

full half-year's rent when he was not to get and did not get a full half-year's possession. The case of a tenant not getting possession of the subject let to him for some weeks after the stipulated term of entry does not often arise. The case that arises most frequently is where possession of the subject let is not got at all. The question that arises here, how far the tenant is entitled to a deduction from his rent for not getting possession of the subject for a certain period, is different from a claim of deduction for something that occurs during the possession. For the period that he is kept out of possession he is entitled to some deduction unless that period be of trivial duration. Here it was not so. Mr Maxwell had to leave the house he was in, and as he could not get into Saint Germain's, he took what seems to be the only natural course of living with his family in a hotel during that period.

But apart from that altogether, I think it is quite enough that he was entitled to some deduction from that half-year's rent, and that being so, the trustees' use of sequestration for the whole of that half-year's rent was not justifiable. That was resorting to sequestration in order to concuss Mr Maxwell into giving up his claim for deduction for the period he was kept out of possession, and although that claim must be small, I think, as I have already said, that he is entitled to make it, and, that being so, I think the Sheriff was quite right in recalling the sequestration. The fact that, if this had been an ordinary action, the pursuers might have got decree for the rent, does not help them in this petition for sequestration, and I do not think it at all necessary to consider that question. It is enough that this is not a good sequestration, and in recalling it I think the Sheriff was quite right.

But that is not the whole case. Captain Maxwell was so much put about by the position into which Mr Brown, the previous tenant of the mansion-house, had got with these trustees that he deposited in bank the whole year's rent demanded by the pursuers, and that raises the question whether he was not entitled to get it back again. The Sheriff and Sheriff-Substitute have held that the natural consequence of the failure of the pursuers in the sequestration proceedings is that the defender shall get up the consigned money, and although I had some little difficulty about that, I have come to think that they are right, and that the whole consigned money ought to be repaid to the defender. On the whole, therefore, I agree with your Lordship in opinion that the interlocutors of the Sheriff and Sheriff-Substitute ought to be adhered to.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. It has been maintained on behalf of the petitioner that, while the respondent stipulated that the water and drains should be put in thorough order by the trustees, he was aware that the house was in the meantime in the hands of another tenant until Whitsunday, and that he was to take possession of the subject let and allow the necessary operations to take place during the period of his tenancy. I am not prepared to say that if the operations on the water and drains had been of a trivial nature, and such as would have occasioned no substantial inconvenience to the tenant, he

would not have been bound to submit. But if after the period of entry it turned out that the house could not be made habitable with the tenant in it, then it appears that that was a matter that the landlords should have arranged for before the term of entry, and if knowing that the house was uninhabitable they thought fit to let it without stipulating that the term of entry should be made some weeks later in order to allow these operations to be done, and if they gave entry at Whitsunday, the tenant was clearly entitled to a habitable house at that date. Here he did not get that at the date of entry, and not for sometime thereafter. And that being so, the landlords could not in law or reason have a claim to the full rent when they could not give a full term's possession.

What the tenant's claim should be may be a question. It is a claim in respect he did not get possession of the subject at the time stipulated, but whether it is a claim for a deduction from the rent in proportion to the time for which he was kept out of possession or something more is a question as to which I give no opinion. If the parties desire to get into another litigation, they appear to have good grounds for having that desire gratified. But without saying more, I think it is perfectly clear that the landlords had no right to use sequestration for the full amount of the rent when they could not give a full term's possession of a habitable house, and therefore I concur in the opinion that the interlocutors appealed against should not be disturbed.

The Court adhered.

Counsel for Pursuers (Appellants)—Kinnea—Jameson. Agent—G. M. Wood, S.S.C.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser)—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Friday, March 5.

FIRST DIVISION.

(Before Seven Judges).

[Lord Adam, Ordinary.

AULD V. HAY.

*Prescription—Possession of a Subject on a Title Conveying "Shares"—Effect of Prescriptive Possession in Clearing up Ambiguous Title.*

H had possessed a subject for more than 40 years on a title conveying "All and whole the several shares" of it "belonging to A B and C D." A raised an action to have his own right declared to four seventh shares of the subject in question, and founded on a title prior in date to the other. *Held* (by a Court of seven Judges) that in the circumstances, the title being habile to embrace the whole subjects, the possession was sufficient to exclude all other evidence on the matter.

