No 23.

THE LORDS sustained the objection made to the sasine following upon the disposition granted by Sir George Hamilton, in so far as relates to the representatives of Russell, and the representatives of Colvill.

Fol. Dic. v. 3. p. 317. C. Home, No 157. p. 266.

No 24.

A precept of *clare constat* having been granted to the person who was the apparent heir, in liferent, and to his son in fee; infeftment taken thereon, to them, in the same terms, in so far as it was granted to the son in fee, found to be erroneous.

1774, *January* 28. THOMAS FINLAY *against* THOMAS MORGAN and Others.

JOHN FINLAY of Shaw, was proprietor of, and died vest and seased in these lands.

After John Finlay's death, James Finlay, his brother and heir, obtained from the superior a precept of *clare constat*, to himself in liferent, and his son John in fee; upon which infeftment followed in their favour, for their respective rights of liferent and fee, in 1709.

After the father's death, John Finlay, the son, granted heritable bonds over the said lands, upon which infeftment followed; and these bonds having come into the person of William Richmond, he, in the year 1735, obtained a decree of adjudication of the lands of Schaw, &c. over which these heritable securities extended, against the said John Finlay, for payment of the accumulated sum of L. 2816 Scots.

This adjudication was afterwards conveyed by Richmond's daughter, and heir to Hugh Campbell, who, in consequence of this conveyance, obtained a charter of adjudication from the superior in 1746; and, in January 1759, he conveyed the lands therein contained to William Muir, who, having soon thereafter disponed the lands of Schaw to Thomas Morgan, for whose behoof he made the purchase, Morgan, in February 1759, was regularly infeft, upon the precept of sasine contained in the charter of adjudication, granted to Campbell, his author, and entered into the possession of the subjects conveyed to him; and, as he alleged, bestowed money upon inclosing and improving them.

A process of reduction and improbation was lately brought at the instance of Thomas Finlay, as heir to his brother John Finlay, the antient proprietor, against Morgan, Campbell, and Muir, for setting aside these rights; and also containing a conclusion of compt and reckoning against them, in which two questions in law arose; the last whereof properly falls within the period of this collection; but, on account of the connexion, the heads of the argument and the decision on the *first* point, are also here inserted.

I. The pursuer insisted, that Richmond's adjudication was null and void, when it was led, in respect, that John Finlay, the granter of the heritable bond on which it proceeded, had neither established any title in his person to these lands, nor had been charged to enter heir to his predecessor; to which it having been *answered*, in point of fact, That John Finlay had been infeft along with his father upon the precept of *clare*, granted to them in liferent

and fee, by the superior, as far back as the year 1709; which, therefore, superseded the necessity of any charge against him to enter heir; it was *objected* for the pursuer, That the aforesaid precept of *clare*, granted by the superior in favour of John, when his father, James Finlay, the apparent heir, was alive, was inept; and that the infeftment following upon it must be null and void, as flowing *a non habente*, it not being in the power of the superior, without a warrant from the vassal infeft, to renew the investiture in favour of any other than the person who is apparent heir under that investiture, as was solemnly adjudged in 1752, in the case, Landales against Landale, *voce* SERVICE of HEIRS. And accordingly, in this case, the Court, upon the 20th July 1770, had given judgment, "finding, That the infeftment upon the precept of *clare*, *anno* 1709, in so far as it was granted to John Findlay in fee, was an erroneous infeftment." No 24.

But, at the advising, it having occurred, that, although the infeftment to John Finlay the son, during the life of his father, was erroneous; yet it might be a title of prescription, and be sufficient to support the adjudication led by William Richmond, which had not been quarrelled for more than 40 years, from the date of that infeftment, this question was reserved for farther hearing; and, in the *interim*, the pursuer, in order to remove an objection to his own title, being only a general service, procured a precept of *clare constat* from the superior, and was thereon infeft.

II. Upon the point of *prescription*, the defenders *maintained*, That their right to the lands is established by prescription, both positive and negative, founded upon John Finlay's infeftment 1709, and the continued possession held by him, and by the defenders and their authors; and, as a consequence thereof, they *pleaded*, That the adjudication being thus rendered unexceptionable, the defenders have an irredeemable right to the lands, the legal of the adjudication having been long ago expired.

In support of the general proposition, *argued* for the defenders; The *positive* prescription is a *modus acquirendi dominii*; it supposes a defect of right, either in the disponer or disponee; if the title is complete in the person of the disponer, the disposition itself, without more, transfers, and vests the right in the disponee. It is, therefore, to supply the defect of such right, that the law requires a continued possession for the space of 40 years; and the possession, so attained, works off every ground of challenge that might otherwise have been competent, falsehood only excepted. So says the statute 1617, cap. 12. in express words; and, therefore, as it stands confessed, that John Finlay, upon the title of his infeftment 1709, and those deriving right from him, have continued in peaceable and uninterrupted possession of those lands, from the date of the infeftment down to this day, the right so established is not now liable to challenge, at the instance of this pursuer, as heir to the said John Finlay.

