

1771. December 6.

BOYD PORTERFIELD of Porterfield *against* JOANNA, MARGARET, and
LILIAS PORTERFIELDS.

No 15.

Found that an obligation to execute an entail, fell under the negative prescription.

IN the year 1716, Gabriel Porterfield of Hapland granted to Porterfield of Porterfield, a declaration and obligation; which, after reciting several debts due by Hapland to Porterfield, and that favours had been shewn him in adjusting these, contains an obligation upon his part, as to delivering up certain receipts and other deeds; and then stipulates, as follows: "And sicklike, I bind and oblige me and my foresaids, to make a destination and tailzie, that, failing of me, and the heirs-male of my body, the lands and estate of Hapland, or what parts thereof I shall happen to acquire, are wholly to accresce to Alexander Porterfield of that Ilk, and the heirs-male of his body; reserving always full power and liberty to me, if there be heirs-female, or that any of my sisters shall survive me, to give them such a competency as I shall think fit."

The estate of Hapland was much incumbered with debt; so that Gabriel Porterfield, instead of entering heir, brought it to sale upon the title of apparen- cy; and having, in 1732, made the purchase for his own behoof, it was, by the decree of sale, adjudged to him, his heirs, and assigns whatsoever.

IN the year 1742, Porterfield of Porterfield executed an entail of his estate; wherein, failing the heirs male of his own family, and of Porterfield of Full- wood his uncle, he called to the succession the heirs-male of Porterfield of Hap- land his cousin.

The issue-male of Hapland having failed, his three daughters, the defenders, entered into possession of the estate; upon which Porterfield, the pursuer, in 1768, brought an action against them, concluding to have it found and de- clared, that, as heir-male of Alexander Porterfield his grandfather, he had good and undoubted right to the estate of Hapland, in terms of the obligation in 1716; and that the defenders and their husbands should make up titles, and thereupon grant a valid disposition and tailzie of that estate in favour of the pursuer and the heirs-male of his body.

IN defence, it was stated, *imo*, That the obligation libelled on was a mono- lateral deed, merely gratuitous upon the part of Hapland; that it was there- fore alterable by him at pleasure, and *de facto* was altered, in so far as the lands having been brought to a judicial sale, they had been purchased by Gabriel Porterfield, and the rights taken to him, his heirs, and assignees. *2do*, That the obligation being dated so far back as the 1716, and no document having been taken thereon from that period to the commencement of the present ac- tion, the obligation was cut off by the negative prescription.

The LORD ORDINARY sustained the defences, and thereafter pronounced dif- ferent interlocutors in the defenders favour. The question having been sub-

mitted to the Court, a great deal of argument was thrown out by the pursuer, to shew that the deed founded on was onerous—by the defenders that it was gratuitous; but as that resolved merely into a particular investigation of circumstances, from which either the one inference or the other was to be drawn, and as the Court was ultimately satisfied that the obligation was of a gratuitous nature, or, at any rate, that the onerosity was not proved, and of course capable of being altered, the legal point that came to be argued was, the second defence of the negative prescription. Upon that point, accordingly,

The pursuer *pleaded*;

1mo, As neither of the statutes 1469, c. 28. and 1474, c. 54, founded on by the defenders, specified the precise time at which prescription began to run, it could not be held as commencing from the date of the deed, but from the time only when it might take effect. In the case of a bond, it did not run from the date, but from the term of payment; it being an absolute rule in every case, *contra non valentem agere cum effectu non currit prescriptio*, see Div. 13, b. t. In the present instance, accordingly, it was not from the date of the obligation in 1716, but from the 1732, when, by the purchase of the estate, Hapland became for the first time capable of implementing his obligation, that the forty years could be counted; which was therefore interrupted in sufficient time by the present action.

2do, According to the terms of the obligation, and in the event that an entail had been executed agreeable to it, the pursuer could have taken nothing till the issue-male of Hapland's body had failed. This did not happen till the year 1766; he could not till then have brought an action to any effect; and it had been found, that when the lineal heirs male of the granter existed, so that the collateral heirs-male were not *valentes agere cum effectu*, the negative prescription could not take place. 31st December 1695, Innes *contra* Innes, *infra*, h. t.

The defender *pleaded*;

1mo, By the statutes 1469, c. 28. and 1474, c. 54. no distinction was made as to the nature of the deeds that fell under the negative prescription; but it was in express terms declared, That all obligations made or to be made, that were not followed out within forty years, should prescribe, and be of no avail. These enactments were pointedly applicable to the present case; the obligation granted in 1716 contained no actual settlement of the estate, and consequently could not be the title of possession. It imported merely an obligation upon the granter to execute an entail and destination, and was of course actionable from the moment it was granted.

2do, The pursuer's plea, of being *non valens agere cum effectu*, was erroneous. For though he could not, till the failure of Hapland's heirs male, have claimed possession of the estate, it was always in his power to have saved the deed from being lost, by making it the foundation of an action against the granter for

No 15. implement, by his executing a settlement of the estate in terms of the obligation.

The following judgment was pronounced: " Find the onerosity of the bond of tailzie by Hapland not instructed; and therefore that it was alterable by him at pleasure, and was altered accordingly; and farther find, that no action having been brought, or other document having been taken upon the said bond or obligation within forty years of its date, the same falls under and is cut off by the negative prescription; and therefore assoilzie the defenders." A reclaiming petition was refused without answers.

Lord Ordinary, *Monbaddo.* For Boyd Porterfield, *Ilay Campbell, J. Swinton.*
For Joanna, Margaret, and Lillias Porterfields, *Lockhart.* Clerk, *Campbell.*

R. H.

Fac. Col. No 115. p. 340.

1774. July 6.

Mr JOHN M'AULAY, Minister of Inverary, *against* DAVID BLAIR,
Factor for the EARL of BUTE.

No 16.
A decree of locality is subject to prescription, and may be lost *non utendo* for 40 years.

IN the 1651 Mr Alexander Gordon, minister of the English congregation at Inverary, obtained a decree of locality out of the teinds of the Bishops of Argyle and of the Isles, before the High Commission for plantation of churches, appointed by Parliament 1649. A horning was raised upon this decree, at Mr Gordon's instance, in the 1691.

Whether Mr Gordon had attained possession, upon this decree, of the three chalders of victual thereby payable out of the island of Bute, did not appear certain; but, in July 1691, the Lords Commissioners of His Majesty's Treasury, upon consideration of a petition for Mr Gordon, with the said decree of locality, appointed the chamberlains of the rents of the bishopricks, above specified, to pay his stipend, conform to the said decree, for the years 1689 and 1690, and he obtained a renewal of this order, crops 1692 and 1693.

The synod of Argyle obtained a grant from Queen Anne, in the 1705, of the rents and revenues of the said two bishopricks, for the pious uses therein expressed.

The Earl of Bute, in the 1723, obtained a tack from the Crown of the teinds, parsonage and vicarage, payable to the Crown, as come in place of the Bishops of the Isles, furth of the whole lands within the island of Bute, for payment of ten merks Scots, and relieving the Crown of all annuities, taxations, and other public burdens, imposed or to be imposed, upon the said lands, and of the stipends payable furth thereof to the ministers within the island of Bute; and the family have obtained renewals of these tacks of teinds.

Mr M'Aulay, the present minister of Inverary, having obtained letters of horning, charged the factor of the Earl of Bute to make payment of the three chalders of victual, conform to said decree of locality in 1651, for the years