22, 1791. Fac. Coll., vol. x., p. 325; et Mor. p. 10810.

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decided by the unanimous opinion of the judges in the case of Caitcheon *v.* Ramsay, in conformity to many prior decisions. Where a person has two titles, on either of which he may possess, as the sons of Lumsdaine, senior, had in this case, his possession must be ascribed to the most favourable title, to an unlimited, in preference to a limited, one. And that the sons did, in fact, all along possess, as heirs at law, and unlimited fiars, and not under the personal entail, is demonstrated by the conduct of John Lumsdaine, the younger, in the contract of marriage in 1769, and in making up titles, as heir to his father, in 1776.

2. The right which the respondent asserts to be in him as a substitute heir by the deed 1753, has been lost by the *negative* prescription, and cannot now be the ground of action, or have any effect in operation. This negative prescription is established by the Act 1469, c. 28, and applies to every personal obligation or right of action which can be figured, and which are not excepted by the Acts, and it is of no importance in what form the right of the creditor or the obligation is constituted. A burden is laid upon the party in whose favour the right of action is conceived, or in whom it vests. If he does not follow forth his right in forty years, he loses it. The negative prescription depends in no degree on the title by which another person holds; it operates as a direct and complete discharge and renunciation by the person who was previously entitled to sue or claim as a consequence of his neglect. Now, it is undeniable, that the ground of the present action is nothing else than a *jus crediti*, a right to sue for the preservation or enjoyment of what was given by the deed of entail. That deed (if good), gave to the heirs or substitutes, a right to insist that all its provisions be fulfilled, and titles made up in conformity to it. But this not having been done, their right under the entail was cut off by the negative prescription.

Pleaded for the Respondent.—The negative prescription, equally with the positive, did not begin to run in this case until a title hostile to the estate was made up by the late Mr Lumsdaine, in 1776; till that period, it was to be held that the possession of his elder brother, and of himself, had been, by virtue of the entail executed by their late father; and until such hostile title was made up, the substitute heirs of entail were *non valentes agere.*

2. It is settled law, in a case like the present, that the negative prescription can only be pleaded by a person

who has established in himself a title by the positive prescription; and the appellant has no such title in him in this case.

3. The appellant, in a lease, in which he was a party, made subsequently to the death of the late Mr John Lumsdaine, recognized and acknowledged the entail in 1753 to be valid and effectual in favour of his brother, the substitute-heir then entitled to possession; and, according to that recognition and acknowledgment, General Balfour is now the heir entitled to take under the entail.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *David Cathcart, James Moncrieff.*

For the Respondent, *Sir Saml. Romilly, John Clerk, W. G. Adam.*

[Fac. Coll., vol. xvi., p. 17.]

Miss MARGARET CARMICHAEL, only child of the late Sir John Gibson Carmichael of Skirling, Bart., and her Tutors and Curators, ... } *Appellants;*

SIR THOMAS GIBSON CARMICHAEL of Skirling, Bart., ... *Respondent.*

House of Lords, 15th May 1816.

TAILZIE—SERVICE—PASSIVE TITLE.—1st, A party possessing an estate on apparency, executed an entail, in which there was an obligation binding his heirs, "to fulfil and perform the whole obligations prestable by me at my death." Held, that though he could not make an effectual entail on apparency, yet that the obligation in the said entail descended, and was a ground to compel the heir of line to implement the conditions of the entail, and to make up proper titles, in terms thereof; and, 2d, That this obligation was onerous, and transmitted in terms of the Act 1695, c. 14, against the heir passing by and serving to the ancestor last infeft.

The late James Carmichael, W.S., died proprietor of the estate of Easter Hailes. He was succeeded by his brother, the Earl of Hyndford, who was served and retoured heir in gene-