The *negative* prescription, which, in this case, goes hand in hand with the *positive*, has, for its object, the quieting and securing the subject in the enjoy-

No 24. ment of those rights which they have possessed for such a long course of years without challenge; and, therefore, supposing John Finlay's infeftment, formal and complete in itself, to have been ever so exceptionable, if it was not brought under challenge till after the long prescription was run, every objection which might otherwise have been competent against the same, is thereby cut off; whereby the defender's right to these lands stands now secured both by the positive and negative prescription.

The pursuer, on the other hand, *contended*, That Richmond's adjudication was *funditus* null and void when it was led; and that there is no room for pleading prescription, either positive or negative, in bar of the objection. 2*do*, *Et separatim*, that, although the adjudication had been unexceptionable; that however the Court, in that case, might sustain the same as a security for the accumulate sum and interest thereof, yet that they would still allow the pursuer to redeem the adjudication, upon payment of what might remain due, after accounting for intromissions; and that the Court would not permit the defenders to carry off, by an expired legal, lands which, in every view, do in value considerably exceed the sum adjudged for, especially where there is no declarator of the legal being expired.

With respect to the *first* of these, *pleaded*; As the infeftment in favour of John Finlay was erroneous, and as no other title was made up in his person to the lands, it is a necessary consequence of what had already been found by the Court, that the adjudication, at the time it was led in 1735, was null and void, it having proceeded against John Finlay, who clearly, at that period, was not vested in the right of the lands, and that, without any previous charge against him to enter heir to such of his predecessors as died vested in the right; and the only question is, Whether this adjudication is rendered a valid and an effectual adjudication by prescription?

John Finlay, at the date of the adjudication 1735, had no better right to the lands than he had at the date of his infeftment in 1709, no prescription having at that time run upon the infeftment 1709, which was then only twenty-six years old; and it must sound somewhat odd, that an adjudication which was *funditus* null and void at the time it was led, should now be rendered an effectual adjudication by the force of prescription, when the adjudication, at this day, is not fourteen years old. The pursuer has no occasion to dispute, that, in a question with a third party challenging John Finlay's right in the lands, or attempting to set aside the defenders adjudication, upon the defect of their author's right, either the pursuer himself, or the defenders in his right, would be entitled to conjoin the possession under the adjudication, with John Finlay's own possession, in virtue of his precept of *clare*, and infeftment, as creating a prescriptive right, in order to exclude the claim of third parties, asserting a right and interest in the lands preferable to that of John Finlay himself; but it must appear somewhat extraordinary, that the defenders, in this case, should be entitled to found upon John Finlay's own possession, in order to cut out the

claim of his heir and representative. As the question here is between the adjudger and the heir of the person against whom the adjudication was led, the adjudger cannot found upon the possession of his authors, in order to secure his own right by prescription, against a challenge, at the instance of the debtor, upon an objection to the form in which the diligence was led; the adjudger can only found upon the titles and possession in his own person; and, in that view, there is not the least pretence for prescription. The adjudication was only led in the 1735, and the infeftment did not follow upon it sooner than 1759. No 24.

If, indeed, prescription had run in the person of John Finlay, upon the precept of *clare* and infeftment 1709, before the adjudication was led, this might have been available to establish his right of property in the lands. If the objection to John Finlay's infeftment had been removed by prescription, a special charge would have thereby been rendered unnecessary. But this is by no means the case. The infeftment was as much a null infeftment in 1735, as it was in 1709; and the adjudication having been led without a special charge, was clearly null and void, as much as if John Finlay had remained in the state of apparency. It must certainly have been found so, if the adjudication had been brought under challenge recently after it was led; and, in order to support a null adjudication by prescription, in a question between the adjudger and reverser, forty years possession must follow upon the infeftment taken upon the adjudication.

As the adjudication in question, which was confessedly null and void when it was led, can, in this case, receive no benefit from the positive prescription, it appears to be equally clear, that it can receive as little benefit from the negative prescription. It is quite inconceivable how any objection to this adjudication can be cut off by the negative prescription, when the adjudication itself is not yet forty years old. No ground of challenge could lie against the adjudication before it existed; and, as forty years have not elapsed since the date of it, every objection that did lie against it when it was first deduced, must still be entire.

And whereas it is said, that any objection that might have lain against the infeftment 1709, is now cut off by the negative prescription; *answered* for the pursuer, That he cannot conceive how the negative prescription can at all apply to this case. The pursuer neither has, nor ever had any occasion to challenge the right which his own predecessors had to the lands, nor has any interest to make such challenge; but he certainly can challenge the *diligence* led by the creditors against the lands, without challenging the *right* which he and his predecessors had to the lands. It is sufficient for him, in this question, to say, that his predecessor had no right to the lands when the adjudication was led, but was only in the state of apparency; and that, therefore, this adjudication, which proceeded without a special charge, could carry nothing; and that any right which might afterwards have accrued to John Finlay, or his heirs, by

