

1726. *January 26.*MARQUIS of CLYDESDALE *against* EARL of DUNDONALD.

No 393.

THE estate of Paisley, &c. stood vested in the person of Lord Cochrane, tailzied to himself and heirs-male. After his decease, his grandfather, the Earl of Dundonald, who had no right in his person, granted a disposition of the same estate to the Lord Cochrane's son and his heirs-male; one of whom, above 40 years thereafter, altered the destination, and conveyed the estate to his daughter. The disposition granted by the Earl of Dundonald being null, as *a non habente potestatem*, the estate, in consequence, was found to be all the while *in hereditate jacente* of the Lord Cochrane; upon which the heir-male, who had access to make up his titles to the Lord Cochrane, after the decease of him who conveyed the subject, as mentioned, to his daughter, quarrelled the conveyance, as being a gratuitous deed by an apparent heir; and the 40 years positive prescription, in consequence of the Earl of Dundonald's disposition, being pleaded in support thereof, the prescription was not found to run, in respect that no man can prescribe against himself.

*Fol. Dic. v. 2. p. 126.*\* \* \* This case is No 2. p. 1262. *voce* BASE INFERTMENT.1802. *November 24.*DURHAM *against* DURHAM.

No 394.

When two unlimited rights are in the same person, prescription cannot be pleaded upon the one against the other.

THOMAS HAMILTON of Boghead executed a disposition of the lands of Foulshiells, (29th August 1699.) in favour of his sister-uterine, 'Jean Bruce, in liferent, and Robert Durham, eldest lawful son of Adolphus Durham, and to the heirs lawfully to be procreated of his body, in fee; which failing, to the other heirs, male or female, without division, procreated or to be procreated between the said Adolphus Durham and Jean Bruce;' which failing, to other substitutes.

Robert Durham (9th July 1702) obtained a crown-charter, in terms of this description, on which he was infest.

He died without issue; and his brother Thomas made up titles to him in these lands by a special service, (6th September 1729,) 'as nearest and lawful heir of line to his brother.' In order to ascertain the old and new extent, and retoured duties, the retour narrates the different charters which had passed of these lands, concluding with the crown charter in 1702, but does not mention on what title the deceased had been infest. They are not narrated in the precept for infestment. Infestment was taken, (4th November 1729,) in terms of the retour of service.

Thomas died in 1744; and his son Robert made up titles to him by special service, as nearest and lawful heir of line to his father.

In 1798, Thomas, only son of Robert, also made up titles by special service, as heir of line, in the same way as his father and grandfather had done.

Thomas died in 1799, without issue, leaving two sisters, Sarah, married to William Shillinglaw of Birkhill, and Janet, married to Alexander Weir, student of divinity. As the titles to the estate had been made up for 73 years, as heirs of line, Janet, the youngest sister, *contended*, That she had a right, as one of the heirs-portioners of line, to succeed along with her sister by these investitures, which were secured by the positive prescription; while Sarah, on the other hand, claimed under the destination in 1699, by which she is called as eldest heir-female, and entitled to succeed without division.

Both sisters, on these different grounds, took out briefs before the Sheriff of Linlithgowshire. These were advocated to the Macers, and Lords Glenlee and Meadowbank were nominated Assessors. Memorials were ordered, which were reported to the Court by their Lordships.

Janet Durham

*Pleaded*; Thomas Durham did not make up titles to his brother Robert, as heir of provision, but as nearest and lawful heir of line to him; and as all the descendants have followed the same mode, and have been infeft, as heirs of line, for nearly 80 years, the destination in the settlement 1699 is as completely done away as it could have been, by a regular deed executed for that purpose. The act 1617, c. 12. declares, that no person, who has possessed lands by virtue of heritable infeftments, for the space of 40 years, continually and together, shall ever be inquieted by any one pretending right to the same, by virtue of prior infeftments. Accordingly, three instruments of sasine have been produced, standing together for more than 40 years, proceeding upon returns, all in favour of heirs of line. This creates a title by prescription in favour of the heirs of line. The fetters of an entail are worked off by possessing for this space upon a title in fee simple; Macdougall of Mackerston, 10th July 1740, No 172. p. 10953.; Douglas of Kirkness, 2d February 1753, No 173. p. 10955.; Ayton against Monypenny, 31st July 1756, No 147. p. 10956.; and every heir who wishes to alter a destination, need only make up titles, and possess in this way. Thomas and his descendants had no right in these lands, except by service; for they never connected themselves with this destination, their service being not as heirs of provision, but of line. But, even if they had had both characters in them, prescription would still have applied in favour of the one on which they possessed; Innes against Innes, 31st December 1695, No 392. p. 11219. It is said, that where a person has two different titles in himself, he is understood to possess on both, and not to prescribe on the one against the other; but where possession has clearly been held upon one title during the years of prescription, the reasonable construction of the act of Parliament establishes a prescriptive right under that title. They had, indeed, the title of apparent heirs under the charter 1702; but an apparent heir has no vested right, not even a personal right to the property; he has merely a

