1677. *November* 27. GRANT *against* GRANT.

No 135.
Forty years possession of a pasturage, upon the title of parts and pertinents, was found a sufficient title, though a prior tack was produced, in virtue of which it was alleged the possession of the pasturage begun, which was not found sufficient to take off the positive prescription.

THERE being an old tack by way of contract, bearing date above an 100 years ago, betwixt the predecessors of Grant of Ballandalloch and Grant of Dalvey, subscribed by Dalvey, but not by Ballandalloch; now Ballandalloch pursues Dalvey for payment of the tack-duty, and restricts it to 39 years, and for cutting and destroying of woods upon the sheillings set by the tack. The defender *alleged*, Absolvitor, because he stands infeft in the property of his own lands of Dalvey, and by virtue whereof, he and his predecessors have been in peaceable possession in the lands of Dalvey, with the pertinents thereof, and especially in a pasturage in this sheilling libelled, and so is secure by prescription. The pursuer *answered*, 1*mo*, That he stands infeft *per expressum* in this sheilling, and that he produces a tack thereof to the defender's predecessor, subscribed by him, whence it must be presumed, that the defender's possession of this sheilling began by this tack, and therefore the tacksman could not intervert his master's possession; and though he did not pay him his duty, he cannot pretend a right to the land, whereof he was tacksman; but the setter of the tack is always understood to be in the civil possession, by the natural possession of his tacksman, in the same way as a superior, by neglecting to lift his feu-duty 40 years, cannot lose his superiority, nor can his vassal prescribe against him, and if it shall be sustained that the master's right is prescribed to the tenant, for not payment of the tack-duty, the tenant may easely abstract his discharges, and defend himself by prescription, and it will be very hard for the master to get his use of payment proved. It was *replied* for the defender, That his defence stands most relevant, for it is unquestionable, that servitudes of pasturage may be acquired by 40 years uninterrupted possession, under the general title of pertinents, in opposition to a contrary special infeftment; the general act of prescription 1617, is expressly introduced to secure all rights, and to cut off all pleas, whereupon the defender is sufficiently founded, both as to the point of title, viz. his infeftment of Dalvey for 40 years, and 40 years peaceable possession of this pertinent, as pasturage thereof, against which there is nothing relevant but interruption; and though in short prescriptions *bona fides* and lawful possession be required, yet in this long prescription, all these are presumed *præsumptione juris et de jure*, and no man needs to dispute how his possession began, if he possess 40 years without interruption, which, and falsehood in the title, are the only exceptions in the statute; neither do the inconveniencies adduced, import, for there never was, and hardly ever will it be found, that a master will suffer a tenant to possess 40 years without payment, or a process; neither will the tenant's possession found a prescription, unless he be infeft, nor can a vassal make use of his infeftment against a superior, unless he take infeftment from another; but if by a several infeftment, he possess 40

years, his former superior's title will prescribe; neither is there any hazard of abstracting of discharges, seeing an infeftment is also required, and it is easy to prove, that within the 40 years, the tenant acknowledged his master by use of payment, which witnesses may instruct; and in this case, this old tack is both suspect of falsehood, and of being an imperfect deed, which the setter never subscribed. No 135.

The LORDS found the defence relevant, that the defender, his predecessors, and authors, had continued infeftments, and continued possession for 40 years of the lands of Dalvey, with the pertinents, and that they had possessed pasturage in this sheilling adjacent thereto, for 40 years without interruption, and repelled the reply of the interversion of possession, or that the pasturage lay on the other side of the water, from the defender's property; but found the pursuer's special infeftment to carry the property of the sheilling, with the burden of the pasturage; and therefore found the defender liable for any wood or timber cut upon that ground within these 40 years.

*Fol. Dic. v. 2. p. 108. Stair, v. 2. p. 566.*

*** Fountainhall reports this case:

1677. *November* 13.—BALLANDALLOCH pursues upon an old tack in 1571, set for five 19 years, Grant of Dalvey for the tack-duty. *Alleged*, 1*mo*, The tack is null, because it wants the writer's name, as the 179th act, Parl. 13th Ja. VI. requires; 2*do*, Wants witnesses, act 117th Parl. 7th Ja. V.; 3*tio*, It is prescribed. *Replied*, The *first* of these acts is long after the tack; the *second* act compared with act 80th, Parl. 6th Ja. VI. requires only witnesses to be insert and designed; 3*tio*, Not prescribed, because the defender possessed by it till 1665, in which year it expired. THE LORDS repelled all those allegeances, in respect of the replies. Then he denied he possessed by virtue of that tack, but ascribed it to another title. THE LORDS ordained both parties to be further heard on the verity of the tack, and point of prescription, and to condescend and clear by what title the defender or his predecessors possest.

1677. *November* 27.—IN an action mentioned *supra*, at the 13th of this month; farther *alleged*, That the tack is prescribed, unless they say they have possessed one year within 40 years, to interrupt the prescription, else rights having *tractum temporis successoribus* shall never prescribe, except as to the rents above 40 years, nor a bond, except as to annualrents preceeding 39 years; as also he ascribed his possession of these lands, as parts and pertinents of Dalvey. *Answered*, they are not contiguous. *Replied*, though this is relevant against parts where there is no union, yet not against pertinents, such as right of pasturage; and cites Spottiswood, SERVITUDE, Laird of Knockdollan against

No 135. Tenants of Borthwick, *voce* SERVITUDE; and in the Town of Perth's case anent the Ise of Staples, (*vide* IBIDEM); and on the 25th of February 1658, Riccart against Linday, (*vide* IBIDEM). The LORDS found this allegeance, that he stood infeft in Dalvey, with parts and pertinents, and pasturage clad with 40 years possession, relevant, since Dalvey and their sheillings did once both belong to the bishop of Murray, and this contiguity was only relevant against part, and that nothing had been done on that tack. It was urged among the LORDS, that this might prove very dangerous to heritors of grass roums, or other lands set in tack to neigbouring gentlemen, who possessing 40 years, and abstracting the discharges, and then pretend they possess it as pertinent of there own land; but this may be obviated, by pursuing on the tack, or renewing it on taking contrary discharges, whereas the inconvenience of producing an old latent tack, of which the heritor can have no suspicion, after 60 or 80 years, is more dangerous, if they shall pretend they possest by that tack.

1677. *December* 6.—THE LORDS having heard the parties farther, *alleging* it was not an ordinary servitude of pasturage, but they build sheillings and a herd stays, from April to September, with their cattle; the LORDS before answer, ordained both parties to adduce witnesses to prove the custom of that country, anent sheillings and grazings, and for clearing deeds of property, and what lands are interjected.

*Fountainhall, MS.*

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1682. *January* 20. COCKBURN *against* BROWN.

No 136.

THE probation of 40 years possession of pasturage, being made up partly by the natural possession of pasturage, and partly by receiving a small sum yearly in lieu thereof, the LORDS restricted the servitude to that sum, and declared the servient tenement liable thereto in time coming, and not to be liable to actual pasturage.

*Fol. Dic. v.* 2. *p.* 108. *Fountainhall.*

This case is No 51. p. 10742.