prove, when read with the deed of 1728, which professes to rectify this discrepancy, that *that* deed was rejected. The deed, besides, was merely conditional, and only to take place on the son's making payment of £950 to the grandfather's nephew. With regard again to the deed of 1728, the deed itself is not produced, but only a scroll; but even if extant, this disposition was also conditional; and from the correspondence produced, it was evident that the parties themselves viewed it in that light. Such therefore being the nature and circumstances of the transactions 1726 and 1728, and such the sense of the parties at the time, nothing can be more iniquitous than the attempt now made by the appellant, after the acquiescence of his father for more than forty years. The title of the respondent is indisputable under the deed of 1715, by which his father, Captain Patrick, became entitled to the estate under an absolute and irrevocable conveyance to him, and the *heirs male of his body*, with express obligation and warranty against any other deed or disposition, in prejudice thereof. After this absolute conveyance and warranty, the grandfather had no right or power to make any subsequent disposition of the estate, conveying it away to another. On these grounds, the deeds 1726 and 1728 are absolutely null and void.

After hearing counsel, it was

Declared that the deed of the 4th of January 1726 was a complete and effectual disposition and settlement of the estate of Bargaly by Andrew Heron, and it is therefore ordered and adjudged that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session to proceed accordingly.

For Appellant, *C. Yorke, H. Dalrymple.*
For Respondent, *Al. Wedderburn, Tho. Lockhart.*

Note.—Unreported.

JOHN CAMPBELL of Ottar, - - *Appellant;*
ALEXANDER CAMPBELL, and WILLIAM WILSON, *Respondents.*

House of Lords, 10*th Feb.* 1770.

POSITIVE PRESCRIPTION—INTERRUPTION OF DO.—Citation in summons of exhibition *ad deliberandum*, does it interrupt? Disability by forfeiture is no *non valentia agere*. In counting deduc-

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tion on account of minorities, the time within which a posthumous child is in the *utero* is not to be counted. The prescriptive possession is not to be affected by jointures or liferents on part of the estate at the time he acquired right to the same, if the whole lands life-rented are conveyed to him, and possession had otherwise.

Colin Campbell, the appellant's grandfather, purchased in
1678. the year 1678 the estate of Ottar from the Earl of Argyle, and he and his descendants had ever since possessed the same as absolute owners under feudal titles.

In the present action, a claim was made to dispossess the appellant of the estate, by the respondent Campbell, stating himself to be a descendant of a family who were owners of the estate before the Earl of Argyle became proprietor, and from whom it was alleged to have been apprised for debts far below its value.

The proprietor of Ottar before the Earl of Argyle was a Colin Campbell, who died in 1620, leaving Archibald, Colin, and other sons. Archibald, the eldest, who succeeded his father, married Ann Stirling, and by marriage contract settled the estate of Ottar, holden of the family of Argyle, and the lands of Evenachan holden of Lamont, upon his *heirs male*, charged with provisions for daughters, and a liferent locality or jointure to his wife Ann Stirling. He
1651. died in 1651, leaving issue one daughter, Jane Campbell. The estate being limited to heirs male, then descended to
1659. his younger brother Colin, who was infeft in 1659. When Colin Campbell came to possess the estate, he was much in debt, and the estate itself was already charged with debts which he was unable to clear off. Jane Campbell and her husband, along with her mother, Ann Stirling, or William Stirling her assignee, had concurred in apprising of the estate of Ottar and Evenachan for the daughter's portion, consisting of £277. 15s. 6d., and for £122. 4s. 3d. for aliments.

Upon these a charter of apprising was obtained from the Crown, (the superior, the Earl of Argyle being under at-
June, 1663. tainder), and upon this infeftment was taken. Jane thereafter had sold and conveyed to her Ann Stirling's right and interest in the above apprising, by her brother and assignee William Stirling; which apprising, unless redeemed and satisfied within the legal or ten years, gave her in law an absolute property in the estate.

The apprising of Jane Campbell was never redeemed by
1672. Colin Campbell. He died without issue before the year

1672, and was succeeded by his younger brother Patrick, who made up titles to Evenachan and Darmacherichbeg, but never to Ottar, nor did he ever take up possession of that estate.