*Observed—per Lord President (Inglis)—that "a charter and sasine containing a description which can be so construed as to embrace an entire subject, though it may also be so construed as to embrace part of it only, if*

followed by 40 years' uninterrupted and exclusive possession of the whole, will, under the Statute 1617, cap. 12, exclude all inquiry, and protect the person holding it against all challenge from any person holding even an express title, prior in date, to the whole or any part of the subject."

Jabez Auld, butcher Inverkeithing, sued John Hay, tanner there, to have it found and declared that "All and whole four just and equal seventh parts or shares *pro indiviso* of All and whole these short roods of land lying near the north or east port of Inverkeithing, within the liberties of that burgh, bounded by the yard sometime belonging to Robert Cant, afterwards to James Walker, now to John Hay, on the south; the short rood of land sometime belonging to Captain Spittal, then to Jean M'Nab, now to John Grant, and the house and yard sometime belonging to Janet Walls, now to William Fraser, on the north; the mill-lead or dam belonging to the Town Council of Inverkeithing, and the Town Council's loaming, on the east and west parts—which subjects lie within the burgh of Inverkeithing and county of Fife; together with the whole parts and pertinents of the said subjects, being the subjects particularly described *secundo* in a writ of *clare constat* by the magistrates of Inverkeithing in favour of the pursuer, dated and recorded in the Particular Register of Sasines for the said burgh of Inverkeithing the 15th day of September 1875, and a disposition granted by John Meiklejon, iron-founder in Dalkeith, in favour of the pursuer, dated the 11th, and recorded in the said Particular Register of Sasines the 15th, both days of August 1876—pertain and belong heritably in property to the pursuer in virtue of his rights and titles," and that the defender had no right thereto. The summons contained also a conclusion of count and reckoning against the defender of his intrusions with the rents of the said subjects, or alternatively for payment of £100 in place of the share thereof due to the pursuer.

The whole of "these short roods of land" had been owned by John Meiklejon, who died about the year 1800 leaving 5 sons and 2 daughters. On his death the lands were held by his seven children *pro indiviso*. The pursuer succeeded to one-seventh part as nearest and lawful heir of his grandmother, who was one of John Meiklejon's two daughters, and he was infet therein by writ of *clare constat* by the magistrates of Inverkeithing in his favour dated and recorded September 15, 1875. The pursuer also became proprietor of other three seventh parts of the said lands, in which he was infet conform to disposition in his favour dated 11th and recorded 15th August 1876, granted by John Meiklejon, a grandson of John Meiklejon senior, who had acquired the share of his father and also those of two of his uncles. On these titles the pursuer sought to have his right to four seventh *pro indiviso* parts of the lands in question established in this action. The pursuer further averred—"The defender John Hay is believed to claim or have right to the other three seventh parts thereof, and he is called upon to produce his titles thereto. The defender has, however, wrongfully, and in defiance of the rights of the pursuer and his authors, taken possession of the whole of the said subjects, and introrried with the rents thereof for a period of over forty years

prior to the term of Whitsunday 1879, without accounting in any way to the pursuer or his authors for their proportion of the same. Said short roods were, along with other two properties in Inverkeithing, disposed in security to heritable creditors so far back as 1801. For payment of the interest due under the bonds so granted the creditors therein undertook the duty of uplifting the rents of said subjects, the proprietors thereof being ultimately entitled to any balance upon their intrormissions. During the whole currency, however, of said securities, no rents whatever were uplifted in respect of the short roods in question, which were possessed exclusively by the defender and his predecessors. Said securities, in so far as over the property of the pursuer, have now been discharged or extinguished. An account of the rents of the two subjects other than the short roods now in question has been rendered. No settlement, however, can be obtained from the defender for any part of his predecessors' intrormissions with the proceeds of the subjects now in dispute."