No 24. *prescription*, or otherwise, cannot supply the want of right at the time the adjudication was led, or have the effect to support a null diligence; and such objection to the adjudication must be competent at any distance of time, whenever the adjudication is founded upon against John Finlay, or those in his right; for, although John Finlay's right to the lands may, after the course of the long prescription, in a question with every third party, be unexceptionable; yet it is certainly competent to enquire, Whether he had a right to the lands at the time the adjudication was led against him, so as to support the adjudication as an effectual diligence against the lands. John Finlay had not a right to the lands at the time the adjudication was led; it could carry nothing. The right afterwards established cannot accrue to the adjudger, so as to support his null diligence, there being a manifest difference between the case of a disponee, and that of an adjudger, as to the application of the principle, *jus superveniens auctori accrescit successori*, as is very clearly laid down by Lord Bankton, B. 3. t. 2. § 2. Par. 18.; and agreeably whereto, it was decided in a case collected by L. Fountainhall, Jan. 11. 1699, Duncan against Nicolson, *voce* JUS SUPERVENIENS, &c. And indeed, it is admitted by the defenders, that there is no *jus superveniens* in this case. In fine, as there is no room for pleading prescription, in consequence of the adjudication, which is not yet forty years old, and upon which no infeftment followed till February 1759; so it is plain, that the defenders cannot maintain their right to the lands, without founding upon the adjudication; and the nullity under which it laboured must equally strike against it now, as at the moment it was led.

But, 2*do*, *et separatim*, there can be no room for pleading prescription in this case, in respect the precept of *clare* and infeftment 1709, is not a habile title of prescription. A precept of *clare constat* to the apparent heir in liferent, and to a third party in fee, is an anomalous right, unknown in the law of Scotland, not in the power of any superior to grant, and, therefore, *funditus* null and void; and, as the objection to the form arises *ex facie* of the deed itself, as being inherent in the right, no length of time is sufficient to remove it. Extrinsic objections may, no doubt, be removed by prescription; but intrinsic nullities and objections, arising *ex facie* of the right itself, are not the object of prescription; being inseparable from the title, they must have the same force, at the distance of one hundred years, as at the beginning.

Answered, for the defenders; The whole of the argument proceeds upon a manifest error and mistake, in supposing that the infeftment 1709 was intrinsically null and void; whereas, both the precept, which was the warrant of that infeftment, and the infeftment itself, are, *ex facie*, formal and complete; and, as no exception has been taken to either of these, farther than what regards the defect of title in the granter, and the defect of right in the grantee, as not being the right person to whom that infeftment ought to have been granted; and, as the positive prescription, though founded upon titles ever so erroneous, is effectual in law to remove every such objection; it must operate an establish-

ment of that right whereupon the possession has been attained and continued. As the infeftment 1709 was never called in question till after the forty years were long expired, and was the title upon which these lands have been all along possessed by Finlay himself, and others in his right, the exception taken to the conjoining Finlay's antecedent possession, prior to the adjudication, with the after possession by Richmond, appears to be a most groundless conceit; and all objections to Finlay's infeftment being thus cut off, long before the pursuer's service, as heir to Finlay, the defenders are entitled to plead both the positive and negative prescription, upon Finlay's own possession, under that infeftment, and the after possession under Richmond's adjudication, charter and infeftment following thereon, as sufficient to secure their right to these lands, both by the positive and negative prescription. No 24.

The pursuer's own admission, that, if the prescription had run out in the person of John Finlay himself, upon the infeftment 1709, before Richmond had obtained his adjudication, all objections to that infeftment would have been thereby effectually removed, and a special charge, in that case, would have been unnecessary, is decisive of the question; as the defenders cannot perceive any solid distinction between that case and the present. In the supposed case, the adjudication could only be supported upon this medium, that a special charge was unnecessary; because the person against whom the adjudication had been led, was, *de facto*, infeft in the lands; and that, although that infeftment was originally erroneous, every objection competent against it, on that account, was removed by the lapse of forty years, which equally applies to the case in hand. The adjudication was led against a person who was *de facto* infeft; and, though that infeftment was liable to challenge, as no challenge was made till after the years of the long prescription were run, it was thereby cleared of every defect that attended it.

Replied; The pursuer cannot distinguish between an infeftment that is null and void, and no infeftment at all. If a special charge is absolutely necessary to support an adjudication led against an apparent heir, an infeftment in the person of the apparent heir, but which was *funditus* null and void, can never supersede the necessity of a special charge; and, if the adjudication was null at the time it was led, it is quite incomprehensible how any thing that has happened since, can render it valid.

The judgment pronounced by the COURT was, "Repel the defence of prescription founded on by the defender: Find that the adjudication, in his person, does only subsist as a security for the principal sum, annualrents thereof, and necessary expenses, both due at the date of the decree of adjudication, and to be accumulated at that date; and also for the annualrents of such accumulated sums, with the necessary expenses, if such there be, and interest thereof, incurred after that period, from the time of disbursement; and remit to the Ordinary to proceed accordingly." *See* PRESCRIPTION.

Act. *R. Macqueen.* Alt. *Dean of Faculty, Al. Wight.* Clerk, *Kirkpatrick.*

Fac. Col. No 104. *p.* 274.