No. 85.

liament, and that it were of a most dangerous consequence to sustain a naked sasine that was never adminiculate during all that time; as likewise, that the possession had not been as undoubted and only proprietors of the said lands, but confest on both sides that it was a mixed possession by the Earls of Argyle and the Lairds of M'Naughton jointly, the Earls of Argyle not only being superiors, and having the universal privilege of a forrestry by hunting and keeping of deer, but likewise having sheels, houses, and steadings of mares and kine in several places, as well as the Lairds of M'Naughton. But as to the manner of possession, and how far it might operate, after a great debate, the Lords, before answer, ordained witnesses to be led by both parties.

Gosford, MS. No 335. p. 154.

1680. *June* 25. Earl of Queensberry *against* Earl of Annandale.

No 86.
It was found, that the sasine of an heir who did not himself possess the whole forty years, never being renewed to his successors, who all of them continued to possess as apparent heirs, was no sufficient title of prescription.

In an improbation pursued by the Earl of Queensberry against the Earl of Annandale, the pursuer excluding the defender with a decreet of certification obtained against his author in 1619, *alleged* against it, That it was null, because the Lord Crighton was only called thereto, and not Irvine of Bonshaw, in whose favours Crighton was denuded; 2*do*, That it was prescribed. *Answered* to the *first*, There needed no other be called but Crighton, for he was the immediate vassal, and he was not bound to know Bonshaw the sub-vassal; And as to the *second*, The certification in 1619 interrupted the prescription. The Lords sustained the certification in 1619, in respect the immediate vassal was cited; and repelled the prescription, because of the interruption produced: As also, the Lords found a sasine not sufficient without the precept of *clare constat*, its ground, albeit Annandale offered to prove they were forty years in possession by virtue thereof, unless they would say that he whose sasine it was lived and possessed forty years by virtue thereof; for the possession of his successor within these forty years would not make up the prescription, unless it be proved that that successor was likewise infeft: Yet the Lords, after the certification, found it relevant for Annandale to prove, that the lands controverted were parts and pertinent of the lordship of Johnston, and to Queensberry to prove they were a part of the lordship of Torthorrel, and allowed a mutual probation.

Fol. Dic. v. 2. p. 103. Fountainhall, MS.

1739. *November* 9. Purdie *against* Lord Torphichen.

No 87.

In a competition about the property of a land-estate, one of the parties founded upon the positive prescription, and produced instruments of sasine in the person of his author and his predecessor, standing together for the space of 40

years, proceeding upon precepts of *clare constat*. It was *objected*, with regard to one of the instruments of sasine, taken in the 1696, That it was null, the superior, who granted the precept of *clare constat*, being at that time dead, which was offered to be proved, whereby the precept fell, and consequently this sasine could be no foundation for a positive prescription. In *answer*, it was admitted, That if the sasine upon which the prescription is founded were null in point of solemnity, as wanting symbols, or such like, there could be no prescription: But where there is no objection to the sasine itself, but to the warrant of the sasine, which the possessor is not bound to produce to support his prescription, the very intendment of the statute is, to remove all objections against the title, other than that of falsehood. THE LORDS found, that the infeftment in the 1696 is a habile title of prescription.

No 87.

Fol. Dic. v. 2. *p.* 103.

*** Lord Kilkerran mentions this case in this manner:

THE exception of precepts of *clare constat* in the 35th act of the Parliament 1693, was found to be absolute, and that such precepts became ineffectual, not only where the receiver, but also where the granter died before sasine taken thereon, though still such precept and sasine was understood to be a title of prescription.

But when the obtainer of a precept of *clare constat*, who had taken his sasine after the superior the granter's death, had conveyed the lands to a singular successor, who had obtained from the succeeding superior many years thereafter a confirmation of all rights, titles, and securities, in respect the obtainer of the said precept of *clare constat* was then on life, although the confirmation was only in the foresaid general terms, the same was found to be effectual to the purchaser, and not challengeable by the heir of the ancient vassal predecessor of the obtainer of said precept.

This confirmation was considered as of the same effect as if the superior had renewed the precept of *clare* to the obtainer of the former, though it did not appear whether or not he knew that he was then on life.

Kilkerran, (PRECEPT OF CLARE CONSTAT) *No* 2. *p.* 413.

1724. *July* 28. The EARL of MARCHMONT *against* The EARL of HOME.

No 88.
Found, that the positive prescription of a right runs by an apparent heir's possession, though

THE Earl of Marchmont having right by progress to the lands and barony of Greenlaw, of which the lands of Tennandrie are a part, by titles derived from the Earl of Home's predecessors, and being, as his authors had been, in the peaceable possession, for years beyond memory, of the whole barony of Greenlaw, except the particular lands of Tennandrie, which had been and continued