The defender John Hay disputed the pursuer's right to the land in question. He stated that in 1818 the estates of Jabez Auld *primus*, the pursuer's grandfather, who was a merchant in Inverkeithing, and a partner of the firm of Auld & Meiklejon, and of Andrew Meiklejon, the other partner of that firm (and a son of John Meiklejon senior), were sequestrated, and David Black, writer in Dunfermline, was appointed trustee thereon, conform to disposition in his favour dated 31st December 1818, and instrument of sasine following thereon dated 15th and recorded 23d April 1819. The disposition, on the narrative of Black's appointment as trustee, whom failing James Russell, writer in Dunfermline, and that Jabez Auld and Andrew Meiklejon had been ordained to execute such a disposition, conveyed "All and sundry lands, heritages . . . belonging to us either as a company or as individuals . . . and particularly without prejudice to the foresaid generality . . . all and whole the several shares belonging to us" of the subjects described in the summons. On Mr Black's death he was succeeded as trustee by James Russell. On 27th July 1836, Russell, as trustee on the sequestrated estates of Auld & Meiklejon as a company, and of Jabez Auld as an individual, conform to decree of adjudication in his favour dated 24th January and recorded 4th February 1824, and instrument of sasine dated 8th October and recorded 1st December 1827, granted a disposition in favour of William Hay, skinner in Inverkeithing. This disposition, on the narrative of the sale by public roup in 1819 by David Black, as trustee foresaid, of the subjects after disposed, to James Walker, who subsequently declared the purchase to have been made for behoof of William Hay, who held a heritable security over said subjects, and who paid the price to David Black, conveyed to William Hay "All and whole the several shares which belonged to the said Jabez Auld and Andrew Meiklejon, and which belong to me as trustee foresaid, of All and whole those short roods of land" described in the summons. William Hay conveyed the subjects to his son John Hay, the defender, under his disposition and settlement, an extract of which, along with the disposition by Russell, were recorded on 22d August 1861.

As above stated, the defender and his father had admittedly had uninterrupted and exclusive possession of the whole subjects for more than the prescriptive period of forty years at the date of the raising of this action in 1879.

The defender pleaded, *inter alia*—“(1) The defender and his predecessors having possessed the subjects held by him under infestments for more than forty years, he is protected by the long prescription, and should be assoilzied from the conclusions of the action.”

On 10th July 1879 the Lord Ordinary (ADAM) pronounced an interlocutor sustaining the defender's first plea-in-law, and assoilzied him from the conclusions of the action. His Lordship added the following note:—

“*Note.*—The question in this case is whether the defender has a good prescriptive title to four seventh parts or shares *pro indiviso* of the subjects specified in the summons, which are certain roods of land in the burgh of Inverkeithing.

“It is not disputed that the defender is proprietor of three parts or shares of the said subjects, which he holds under titles other than those now in question.

“It is admitted by the pursuer that the defender and his authors have had exclusive possession of the subjects for a period of more than forty years—[His Lordship then summarised the titles above set forth].

“Such being the state of the titles and of the possession following thereon, the Lord Ordinary did not understand the pursuer to dispute that the defender, his predecessors and authors, had had possession of the subjects described therein in virtue of infestments for the space of upwards of forty years continually and together subsequent to the dates of the said infestments, but he maintained that the description of the subjects in the titles was not such as to be habile to give to the defender a prescriptive title to the subjects, or to preclude inquiry as to the antecedent titles.

“The description of the subjects is ‘All and whole the several shares which belonged to Jabez Auld and Andrew Meiklejon of all and whole’ the subjects in question. The pursuer now proposes to show that at the date of the disposition by Auld & Meiklejon in 1818 the four shares of the subjects thereby disposed by them did not belong to them but to his predecessors, and that they now belong to him. It appears to the Lord Ordinary that whether the shares in question belonged to Auld & Meiklejon or not, their disposition of them to the defender's authors was a sufficient title on which to prescribe a right to them, and the defender and his authors have had exclusive possession of them for upwards of forty years. So far as the Lord Ordinary can see, the possession had by them has not been adverse to or inconsistent with the terms of the titles. He thinks therefore that the defender ought to be assoilzied.”

The pursuer reclaimed. The case was argued before the First Division, and was subsequently put out for hearing before Seven Judges.