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capacity of acquiring a right by completing his legal titles; and his powers over the property are extremely limited; so that, even supposing that this right of apparenancy were to be considered as a title to the property, still any right of property, whether a fee simple, or a tailzied fee, would be a more valuable right; and, therefore, prescription might run in favour of this last against the other, by possession on it for more than 40 years.

The decision, Smith and Bogle against Gray, 30th June 1752, No 89. p. 10803. has been thought adverse to this plea; but this is opposed to Edgar against Maxwell, 6th July 1736, No 10. p. 3089.; besides, the heir there had two titles in his person, both as heir of line and disponee; but, neglecting the personal right in virtue of the disposition, he made up titles as the heir of line of the antecedent investitures.

According to the doctrine on the other side, latent titles, which have remained so for centuries, would have the effect of divesting proprietors of their estates, if they happen to have two unlimited titles in their person, one of which he might have defeated, but did not, merely because he was ignorant of its existence.

*Answered;* A service as heir is not a regular mode of altering the settlements of an estate; and in this case, there could be no such intention, as the property being a fee simple, the moment any of the heirs was infeft, he could convey it to a stranger. A service is not a new investiture, but it only continues the old investiture; and when a person makes up his titles in this way, he takes the succession in the very same terms, and under the same conditions, in all respects, as those on which it was given, to his predecessor. If any alteration is intended, a new disposition, or a resignation into the hands of the superior, is the regular mode, as he then reconveys it with the new line of succession. The jury who served Thomas heir of line to his brother, had before them the charter 1702; and the retour shows his intention of taking up the estate of Foulshiells; consequently, they could only be presumed to authorise his doing so, without prejudice to his title under that charter; and all the services down to the last, bear special reference to the investiture, which first conferred the estate with a destination of heirs, preserving it from the negative prescription, by thus founding on it, and preventing the operation of the positive prescription, as prescription cannot operate in any person's favour in the face of his own titles. All the cases founded on show merely, that an entail may be cut off by prescription, where it is not made the title of possession, but has continued latent during the prescriptive period, and possession has followed on an unlimited title; but here there is no case of that kind, both titles being unlimited, so that there is nothing to be gained by prescription; neither has there been any person in existence during the 73 years, against whom, as a creditor, prescription could run, or who could have taken measures to interrupt it.

The Court held, Smith and Bogle against Gray, 30th June 1752, to be the regulating decision, whenever one has two unlimited titles in his person, in which case he is supposed to possess on both. The idea, that there was only one title of possession on which prescription could be pleaded, the other being a right of apparenry merely, under the charter 1702, and, therefore, inferior (it was argued) to the right by infeftment, was not listened to by the Court; because, though an apparent heir cannot exercise the higher rights of property, such as selling or encumbering with debt, yet apparenry is a good title of possession, which is sufficient for the present purpose.

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The Court found, (24th November 1802,) "That Mrs Sarah Durham has the sole right to be served heir of provision to her brother, the deceased Thomas Durham."

To which judgment they adhered, by refusing a reclaiming petition, without answers.

For Sarah, *Lord Advocate Hope, J. Wolfe Murray.*

Agent, *Ja. Fergusson, W. S.*

For Janet, *Solicitor-General Blair, J. Clerk, Cathcart.*

Agent, *Ja. Gibson, W. S.*

Clerk, *Colquhoun.*

F.

*Fac. Col. No 62. p. 141.*

DIVISION XIV.

Time of Prescription how Computed.

1610. November 30.

A. against B.

No 395.

A BOND bearing no date of day, month, nor year *in facto antiquo* will be interpreted expired and prescribed as past 40 years, and so will give no action, unless the producer condescend upon a date within 40 years at the intending of the action.

*Fol. Dic. v. 2. p. 126. Haddington, MS. No 2027.*

1630. December 23.

OGILVIE against The Lord OGILVIE.

No 396.

PRESCRIPTION being alleged against a bond dated the \_\_\_\_\_ day of \_\_\_\_\_ 1590, whereupon summons was not raised till June 1630, it was found that it did not prescribe, in respect that it was pursued within the 1630, for, because