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

No 88.
not infeft, if his predecessor was infeft by virtue of a charter; and that an uninterrupted immemorial possession was relevant to presume a complete possession back to the infeftment, if not elided by contrary evidence.

to be in the possession of the Earls of Home also for time beyond memory; raised in the year 1695 a process of reduction, improbation, and declarator of property of the lands of Tennandrie against Charles then Earl of Home, at that time in possession of these lands, and likewise against the apprisers of the estate of Home, against the Representatives of George Home of Dirrington, and against the Representatives of Mr David Home, parson of Greenlaw, which George and David Homes, the pursuer supposed, from the writings produced by him, to have been authors to the Earl of Home in the right by which he possessed the lands of Tennandrie.

It appeared from the writings produced by the pursuer, and was admitted by the defender, That the barony of Greenlaw, including Tennandrie, had been granted in feu by the Earls of Home before the year 1600, and that by progress they had come into the person of Home Earl of Dunbar, who was infeft in the absolute right of them, both property and superiority, by virtue of a charter under the Great Seal, *anno* 1606, proceeding on the necessary resignation.

It appeared also by the pursuer's production, and was admitted by the defender, That Lady Anne Home, daughter and co-heiress to the said Earl of Dunbar, and as deriving right from her sister, had in the year 1615 granted a wadset right over the whole barony, including Tennandrie, to Sir Gideon Murray, for 20,000 merks: That Sir Gideon conveyed the said right to Home of Manderston, who, in the year 1620, used requisition of his money in due form; but not having received it, he carried on a process of poinding the ground, and obtained decreet against the then possessors, particularly against one Mr David Home who possessed the lands of Tennandrie: And that Manderston likewise that same year carried on a process of apprising, by which he evicted the ground right of the whole lands, and all reversions, &c. of it, upon which apprising he expeded a charter under the Great Seal, and was thereupon infeft; and that in the said year, Manderston entered into a new transaction with Lady Anne; aud for a further sum of money then paid to her, he obtained from her a ratification of the apprising, a discharge of the legal reversion, and a full disposition to the lands, and to all rights of reversion, &c. competent to her as to the said lands of Greenlaw, including Tennandrie, whereof she then delivered him a connected progress of writings.

Anno 1623, Manderston disponed his right to Logan of Coultfield, who in the year 1624, obtained a decreet of removing against the tenants of Greenlaw, and particularly against Home, parson of Greenlaw, as possessor of Tennandrie, who, by mistake, was named in the decreet Alexander instead of David.

It also appeared from the pursuer's writings, that the said right had come by progress, in the year 1644, into the person of Home of Haliburton, who obtained from the Crown a new charter containing a clause of *novodamus*, and that he used an order of redemption of a wadset right, said to have been ori-

ginally granted to Mr David Home, parson of Greenlaw, in the lands of Tennandrie, for the sum of 4400 merks, by the said Lady Anne Home; which order of redemption proceeded against the heirs of the said Mr David and against Home of Dirrington, as purchaser from Mr David, and against the then Earl of Home, as purchaser from Dirrington; and that upon this order he raised and executed a summons of declarator of redemption in the year following. No 88.

And, *lastly*, it appeared, and was admitted, that the said rights had, in the year 1683, passed by progress to the pursuer, and that he had used a new order of redemption of the lands of Tennandrie, on the same footing with the former used by Haliburton, and likewise that the pursuer had *anno* 1695 raised the present process, and kept it alive, or revived it by proper transferences, as occasion required, till this time, and that in December 1721, the pursuer had extracted a decreet of certification against all writings in the possession of the Earl of Home, and the other defenders, affecting the lands of Tennandrie, which had not been produced; and that the Earl had produced none, but such as showed that he was heir by progress to James Earl of Home, heir-male to the former Earl of Home, and son and heir to the said Lady Anne Home, who *anno* 1638, obtained a charter from the Crown, proceeding on a resignation by the Ladies Down and Maitland, daughters and heiresses of line to the said former Earl of Home, containing the lands of Tennandrie, &c.; *Item*, Sasine on the said charter; *Item*, Retour, Alexander Earl of Home, as heir to the said James his grandfather, dated *anno* 1707; *Item*, Precept and sasine thereon of the lands of Tennandrie, &c.

