

No 163. ed by prescription ; and, though it was not now extant, the presumption was, that they had originally possessed a seal of cause, or charter.

Lord Ordinary, *Meadowbank.* Act. *Williamson, Jo. Murray.* Agent, *G. Andrew.*
 Alt. *Corbet.* Agent, *D. Freer, W. S.* Clerk, *Menzies.*

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Fac. Col. No 76. p. 170.

S E C T. XIII.

What kind of possession requisite.—Connection of possession.

1665. *June 30.*

YOUNGER *against* JOHNSTONS.

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In a competition of two heirs, one of them founding upon the positive prescription, the liferenter's possession flowing from the defunct's predecessor, was not found profitable to either of them in prejudice of the other ; but the Lords declared that the liferenter's possession should be the possession of him who should be found to be the righteous heir.

ONE Porteous merchant in Edinburgh, having died infest in several tenements in Edinburgh above 50 years ago, his relict possessing them as liferenter to this time ; shortly after his death, one Patrick Porteous was served nearest and lawful heir to him, and thereupon infest, so that his right came by progress to Johnston 40 years after. Younger takes a right from one Stephen Porteous, residenter in Polland, and gets him served nearest heir to the defunct, and thereupon raises reduction of the first retour, and all the infestments following thereupon. Defence absolvitor, because the defender's author being served heir 40 years before the pursuer's author's service, it is prescribed, and likewise being infest 40 years since, all quarrel against the infestment is prescribed. For the first point they condescend upon the second act of Parliament anent prescription, of the reduction of retours, which bears, that if they be not pursued within 20 years, they shall never be quarrellable thereafter.

THE LORDS having considered this case at length, most part thought that the retour could not prescribe by the first act of Parliament, because it excepted minors, and absents out of the country, which they found not to be meant of absents *republicæ causa*, but of any absence, nor that it fell not directly within the second act, which bears expressly, retours to have been reduced thereafter, should be only reduceable within 20 years. Others thought the act might not be extended, but bearing expressly to the future it could not be drawn back, and the act of prescription 1617 meets not this case ; for if, under the prescription of actions not pursued within 40 years, serving of persons to their predecessors' heirs were comprehended, it would impede any person to serve himself heir to any defunct after 40 years, which is yet ordinary, and as to the infestment, they found that it fell not in the case of the act of Parliament 1617, because it was not cled with possession, in respect of the life.

renter's life, whose possession behoved to be the possession of the true heir of her husband. No 164.

But the LORDS did not decide it, seeing the case was rarely occurring, and Johnston's infeftment very old unquarrelled, and recommended the parties to agree.

1665. November 28.—PATRICK PORTEOUS having a tenement of land in Edinburgh, provided his wife thereto in liferent, and died before the year 1608. His wife lives and possesses as liferenter; yet, in *anno* 1608, one Porteous his brother's son, was served and retoured heir to him, and infeft as heir, and disponed the land; which is come through three several singular successors to Johnstons, who are infeft therein as heirs to their father, in *anno* 1655. Younger having acquired a disposition from Stephenlaw Porteous, resider in Polland, causes serve the said Stephenlaw as nearest heir to the said Patrick, whereupon Stephenlaw is infeft, and Younger is infeft. There are now mutual reductions raised by either parties of others' retours and rights; wherein Younger *alleging*, That his author Stephenlaw Porteous was the nearest of kin, in so far as Patrick the defunct had four brethren, and Stephenlaw Porteous was oye to the eldest brother, whereas the other pretended heir was son to the youngest brother, which he offered him to prove; it was *answered* for Johnstons, absolviator from that reason of reduction, because they had established their right by prescription, in so far as they had a progress of infeftments, far beyond the space of 40 years clad with possession by the liferenter, whose possession behoved to be accounted their possession, because the act of Parliament anent prescription bears, that the person infeft being in possession by himself, or by his tenants, or others deriving right from him, and therefore the liferenter's possession is always the fiar's; *2dly*, By the first act of Parliament anent prescriptions of retours, they prescribe if they be not pursued within 20 years; and by the last act of Parliament 1617, anent the prescription of retours, they are declared to be prescribed if they be not quarrelled within three years; and by the general act of prescription 1617, there is a general clause, that all reversions, heritable bonds, and all actions whatsoever, shall prescribe, if they be not followed within 40 years;—by all which Stephenlaw Porteous not being retoured till the year 1655, nor having moved any action against the first retour, this action of reduction, and all other actions competent, are prescribed. It was *answered* for Younger, That he being heir to maintain the right of blood, which is the most important right competent by the law of nations, no statute nor positive law can take it away, unless it be express and evident; for the right of blood can never prescribe, seeing it is certain, that a man may serve himself heir to his predecessor, though he died 1000 years since, if he can instruct his service. And as for the acts of Parliament alleged upon, they cannot take away any right of blood, for the first act of prescription on three years expressly bears, to extend to those within the country, as Stephen-

