

Duplied for the pursuers, *imo*, It was never pretended that a decreet, which a retour is, could be reduced, if just in itself, because it doth not express the *ratio decidendi*. So that it is of no moment, that the reason why these lands held of the Crown in the year 1661 was not expressed; and the immediate superiority of these lands falling to the Crown, by Argyle's forfeiture, the King, as coming in place of Argyle, might have disposed of the superiority to any person, as Argyle himself could have done, 26th Nov. 1672, E. Argyle *contra* L. M'Leod, *voce* SUPERIOR and VASSAL; for the meaning of that principle, that a superior cannot interject betwixt him and his immediate vassal, is, that a superior cannot multiply superiors over his vassals, and in place of one, give him two or three, whereby the vassal would be vassal to the mediate as well as to the immediate superior: But a mediate superior acquiring right to the immediate superiority, may dispoise either of them and retain the other, in which case he does not multiply the superior in prejudice of his vassal. And even though the Earl of Argyle had resigned in the Sovereign's hands *ad remanentiam*, his Majesty succeeding in the Earl's right, might no doubt have gifted the superiority next day. For it is a mistake to allege any *jus quasitum* here to the subject, since the Crown coming in place of the immediate superior *tantum utitur jure privato*. The reason why the bishop's superiority cannot be gifted by the Crown is because an express act of Parliament provides so, 29th act, Sess. 2d, Par. W. and M.; *2do*, It was never heard, that the production of the warrant of the predecessor's sasine would supply the want of a sasine in the person of his heir; and no argument can be drawn from purchasers to heirs; the case of the former acquiring *bona fide* for an adequate price, who could not know the defect of his predecessor's titles, being more favourable than that of the latter, who could not fail to know the nature of his predecessor's rights in his own hand.

THE LORDS repelled the defence of prescription, in respect the defender's lands did at the time of the retour hold of the Crown, by virtue of the Marquis of Argyle's forfeiture; and repelled the allegiance of interjecting a superior, in respect the right of the superiority did only devolve upon the Crown by virtue of the said forfeiture.

Fol. Dic. v. 2. p. 112. Forbes, MS. p. 77.

1727. *January*. ELLIOT of Arkleton, &c. *against* MAXWELL, Fiar of Nithsdale.

ADAM CUNNINGHAM of Woodhall, in the year 1633, was infest by charter under the Great Seal, in the lands of Meikledale and Meikledale-hope, heritably and irredeemably. He conveyed these lands in the 1643 to Walter Scot of Broadhaugh, who was likewise publicly infest; and, in the 1669, Scot conveyed to Elliot of Arkleton, who obtained also a charter from the Crown, with a *novodamus*; and upon these titles, the lands having been possessed by Arkleton as proprietor, ever since, till of late, that, upon the faith of his right, several cre-

No 183.

A registered reversion found good against a party asserting an irredeemable right to the lands by the positive prescription, a having been

No 183.
in possession
above 40 years
upon a char-
ter and sasine.

ditors having lent him their money, the apparent heir brought the estate to a sale, for their payment; in the course of which process compearance was made for William Maxwell, fiar of Nithsdale, and for him *pleaded*, That Adam Cunningham's right was at first no more but a wadset, and that there was an eik to the reversion, made by contract betwixt the Earl of Nithsdale and Walter Scot the purchaser, from Cunningham, *anno* 1663, which eik was duly registrate; and that, therefore, the rights were all qualified by the reversion, even in prejudice of creditors and singular successors.

It was *answered* for the creditors and pursuer of the sale, That they had the benefit of a positive prescription, their authors having possessed for more than 40 years, *viz.* from the 1669, by virtue of charters from the Crown absolute, without any reversion, and without any document taken upon any letter of reversion; and, therefore, they were secure, both upon the words and intention of the statute, whatever action the reverser might have against Cunningham the granter of the reversion, or his heirs, or Scot who accepted of the right with the burden of reversion. The act expressly declares, 'That persons possessing for 40 years without interruption shall only be obliged to produce a charter and sasine of the lands, or instruments of sasine, one or more, continued for the space of forty years.' Herein the law is positive, and makes no exception upon a reversion, registrate or not registrate, but excludes every claim other than falsehood. It is declared, indeed, in the act, that registrate reversions shall not prescribe; but if the matter be narrowly considered, it will be found, that nothing is meant but the negative prescription; for it is plain, the first part of the act, introducing the positive prescription of land-rights, is a perfect separate clause, from that which introduces the negative prescription of actions upon bonds, heritable bonds, reversions, contracts, &c. just as much as these two had been separate laws. The first clause is complete of itself, without any manner of exception, even as to reversions registrate; then comes the second clause, not by way of exception to the first, but as a new statute, 'And sick-like, his Majesty statutes and ordains, that all actions, &c. shall be pursued within 40 years.' Then there is subjoined a particular exception as to reversions, 'That actions upon reversions, engrossed and registrated, ought to be perpetual.' To fortify which, let it be considered, the other exceptions that are designed to be from the act in general, and not only from the negative prescription, are introduced in quite different terms: Thus, with respect to warrandice, the words used are, 'Excepting always from this present act, all actions of warrandice,' &c. whereby, from the generality of the words, 'from this present act,' it is commonly thought, infeftments of warrandice will not even be excluded by the positive prescription: So as to minors, it is declared in general, 'That in the course of the said 40 years prescription, the years of minority shall nowise be counted.' And this variation of the expression, with respect to these two noted cases, which is done in a manner to relate to the whole body of the act, seems plainly to imply, that the exceptions with re-