The pursuer also insisted (but it was not admitted by the defender) that Lady Anne had, *anno* 1617, granted a feu-right of the lands of Tennandrie to Mr David Home, parson of Greenlaw, redeemable for the sum of 4400 merks, and that she had conveyed the right of redemption to Manderston by the above transaction *anno* 1620, to which the pursuer had now right by progress. He likewise contended, that it appeared from his production, that the Earl of Home had come into possession of the lands of Tennandrie by virtue of a conveyance from Home of Dirrington, of the said wadset right, originally granted to Mr David Home, which right Dirrington had acquired from the said Mr David; and this wadset-right being now become void by virtue of the certification extracted *anno* 1721, the complete right of property to the lands of Tennandrie ought to be declared to belong to him, as having right by progress to the absolute disposition of the said lands granted by Lady Anne to Home of Manderston *anno* 1620.

And for proving that the said wadset-right had been granted by Lady Anne to Mr David Home, and that he had thereupon entered into the possesssion of the lands, and conveyed his right to Dirrington, and that Dirrington had conveyed it to the Earl of Home, the pursuer referred, *imo*, to a letter of reversion produced, bearing to have been granted by Mr David Home to the said

No 31. Lady Anne *anno* 1617, posterior to the wadset-right to Sir Gideon Murray, but prior to the absolute right granted by Lady Anne to Manderson, wherein Mr David declares, " That forasmuch as the Lady Anne, with consent of her husband, Sir James Home, had set, and in tack and feu-farm letten to him, his heirs and assignees, the lands of Tennandrie for 4400 merks; that the said feu-farm shall be redeemable for the said sum by the said Lady Anne and her husband, or their heirs:" But it must be noticed, that the letter contains a *proviso*, " That in case it should happen the said Lady Anne and her spouse to sell and dispone the heritable right of the foresaid lands before the lawful redemption, that then, and in that case, the foresaid letter of reversion should expire, be null, and of none avail, and that the said lands should remain with the said Mr David and his foresaids in feu-farm, conform to the infeftment, right, and security made thereupon." 2*do*, For proof of the said points, the pursuer referred to the above decreet of poinding the ground obtained by Manderston *anno* 1610, against the tenants and possessors of the lands of Greenlaw and Tennandrie, particularly against the said Mr David, as possessor of Tennandrie;— 3*tio*, To the decreet of removing obtained by Logan of Coultsfield *anno* 1624, against the tenants and possessors, particularly against the parson of Greenlaw, as possessor of Tennandrie; 4*to*, To the order of redemption used by Home of Haliburton *anno* 1644, against the heirs of the said Mr David of Dirrington and of the Earl of Home, together with the summons of declarator raised thereupon in the year 1645; 5*to*, To the order of redemption used by the pursuer *anno* 1638; 6*to*, To a sasine of the lands of Tennandrie in favours of Home of Dirrington *anno* 1633, bearing to have proceeded upon a disposition from the said Mr David Home, mentioned to have been dated at the house of Tennandrie, and to have reserved a liferent to the said Mr David and his spouse, and the longest liver of them.

It was *answered* for the Earl of Home, 1*mo*, That the writings produced did not prove that there was a feu under redemption granted by Lady Anne to Mr David Home, nor that he, or any deriving right from him, were in possession of the lands of Tennandrie; for no less could be a proof of that, than the production of the feu-right itself, and sasine thereon. As to the letter of redemption granted by Mr David, it could not prove his right; and as to the decreets of poinding and removing, and the orders of redemption, they all, indeed, might have proceeded on the supposition, that Mr David had a redeemable feu-right, but did not prove that he had one, especially since the Earl of Home produced a continued progress of infeftments in the lands of Tennandrie, and had proved peaceable possession *ultra hominum memoriam*, which founds a legal presumption, and must stand as a proof of continued possession, as far back as the infeftments go, until the pursuer show by legal evidence, that the Earls of Home were once out of possession. 2*do*, Admitting, that Mr David Home had a feu-right subject to redemption, in terms of the letter of reversion produced, and that he was in possession, and that the said right and possession

reverted by progress through Home of Dirrington to the Earl of Home, yet the letter of reversion bearing a clause confining the power of redemption to Lady Anne and her husband, and their heirs, and declaring the feu to be absolute against singular successors, the pursuer claiming by singular titles could not have the benefit of the redemption. *Answered*, 3*tio*, Whether the case was, that Mr David had a feu-right redeemable, and that Manderston and the pursuer, as deriving right from him, had the power of redemption by virtue of the ratification of the apprising and absolute disposition from Lady Anne Home *anno* 1620; or if the case was, that there was no such right as Mr David's, but that Manderston and the pursuer under him, had, by virtue of the said disposition, a direct right to the lands of Tennandrie, as well as to the rest of the barony of Greenlaw; yet in either of these cases, the pursuer's right was prescribed *non utendo*, and the absolute right of property was vested in the Earl of Home, in terms of the act of Parliament 1617, anent the prescription of heritable rights, he having produced a connected progress of consecutive sasines proceeding on charters and retours, accompanied with peaceable possession for forty years. No 32.