The claimer argued—He had good right to four seventh shares, provided he were not excluded by the defender's prescriptive possession of the whole subject. But the defender's title was not habile to found prescription. For it was impossible under a title to “shares” to prescribe a title

to the whole of a subject. “The several shares belonging to us” could not, on any natural interpretation, be held to mean the whole. The defender's title, then, being *ex facie* limited, must be held as referential, and it might be explained by reference to something outside it, whether the “shares” conveyed were really the whole subject or not—*Mackintosh v. Abinger*; *Lord Advocate v. Balfour*; *Earl of Dalhousie v. M'Inroy*; *Reid v. M'Coll*—reference to the other titles showed they were not so. Possession for over forty years was of no special value in interpreting a doubtful title, though it was absolute in rearing up a bad one. A title to “shares” could not be explained by possession on the analogy of a title including “parts and pertinents.” Again, the defender could not connect himself feudally with Black's title, for Russell, though succeeding him as trustee, had not formally taken the estate out of him. The defender's subsequent possession must be held to have followed on Russell's title. But Russell had never been infest in any shares belonging to Andrew Meiklejon as an individual, for the adjudication on which his title proceeded included only the estates of the firm and of Jabez Auld as an individual.

The respondent (defender) answered—He had admittedly had peaceable and uninterrupted possession of the whole subject for more than forty years. The title on which that possession had followed was habile to found it. To prove otherwise, the pursuer must show that defender's right was expressly excluded. “Several shares” might be ambiguous, but the ambiguity was cleared up by the subsequent possession, which was conclusive of the matter, and excluded all other evidence—*Bucleuch v. Cunynghame*; *Lord Advocate v. Graham*; *Forbes v. Livingstone*; *Brand v. Charteris*. Thus “parts and pertinents” had often been explained and defined by subsequent possession—*Magistrates of Perth v. Earl of Wemyss*; *Earl of Fife's Trustees v. Cuming*; *Montrose v. Macintyre*—and “fishings” held to mean “salmon-fishings” after the requisite period—*Lord Advocate v. Sinclair*; *Fraser v. Grant*. As to Russell's title, the Bankruptcy Act (54 Geo. III. cap. 137, sec. 31), under which he succeeded Black as trustee, vested Black's right in him “without any form whatever;” the adjudication was unnecessary. Thus the defender could found on Black's title as well.

Authorities—*Mackintosh v. Abinger*, July 12, 1877, 4 R. 1069; *Lord Advocate v. Balfour*, Dec. 12, 1860, 23 D. 147; *Earl of Dalhousie v. M'Inroy*, July 20, 1865, 3 Macph. 1168; *Reid v. M'Coll*, Oct. 25, 1879, 17 Scot. Law Rep. 56; *Bucleuch v. Cunynghame*, Nov. 30, 1826, 5 S. 57, 3 Ross' L. C. 338; *Lord Advocate v. Graham*, Dec. 10, 1844, 7 D. 183; *Forbes v. Livingstone*, Nov. 29, 1827, 6 S. 167; *Brand v. Charteris*, Dec. 18, 1841, 4 D. 292; *Magistrates of Perth v. Earl of Wemyss*, Nov. 19, 1829, 8 S. 82, 3 Ross' L. C. 442; *Earl of Fife's Trustees v. Cuming*, Jan. 16, 1830, 8 S. 326, 3 Ross' L. C. 445; *Duke of Montrose v. Macintyre*, Mar. 10, 1848, 10 D. 896; *Lord Advocate v. Hebden*, Feb. 26, 1868, 6 Macph. 489; *Lord Advocate v. Sinclair*, June 21, 1865, 3 Macph. 981; *Fraser v. Grant*, Mar. 16, 1866, 4 Macph. 596.

At advising—

LORD JUSTICE-CLERK—The present action has

for its object to vindicate the right to four seventh parts or shares *pro indiviso* of a plot of ground in the burgh of Inverkeithing contained within certain boundaries specified in the summons.

The pursuer alleges that in the year 1800 the entire tenement in question was divided into seven parts, in terms of a disposition granted by the eldest son and heir of the former proprietor to himself, and his brothers and sisters, as part of a contract of collation. He further alleges that he is entitled to one of these shares as heir-at-law of his grandmother, who was one of the original disponees, and to other three shares to which he has acquired right from a certain John Meiklejon who is said to have succeeded to them. All the writs which are said to have vested these rights in the pursuer bear date in 1875 and 1876, and no intermediate rights or transmissions are mentioned in the record by the pursuer.