gard to reversions, only respected the negative prescription, and had no view to the positive. And there is good reason for making a difference; nothing was to be imputed to a person who had an infetment of warrandice, that he did not sooner prosecute his right, he was not *volens agere*: And as for minority, it is protected by every law: But the reverser hath himself to blame, who did not advert the right that he had given, should not be inverted from its proper nature, which was easy to do, and his negligence ought to prejudge himself alone. This then is no exception from the clause concerning the positive prescription, but in relation only to the negative. For illustrating this, it was urged, That the registration of the reversion can be no stronger, than if prescription of the reversion be interrupted by action or order of redemption: And if it be made appear, that the action upon a reversion may in law be preserved from prescription, and yet the positive prescription of the land-right take place, no difficulty can arise from this exception. Now, suppose the reversion not registered, but at the same time prescription of the reversion interrupted by diligence against the granter, this would not stop the positive prescription; and yet, because of the interruptions, there was no negative prescription; it is apprehended the present case is just the same: The registration of the reversion has the same effect with a perpetual and daily interruption of the prescription against the granter and his heirs; but no effect upon the positive prescription of the singular successor, possessing by virtue of charter and sasine, absolutely conceived without any incorporate reversion.

2do, If this matter were otherwise, and registrate reversions good against the positive prescription, then it follows, that the common and universal opinion of all purchasers as to their security is imaginary; for here 40 years possession is no security at all; no purchaser can be secure without reading over the whole records from the 1617 to this very day, and so in all time hereafter; were it a hundred years after this, every such purchaser must go through the whole records from the 1617, because it is uncertain but at some time an author of the seller's may have granted a reversion, which must be effectual against singular successors to the day of judgment. The same must happen as to every creditor pretending to contract with a debtor, upon seeing in his person a connected progress of land-rights for 40 years; and so, in effect, there is an end of all commerce and security as to lands; for nobody will imagine it a possible thing, upon every occasion, to search over the whole records from the 1617; and, therefore, the interpretation of the law in that manner, seems to carry such difficulties along with it, that surely it never can go down, if the act admit of another sense or meaning, which, as is endeavoured to be made out above, it plainly does.

To the *first* it was *replied*, The exception pleaded upon, is not an exception from any particular clause, but from the act itself, and from the positive as well as negative prescription, as are all the exceptions subjoined: ' Reversions incorporate within the body of the infetments, used and produced by the pos-

No 183.

' sessor of the lands for his title of the same,' are such as every one must admit to be free from both prescriptions; and reversions registrate are joined in the same sentence and put upon the same footing. And there is good reason the positive prescription should have no place against reversions registrate, more than where engrossed and used by the possessor for his title, upon this principle, ' That no man can prescribe contrary to a quality in his right.' Now, the registers being designed for publication, every thing therein contained is presumed to be public, so that one possessing by virtue of a right, whereof there is a registrate reversion, is presumed to be conscious that his right is qualified, equally as if the reversion were engrossed; and in neither case will be understood to possess *eo animo* as absolute proprietor, without which *animus* there can be no prescription exclusive of the reversion.

To the *second* this reply was made, That it is highly reasonable a purchase made upon the faith of the records meet with all favour the law can afford it; but even at first view it must appear incongruous, that one purchasing contrary to the express admonition of the records, should plead favour, merely because it is a little troublesome to look them over. But let it be considered, no purchaser imagines himself safe, with a bare infeftment and 40 years possession, without going to the records; for one article, there being many sorts of interruptions, sufficient to stop prescription, not so easily found out as reversions, though the records be searched back even as far as the 1617. There is equal difficulty in finding out infeftments of annualrent, which may be kept alive 100 years by minorities. Infeftments of warrandice will take place in many cases, a long time after the date of the infeftment, and the same in inhibitions and other diligences; so that to conclude, the rule is the same in reversions, as in other cases, that whoso pretends to purchase with safety must have recourse to the records.

" THE LORDS found, That the reversion being registrate in the register of sasines and reversions, does not prescribe."

Fol. Dic. v. 2. p. 113. Rem. Dic. v. 1. No 92. p. 181.

No 184.

Use of payment for 40 years past, of an additional stipend, by the inhabitants of a burgh of barony to their minister, found sufficient to bind them in all time coming.

1757. December 21.

Mr DAVID TURNER, Minister of Greenock, *against* The MAGISTRATES and COUNCIL of the Burgh of GREENOCK, and the FEUARS and INHABITANTS thereof.

IN the year 1686, the village of Greenock was erected, by a charter from the Crown, into a burgh of barony, in favour of Sir John Schaw of Greenock, with the usual privileges competent to every burgh of barony.

In the year 1741 and 1751, Sir John Schaw granted charters to the feuars and sub-feuars of the burgh, empowering them to elect two Bailies, a treasur-