In this year, Jane Campbell conveyed to the appellant's author, the Earl of Argyle, all the lands contained in the apprising, assigning to him all the decrees, charters, and other relative writings, together with the rents, mails, farms, kains, and customs of the hail lands. This disposition, which was granted in consideration of the Earl conveying to Jane the lands of Stronderer and Stronwhilling, contained a procuratory of *resignation ad remanentiam*, whereby the lands of Ottar were resigned into the hands of the Earl, as superior, of this date, and instrument recorded on the 1st June thereafter. June 1, 1672. May 20, 1674.

In virtue of these wadsets, Jane Campbell had entered into possession of the estate of Ottar, previous to her sale to the Earl. And the Earl himself had entered into possession, by uplifting the feu-duties and rents of the estate, as was proved by the rental books of the Argyle estates. The Earl then conveyed to the appellant's grandfather for a price immediately paid. In this disposition there is an exception in the assignment of the rents, mails, and duties, applicable to the lands over which Ann Stirling's liferent extended, viz. Largiebeg, Largiemore, Kilfail, and the lands of Corra. No infeftment followed upon this conveyance, but in implement of it a charter was granted by the Earl, on which infeftment followed, and in which there was an exception in the warrandice clause of Ann Stirling's jointure.

In virtue of these writs and titles, Colin Campbell the purchaser, and appellant's grandfather, entered into immediate possession of *all* the lands of the estate, with the exception of those held by Ann Stirling in jointure. He also soon thereafter obtained possession of the jointure lands, by a transaction in which she assigned him her liferent right.

The appellant therefore stated the defence to this action, that, in virtue of these two distinct titles—the disposition to the property of the whole, and assignation of the liferent, and the possession had upon them for more than double the prescriptive period, the pursuer totally excluded by the statute 1617, and that he might ascribe his prescriptive possession to either title.

The respondent replied, that, by minorities and forfeitures in his family, which were allowed as deductions from the

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years of prescriptive possession, reduced it to a period of 39 years and 5 months and 24 hours, and so within the prescriptive period. The Court allowed a proof, the one of prescriptive possession, the other of interruption thereof. Of the interruption proof was led of, 1st, Minorities; 2d, Forfeitures; and, 3d, Citation on Summons of Exhibition *ad deliberandum*.

Dec. 20, 1765. The Court, of this date, pronounced this interlocutor, "Find that the titles produced for the defenders, with the "possession following thereon, are sufficient to exclude the "pursuer from the subjects under challenge, and therefore "assoilzie the defenders (appellants)."

The respondent reclaimed, contending that the possession of the appellant's ancestor had not been total from the date of his purchase, the liferentrix being in possession of certain parts of the estate, viz. of Argadden and of Largiebeg, Largiemore, down to the year 1691; and, therefore, these were sufficient to interrupt and exclude the possession under the statute 1617.

After considering the argument on this point, the Court,
Aug. 7, 1766. of this date, "Find that the defender has produced suffi-"ciently to exclude the pursuer's title, in so far as concerns "the lands of Argadden, which were liferented by Mary "Campbell, and in so far they adhere to their former inter-"locutor, and refuse the desire of the petition; but find the "defender has not produced sufficiently to exclude the pur-"suer's title, in so far as concerns the lands of Largiebeg "and Largiemore, the lands of Kilfail, and the just and "equal half of the lands of Corra, which were liferented by "Ann Stirling, and remit to Lord Auchinleck, this week's "Ordinary on the Bills, to proceed." And on reclaiming
Feb. 18, 1767. petition, the Court adhered.

Against this interlocutor the present appeal was brought.

Pleaded for the Appellant.—The appellant's ancestors purchased *bona fide* the estate of Ottar at its full value, and have possessed it unchallenged, for a period of nearly 89 years, more than double the number of years required by the statute 1617, to quiet the mind of every proprietor of land. The respondent's ancestors, if such they were, had been divested even prior to that period by apprising creditors, who at the expiry of the legal term of redemption, became owners, and might and did dispose of the estate. Jane Campbell and William Stirling apprised the estate, and obtained charter and infeftment thereon in 1663, from which time, if necessary, the prescriptive right might be maintained

to commence. They in 1672 assigned their whole interest to the Earl of Argyle, the superior, who bought up other debts affecting the estate, and on 20th May 1674, resigned the lands to him in property, whereby the property and superiority became consolidated; and from this period, the said Earl and the appellant, as now in his right, had right to the benefit of prescription, founded on possession on the part of Jane Campbell, by her uplifting the rents. Then the appellant's grandfather purchased the estate from the Earl in 1678, and he and his ancestors have possessed from that date, down to the raising of the present action in 1759, without challenge.