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law was not ; and the last act is expressly only in relation to retours, to be deduced thereafter, but this first retour quarrelled, was deduced long before, viz. *in anno 1608*. As for the general act of prescription, seeing it mentions not retours, but only infeftments, reversions and heritable bonds ; the general clause of all actions whatsoever ought not to be extended to retours ; especially seeing the meaning of the Parliament appears not to have been extended by them to retours, because the very next act doth specially order the prescription of retours. As to the Johnstons' infeftments, they have not the benefit of prescriptions, never being clad with possession ; for the liferenter's possession, as it was the defunct's possession, so it did continue to be the true apparent heir's possession, although none had been served to this day ; and therefore the service or infeftment following thereupon, cannot take away from the true heir the presumptive possession of law, which the true heir hath. *zady*, No prescription can be valid against others, but those that know, or are at least obliged to know the right whereupon it proceeds ; but the true heir was not obliged to know their service, nor was he obliged to serve himself but when he pleased, especially seeing he could get no benefit as long as the liferenter lived ; and that he was not obliged to know the first service, appears, because he was not called thereto, otherwise than by a general citation at the market cross, to all parties having interest, which is but a point of mere form, and prejudices nobody ; and at least could not prejudice a stranger living out of the country, *animò remanendi*, there being neither special nor general citation, as to persons out of the country on 60 days.

THE LORDS found no weight in this last point, seeing the law requires no citation on 60 days in cases of retours, but only 15 days generally at the market cross, which they find every man, *origine Scotus*, obliged to take notice of, or to have a procurator at Edinburgh, as *in communi patria*, who may search the register of retours, whether in the public register or town books, before they prescribe. They also found that there was no ground for prescription upon the first act of Parliament, as bearing only relation to those in the country, nor upon the last act of Parliament, as bearing only relation to retours, to be deduced thereafter ; neither did they sustain the prescription upon the first part of the general act of prescription ; for they found the liferenter's possession in the competition of two heirs not to be profitable to either of them in prejudice of the other, nor yet to be the possession of singular successors, seeing it flowed not from these singular successors, but from the defunct, to whom both parties pretended to be heir ; but the LORDS found the posterior clause in the act of Parliament, of all actions whatsoever, to extend to the reduction of retours, and to be general as to all actions that may concern heirs, in prejudice of others ; and found it so much the rather to extend to retours, that the next ensuing act finds retours to be deduced thereafter, only to be reduceable within 20 years, and so finds the reduction thereof to prescribe sooner than other

rights, and therefore cannot be thought not to have meant to reach bygone retours by the general act. No 164.

Fol. Dic. v. 2. p. 112. Stair, v. 1. p. 292. & 315.

* * * Gilmour reports this case :

1665. November.—JEAN and BEATRIX JOHNSTONS being infeft in a house in Edinburgh, as heirs to the deceased Robert Johnston their father, who was infeft upon the resignation of Thomas Lawrie, who had right from Robert Johnston elder, who had right from Patrick Porteous of Hawkshaw, who was infeft as heir to Leonard Porteous his uncle, *in anno* 1608; pursues a reduction, improbation, and declarator of property against William Younger, to hear and see it found and declared, that the pursuers have the undoubted right of property to the said tenement to which William Younger alleges right from Stephenlaw Porteous, who is infeft as heir to the said Leonard; and which infeftment and service of Stephenlaw's, was past by a procuratory granted by him to the said William, who likewise pursues the like action against the said Jean and Beatrix; the question being, whether the said Patrick or Stephenlaw Porteous be the true heir of Leonard; the reason of Jean and Beatrix their reduction being, that Stephenlaw's right as heir was prescribed, not being pursued within 40 years. It was *answered* for the said William Younger, That Stephenlaw's right did not prescribe, because there is a liferenter yet living, viz. Catharine Thorbrand, relict of the said umquhile Leonard, who was infeft by her husband, and all this time in possession; so that the prescription could not run during her right and possession; but on the contrary, her possession must be interpreted to be Stephenlaw's possession, being the righteous heir, and not the said Patrick's, who *in anno* 1608 was surreptitiously served. To which it was *answered*, That Patrick being served and infeft heir *in anno* 1608, the possession of the relict must be interpreted Patrick's possession, and consequently the pursuers' and their authors', Patrick being declared heir, and nothing being done by Stephenlaw till the year 1655, long after 40 years.

THE LORDS found, that the relict's possession should be interpreted the possession of the heir, who shall be found the lawful and righteous heir; and therefore finds the allegiance relevant.

