defenders have no interest to plead the negative prescription; and, therefore, decerned and ordained them to convey and make over said debt accordingly, but with warrandice from their own fact and deed allenarly.' No 18.

Lord Ordinary, *Alva.* Act. *G. B. Hepburn.* Alt. *M'Laurin.* Clerk, *Colquhoun.*
L. *Fac. Col. No 67. p. 107.*

*** This case was appealed:

1782. *April* 22.—The House of Lords ORDERED and ADJUDGED, that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 100 costs.

SECT. II.

Negative prescription pleadable only by a person infeft.—Effect relative to the original tenure of land.—Claims of relief.

1725. *July* 20.
FRANCIS PATON, Portioner of Hillfoot, *against* JOHN DRYSDALE of Townhead, and Others.

No 19.
In a reduction of an adjudication, found, that the adjudger, tho' forty years in possession, could not plead the negative prescription, not having been infeft.

FRANCIS PATON, as heir to his predecessor in the lands of Hillfoot, insisted in a reduction against John Drysdale, of an adjudication led at the instance of Robert Blackburn, in the year 1679, against Paton's predecessor; to which adjudication Drysdale had right, and, in virtue whereof, he and his authors had possessed the lands for upwards of 40 years without interruption.

The grounds of reduction were certain nullities objected to the adjudication; particularly, that it was pronounced and extracted upon the same day. Particular answers were made to the nullities; but a general defence was *pleaded* for Drysdale, namely, That he and his predecessors and authors having obtained possession upon the adjudication, and continued therein upwards of 40 years, his title was secured by the positive prescription; and no action being brought within that time against them, the pursuer could not now be allowed to object the nullities, because he was excluded by the negative prescription.

No 19.

It was *answered* for the pursuer; That nothing could hinder him, as heir to his predecessor, to claim the property of the lands, unless his predecessor had been denuded of it, or the defender had acquired right thereto by the positive prescription, neither of which was the present case. It was true, that an expired adjudication is a good title to denude a debtor; but then, all objections to which it is liable are proponable at any time, by way of exception or reply, when the same is set up as a title to exclude the proprietor, unless it is secured by the positive prescription, since exceptions and objections of nullities are perpetual, and the longest course of possession cannot make the title, *viz.* the adjudication, which is only a personal right, better than it originally was. As to the positive prescription, it requires an infeftment as the title, and 40 years continued possession thereupon, by the statute 1617; but the defender's infeftment on his adjudication was no earlier than the 1719; so that he cannot found on the positive prescription: And as to the negative, it cannot defeat the pursuer's right of property, being only competent to debtors in obligations whereon no documents had been taken by the creditors for the course of 40 years, for the obligations became thereby extinguished, the prescription being a legal discharge; but rights of property could not be cut off in that manner, for they could not be lost to one, unless they were acquired to another.

Thus in the civil law, *Usucapio* (which is the same with the positive prescription in our law) required a just title as well as continued possession; and without a proper title the longest possession could not avail. And, by later constitutions, the prescription of obligations was introduced, which only afforded a defence to the debtor against any obligation not sued upon within the time thereby limited.

After this example, the prescription of heritable rights was introduced into our law by the act 1617, before which, no such prescription took place, though the negative prescription of obligations was long before in use, by the old statute of James III. and the clause in the act 1617, concerning that prescription, is of the same kind, extending it, indeed, to heritable obligations; but this clause, touching the negative prescription, does not concern rights of property more than the old statute did; and the chief intendment of the act 1617, as appears from the preamble, was to regulate the prescription of land rights, (commonly called the positive prescription,) to which (as is above said) it requires infeftment and 40 years uninterrupted possession.

It was *replied* for the defender, 1*mo*, That though the act 1617 mentions an infeftment as the title of a positive prescription, yet it does not exclude other titles of possession, such as an adjudication, which being a good title of possession, may found the adjudger in the positive prescription, if continued for 40 years; and this seems to be the opinion of Sir George M'Kenzie in his Observations upon that act.

But, 2*do*, Though the defender were not entitled, by that act, to the positive prescription, yet the pursuer was excluded, by the negative, from making any

objections to the adjudication, since he did not insist on them within 40 years of its date, or, at least, of possession's being obtained thereon. The clause in the foresaid statute 1617 bears, That all actions, competent upon heritable bonds, reversions, contracts, or others whatsoever, shall be pursued within the space of 40 years: From which it was *contended*, That the general words, OTHERS WHATSOEVER, must comprehend all claims for which an action was competent, and, consequently, claims of property; and upon this ground it was, that the LORDS found an action of reduction, *ex capite lecti*, prescribed *non utendo* within 40 years; March 18th 1707, Murray against Irvine, No 32. p. 10721. No 19.

3*tio*, The foresaid clause mentions reversions expressly, which do prescribe, with an exception of those incorporated *in gremio juris*, which cannot relate to legal reversions; and, therefore, when the pursuer pretends to object nullities to the adjudication, so as to open it, and render the same still redeemable, he is, by the act, expressly debarred *non utendo* for upwards of 40 years, and it must remain an absolute and irredeemable right.

THE LORDS found, that the adjudger, though 40 years in possession, yet, not being infeft, he could not object the negative prescription against the pursuer, as heir.

Reporter, *Lord Newhall.* Act. *And. Macdowal.* Alt. *Jo. Forbes.* Clerk, *Gibson.*

Fol. Dic. v. 4. *p.* 91. *Edgar, p.* 199.

1768. *August* 5.

DUKE of BUCCLEUCH *against* The OFFICERS of STATE.

No 20.
Original tenure of lands lost by the negative prescription.

WALTER, Earl of Buccleuch, purchased the barony of Ewisdale from Sir John Ker, who became bound to infeft him, either *de me*, for a feu-duty of 160 merks, or *a me*. The Earl was infeft base, and got a perpetual discharge of the feu-duty.

Anne, Countess of Buccleuch, in her contract of marriage with the Duke of Monmouth, granted procuratory for resigning her lands, in terms of the contract; and a charter was thereon expede, under the Great Seal, comprehending the barony of Ewisdale, as if holding feu of the Crown, for payment of 160 merks, though the Countess was not crown-vassal in that barony.

The feu-duty never had been exacted, nor entered in the property-rolls in Exchequer. At length, in 1760, the Barons made an order that the Duke should be charged with the feu-duties for 40 years back, and in time coming.

The Duke brought an action in the Court of Session, to have it found and declared, that, as the barony of Ewisdale was formerly held ward of the Crown, so he was now entitled to hold it blanch, and to have all subsequent charters and retours expede in those terms.