The respondents admit the prescription to have run from 9th April 1678, and likewise admitted that possession followed upon this disposition on the part of the appellant's grandfather, with the exception of the jointure lands. But there is sufficient evidence also of his having afterwards acquired possession of the jointure lands, under a valid assignation to the liferent right. In 1687 M'Lean and Ann Campbell, as possessors of the whole estate of Ottar, gave up to the Government Commissioners of Valuation the valuation thereof, as possessed by them, which could not have been the case had Ann Stirling still continued to possess her jointure lands.

The deductions claimed in respect of the minorities are not founded on the statute 1617; the deductions directed by that statute having reference to the negative prescription alone. The same cannot be here pleaded to the positive. But even supposing it could, the minority of Neil Campbell is not made out. Instead of being 15 years of age in 1690, it is brought out in evidence that he must have been 30 or 40 years. Alexander the writer, his posthumous son, for whom is claimed a deduction of 21 years and *seven months*, can be entitled to no more than his years of minority (21 years), and not to the seven months during which he was in his mother's womb *in esse*. And as to Neil Campbell's *forfeiture*, there is no ground in law for any deduction on that account. Looking, therefore, to the proofs of possession, which, for so ancient a period, are as satisfactory as well can be expected, it ought to be held sufficient to sustain the prescriptive title now pleaded in bar of the present action.

Pleaded for the Respondent.—The title of the respondent to the estate of Ottar, if not barred by prescription, is clear

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and certain. It is to be kept in view, that prescription is always an unfavourable, sometimes a very ungracious plea; for however expedient it may be to settle the tenure of property, by discouraging old and antiquated claims, when the evidence for rebutting them have disappeared, or been laid aside, yet it is manifest the claims of those who have been unlawfully deprived, are not therefore to be utterly silenced. In all cases, therefore, law and equity will judge strictly of the title necessary to constitute such a plea, ere it totally shut out the claimant. If, therefore, there be any defect in the title necessary to constitute this prescriptive right, this will be availing. And as the possession here, which is a requisite of the statute, has not been complete, it follows the title cannot be pleaded. It is a bar to such plea, that the respondent's ancestors were *non valentia agere;* or disabled from possession, and therefore minority and forfeitures ought to be deducted. As to those lands possessed in jointure, prescription cannot apply, according to the Roman law *tantum prescriptum quantum possessum;* and the evidence by which the appellant has attempted to prove that neither of these liferents were in continuance after 1768 is entirely inconclusive; whereas the respondent has adduced satisfactory evidence of the continuance of these liferents down to so late a period as must necessarily deprive the appellant of the number of years necessary to complete prescription.

After hearing counsel, it was

Ordered and adjudged that the interlocutors of 7th August 1766, and 18th February 1767, complained of in the original appeal be reversed; and that the interlocutors and parts of interlocutors complained of in the cross appeal be affirmed.

For Appellant, *Jas. Montgomery*, *Al. Forrester.*
For Respondents, *Al. Wedderburn*, *Tho. Flockhart.*

Vide 5 Brown, Sup. 917.

Note.—It is not noticed that this case was reversed in the House of Lords by Professor Bell, vide Principles, § 625. Illustrations, vol. I. pp. 365 et 372; vol. II. p. 54. Vide Napier's Com. on Prescription for strictures on this case, p. 176, et seq. Mr. Napier says, without giving any authority, that the House of Lords "went *not against the doctrine* that the possession of the liferenter *cannot be reckoned* in a course of prescription, but merely determined that where a party produces a charter and sasine, followed by forty years uninterrupted possession of the whole estate *ex facie* embraced by those titles, he produces a title exclusive of such enquiries."