Thereafter, it was *alleged* against William Younger's reduction, That it is prescribed upon that clause contained in the act of Parliament 1617, whereby it is declared in general, that all actions upon bonds, obligations and others, shall prescribe not being pursued within 40 years. To which it was *answered*, That the foresaid clause relates only to personal actions upon bonds and sick-like, and not to retours and reductions thereof, whereupon infeftment follows, to which only the first part of the act of prescription relates. *Replied*, That the general clause bearing, and others, must be extended to retours, as well as

No 164. to personal actions; which if they be not intended within 40 years at the instance of another more lawful heir, prescribe also.

Which the LORDS found accordingly.

But thereafter, it was *alleged* for Stephenlaw, that he was minor for as many years as made the prescription sleep and not run out.

Which the LORDS found relevant.

Nota. In this cause the act of prescription of retours by 20 years, was not found to have place in this case, in respect Leonard died before the said act, which is only made *ad futura*. Neither the old act of prescription of three years, which runs not against persons out of the country, and consequently not against Stephenlaw, who all this while has been in Polland and his father also, who was alleged to be the nearest heir to Leonard.

Gilmour, No 169. p. 120.

* * * This case is also reported by Newbyth :

1665. November 28.—JOHN and ANDREW THOMSONS being infest in a tenement in the Castlehill, as heirs portioners to Robert Thomson their father; which Robert was infest upon the resignation of Thomas Lawrie, which Thomas had right thereto from Robert Thomson elder; which Robert had right from Patrick Porteous of Hawkshaw; which Patrick was infest therein as heir to Leonard Porteous his uncle *in anno* 1608; and upon this progress of right, they pursue a summons of improbation, and reduction and declarator against William Young and Steven Porteous in Salvonia, to hear and see it found and declared, that the right of the said tenement belongs unto them, as having right by progress, as said is. The said William Young pretends right thereto from the said Steven Porteous, whom William has caused serve heir to the said Leonard *in anno* 1655, and thereupon has likewise summons of improbation, reduction and declarator; in both the which causes, the production are holden as satisfied. There be two reasons of reduction for reducing the said William his right: *1mo*, That the said Jean and Beatrix their right flows by progress from Patrick Porteous, who was served heir to Leonard his uncle in 1608, now by the space of 55 years, and so cannot be quarrelled, seeing by the act 57. Parliament 1494, reduction of retours are appointed to prescribe in three years; and by the act of Parliament 1617, there is only 20 years allowed to the nearest of kin; and the *second* reason is upon the act of Parliament 1617, anent prescriptions, that they have the benefit of prescriptions having a right and 40 years possession. THE LORDS sustained Jean and Beatrix Thomson their action, and assoilzied them from Young's pursuit, and sustained their author's title founded upon the retour, which they found reducible, and the right to be preserved in regard of the act of Parliament 1617 anent prescriptions; and so found the liferenter's possession, who liferented the said tenement, to be Jean

and Beatrix Johnsons' possession, albeit it was *alleged*, that Stephenlaw Porteous, from whom Young's right flowed, was a stranger, living in Salvonia; albeit he was *origine scotus*, and that he was not obliged to know the municipal statute of Scotland, whereby right of lands did prescribe to the prejudice of the blood.

Newbyth, MS. p. 42.

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1679. *January 21.*FRASER *against* HOG.

A WIFE'S infertment, granted by her husband, who was not himself infert, has not the benefit of the positive prescription by the husband's possession, it being necessary to validate her infertment, that she herself possess 40 years after his death.

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Fol. Dic. v. 2. p. 112. Stair.

*** This case is No 79. p. 10784.

1682. *December.*M'PHERSON *against* M'INTOSH of Stream.

A SUPERIOR having feued some lands to one who continued thereafter to come to the superior's mill for eight or ten years, and having after these years feued the mill to another, *cum multuris solitis, &c.*—the first feuar continued to go to the mill, and to pay insucken multures for the space of 34 years; whereupon the heritor of the mill raised a declarator of thirlage against the heritor of the lands.

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Alleged for the defender; That he had his lands free, and the pursuer could only lay claim to 34 years possession of astricted multures, which is the age of his title to the mill, and could not make up prescription.

Answered for the pursuer; That the years of his author the superior's possession must be reckoned to make up the prescription, and accresce to the pursuer.

THE LORDS found, That the right and possession of the superior, the common author, was to be conjoined to the pursuer's right, to make up the prescription of 40 years; and declared the defender's lands to be astricted to the pursuer's mill.

Fol. Dic. v. 2. p. 112. Harcarse, (PRESCRIPTION.) No 763. p. 216.

1701. *December 3.*FORBES *against* UDNEY.

IN a proof of 40 years possession of a salmon-fishing, a party proved his possession as to fishing by angle, speer, and wand, and that it was accounted

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