

the Earl of Home possessed the lands of Tennandrie in virtue of a progress from Mr David Home, the pursuer, as being a singular successor to Lady Anne, could have no benefit by the letter of reversion.

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Duplied to the additional replies to the *third* answer, That admitting that a real right to lands, supported by infeftment and possession of a part, cannot be extinguished *non utendo*, or by the negative prescription, unless there be an acquisition upon the positive prescription by another party; yet that could not avail the pursuer, since the defender pleads the positive prescription upon a connected progress of infeftments from the year 1638, and possession proved as far back as the memory of man can reach; which must be presumed *retro*, unless a direct proof of the contrary were produced. And as to the distinction made by the pursuer between possession on infeftments actually taken and apparen- cy, the defender insisted, That the ancient infeftment *anno* 1638, together with the supervenient infeftment *anno* 1707, excluded any such distinction. And as to the distinction between an infeftment proceeding on a new title, and one proceeding on the erroneous custom of continuing in new charters and retours of antient families, their old possessions after they had been alienated; it was *answered, imo*, That the act 1617 makes no difference as to that point; neither is there any ground of distinction, where the possession continues with the party infeft, and claiming right by prescription. *2do*, The infeftment 1638, to which the defender connects a progress of infeftments supported by possession, was a new and singular title; and though the co-heiresses, upon whose resignation it proceeded, should be supposed to have had no title to the lands of Tennandrie, yet the infeftment being supported by possession was a good title by prescription, though it had flowed originally *a non habente*.

THE LORDS found, That prescription runs by an apparent heir's possession though not infeft, if their predecessors were infeft by virtue of a charter: And found the Earl of Home and his predecessors' immemorial possession, relevant to presume *retro* to the infeftment 1638, without prejudice to the pursuer to elide the defender's and his predecessors' presumed possession by stronger documents in the contrary, and granted diligence to recover such documents. *In presentia*.

Act. Dun. Forbes, H. Dalrymple, & J. Ferguson. Alt. J. Graham, sen. Clerk, Gibson.

Fol. Dic. v. 4. p. 94. Edgar, p. 106.

1752. June 30.

SMITH and BOGLE *against* GRAY.

WHEN one has several rights in his person, prescription cannot be pleaded against any one of them by a third party, because possession is available to preserve to the possessor any right in his person. But it is a different question,

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In what case, where two rights are in the same person, prescription can

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be pleaded
upon the one
right against
the other.

How far a man having different titles, upon either of which he can possess, his heir in that title to which he did ascribe his possession can plead prescription thereon in bar of the heir in the other title? A question which cannot happen while the same heir is heir in both titles, but may, and often does happen where the succession comes to split, by the heirs becoming different in the different titles: And the question is resolved by a distinction, that if by both rights the possessor is unlimited fiar, then prescription cannot run by possession upon the one title against the other; but if one of the titles be an unlimited right, and the other be a right limited, *e. g.* by a tailzie, or a clause of return, then, if the possession has been for forty years upon the unlimited title, the limitation in the other title will be wrought off by prescription, as was found in the case *M'Dougal contra M'Dougal, infra, h. t.*

And agreeable to this distinction, the Lords determined in this case, where James Carbarn had in the year 1671 disposed his little estate, consisting of some acres, to Thomas Carbarn his eldest son of his first marriage; whom failing, to James his second son, and the heirs of his body; which failing, to the heirs of the body of Anna Johnston his second wife. Thomas, who had in him the title both of heir and disponee, chose to serve heir to his father; and Thomas dying without heirs of his body, James served heir to him, and conveyed the subject to William Smith, who was his own heir at law.

Of this disposition, William Gray, as assignee of Anne Skirving his mother, the daughter of Anna Johnston, pursued a reduction on this ground, that the said James Carbarn younger was fatuous and incapable to alienate. To which it was *inter alia* objected for the defender, That as Thomas and James Carbarns had possessed for forty years upon the title of service as heir to James Carbarn elder, the pursuer Gray claiming as heir by the destination of James Carbarn elder, was barred by the positive prescription.

Which the Lords "repelled," in respect that Thomas and James Carbarns, who possessed by services as heirs of line, had also right by the disposition of tailzie made by old James Carbarn, which contained no prohibitory clause or limitation whatsoever, and were therefore understood in law to have possessed by virtue of all titles in their person.

And whereas it was further *objected* for the defender, that he was a singular successor, and upon that ground safe against the reduction; the Lords found, "That there being no more than an incompleat personal minute of sale, and no price paid, the same could not subsist in prejudice of the pursuer." And lastly, on advising the proof, "found the reason of reduction proved, and reduced accordingly.

Fol. Dic. v. 4. p. 95. Kilkerran, (PRESCRIPTION.) No 20. p. 424.