Replied for the Earl of Marchmont to the *first* answer, That though it was not material in the present state of the process for him to prove, that Mr David Home had a feu-right redeemable, since the defender had not founded upon it, but allowed certification to be extracted against it, yet he contended, that the letter of reversion granted by Mr David *anno* 1617, together with the decreet of poinding the ground *anno* 1620, and the decreet of removing *anno* 1624, and the order of redemption in the year 1644, with the summons of declarator 1645, and order of redemption 1683, conjoined with Dirrington's sasine 1633, reciting a disposition from Mr David, dated also at the House of Tennandrie, and reserving Mr David and his spouse's liferent, accompanied with this particular circumstance, that Home of Haliburton, who used the order of redemption *anno* 1644, was procurator in taking the sasine for the Earl of Home in the year 1638, did all manifestly show, 1*mo*, That the pursuer's right to the lands of Tennandrie was not prescribed *non utendo*, since the said processes and orders of redemption in the years 1620, 1624, 1644, 1645, 1683, 1695, &c. were sufficient interruptions not only of the negative prescription, but likewise of any pretension the defender had by the positive; 2*do*, That the Lady Anne and her successors were certainly out of the possession of the lands of Tennandrie after her infeftment in them; at least, that the continued possession cannot be presumed *retro* from the present immemorial possession, against so strong documents in the contrary, which show, that it is impossible to connect the present possession with the ancient infeftment, or to suppose it to be of equal continuance with them, so as to found a prescription to the Earl of Home upon the act 1617, which would necessarily require some new title of infeftment subsequent to Mr David Home's feu-right and possession, as a *justus titulus* to support the present immemorial possession.

No 88.

Replied to the *second* answer, that the limitation mentioned in the letter of reversion granted by Mr David Home, was not material in the present state of the process, on account of the foresaid certification.

In reply to the *third* answer, the reply to the first answer was repeated.—2*do*, As to the negative prescription alleged to have cut off the pursuer's right, though there had been no interruptions, yet the pursuer's right being real to lands supported by infeftment in them, and possession of so considerable a part of them as the rest of the barony of Greenlaw, without the lands of Tennandrie, the negative prescription could not operate against it, unless the defender could plead a positive right acquired by prescription, which he could not do on account of the interruptions of Lady Anne and her successor's possession, which hindered the present possession to connect with her and their infeftments. 3*tio*, Though a continued course of uninterrupted infeftments, down from the death of Earl James, who was infeft *anno* 1638, might be admitted to support the present possession; yet the fact being, that from the death of the said Earl James to the year 1707, there was no infeftment at all on the part of the Earls of Home, the lands during all that time having been possessed by them upon the sole title of apparency; such a possession could not support the claim of acquisition by prescription in terms of the act 1617, which requires consecutive sasines: Whatever might be the case as to acquisition by prescription upon infeftments proceeding on a new title, yet the infeftments founded on by the Earl of Home, being no other than accidental, and proceeding not upon any new right to the lands of Tennandrie, but upon the known erroneous mistake of continuing, in new retours and charters of antient families, the whole lands their predecessors had been infeft in, even after they had been alienated and effectually conveyed to third parties.

Duplied for the Earl of Home to the *first* reply, 1*mo*, That the alleged interruptions having been all directed against the feu-right supposed to have been granted to Mr David Home, they could in no way affect the defender's right proceeding on his own and his predecessor's infeftments and possession, which were exclusive even of Mr David's right, though it had been such as the pursuer alleged, as was decided 22d June 1681, Kennoway against Crawford, No 9. p. 5170; and in a later case, Mackenzie of Ardross against Ross of Tollie, (See No 12. p. 5176*.) 2*do*, That nothing less than a direct proof of Mr David's having had right to the lands of Tennandrie, by producing his feu-right and infeftment, and of his having been in possession by receiving the mails and duties, could exclude the legal presumption of the defender's possession *retro* to the 1638, when Earl James his predecessor was infeft, since he was admitted to have been in possession for time beyond memory.

Duplied to the *second* reply, That though the limiting clause in the letter of reversion might not be material in the present state of the question, yet it showed, that in point of justice, and upon the supposition that the case was as the pursuer apprehended it to be at the commencement of this process, that

* Examine General List of Names.

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. No 88.

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 apparency, 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*, *1mo*, 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 coheiresses, 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 præsentia.*

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

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

1752. *June* 30. SMITH and BOGLE *against* GRAY.

No 89.
In what case, where two rights are in the same person, prescription can

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,