The defence stated by the defender, as we have had it explained by the writs produced and by the argument at the bar, is that the whole subject in question belonged in 1818 partly to Andrew Meiklejon and partly to Jabez Auld; that these two persons, who were in partnership, became bankrupt and were sequestrated in 1818, and disposed their whole estates, including the shares of this subject belonging to them, to David Black, the trustee in the sequestration, and to James Russell, as trustee in succession; that David Black was infert, and died in 1828, when he was succeeded by James Russell, who completed his title and disposed these shares to the predecessor of the defender in 1836. It is admitted in the record that for forty years preceding this action the defender (which must mean the defender and his authors) had possessed the whole subject in dispute, and by minute lodged for the pursuer this is explained to mean exclusive possession.

The first, and as it appears to me the only, question raised in the case is, whether there be here a habile title on which prescriptive possession can proceed? for if there be, the possession itself, its continuity, and its ascription to the title, appear to be beyond dispute. Whether the title founded on be one on which possession for forty years can establish a right of property depends solely on the terms of the written charter or disposition itself, and neither on extrinsic evidence nor on possession. A habile title does not mean a charter followed by sasine, which bears to convey the property in dispute, but one which is conceived in terms capable of being so construed. The terms of the grant may be ambiguous or indefinite or general, so that it may remain doubtful whether the particular subject is or is not conveyed, or if conveyed, what is the extent of it. But if the instrument be conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance, that is enough, and forty years' possession following on it will constitute the right to the extent possessed.

I am of opinion that in the present case the conveyance to David Black and the other trustees in succession, in 1818, was habile to import a conveyance of the whole of this property. Indeed, I am at a loss to see how the contrary can be maintained. The general scope of the conveyance is the following :—[*goes through the clauses*]. It thus

appears that each of the two partners convey to Black their several shares of this piece of ground. This proves—First, That the ground was divided into shares; Secondly, That accordingly each of the partners could only convey what he had, and could not in correct conveyancing, even along with the other, convey the amount or sum of the shares of each together; and Thirdly, That the conveyance leaves it entirely doubtful whether the shares of each together did or did not comprehend the whole. There is nothing to raise a necessary implication either way. But I should infer, from nothing being said as to the extent of the shares, that there were not at that time any other recognised proprietors. I am therefore of opinion that the assumption of the pursuer's argument, that because the conveyance was by shares, the subject of it was, in the aggregate, less than the whole area defined in the conveyance, has no foundation in the terms of the instrument. If, as the pursuer alleges, there had originally been seven proprietors, and each had been a party to the conveyance, each would have conveyed his share in precisely the same terms.

If this, then, be so, I see no other question remaining, for Black was duly infert under the conveyance of 1818, and exclusive possession for forty years prior to 1879 implies possession from the date of that infertment. This seems too clear for argument, but I shall say a word or two on the criticisms which have been raised in the sequel. Meantime, on the assumption that there is a habile title for prescription, and that possession has followed for forty years, what remains?

It seems to be thought that possession only acts on the title as evidence of its true construction, and that after prescriptive possession the prior titles may be referred to in order to rebut that construction. I think such a view entirely erroneous. Indeed, the effect of forty years' possession on a habile title is not, in any accurate sense, to construe the title. Its effect is to establish the right. It is of no consequence what the true construction of the title may be, as long as it is susceptible of a construction consistent with the prescriptive possession; and when that has run, it is the possession, not the words of the charter, which establishes the right. This is well-settled law. Prior to the completion of the prescriptive term, no doubt, possession, while an important element in construing a doubtful grant, has no effect at all as the foundation of a right of property, and prior titles, or other extrinsic elements, such as want of power in the granter, may be adduced to control and counteract its effect. But when possession consistent with and ascribed to the infertment on a habile title has once reached the prescriptive term, its effect is wholly altered. It is no longer evidence of the construction of a written title, but operates as in itself the constitution of a right of property, and thenceforth the construction of the written title is of no consequence at all, excepting so far as habile as a groundwork for prescription. So, if prescriptive possession of salmon-fishing follow on a title *cum piscationibus* only, or of lands on a title of part and pertinent, it is wholly irrelevant to allege that the prior titles will show that the granter had no right to salmon-fishings or that the lands were vested in another. The principle is well expressed in a sentence from the

opinion of five of the consulted Judges in the case of *Forbes v. Livingston*, which was adopted by the majority of the Court. The case, which is a leading one in this branch of the law, related to a grant from the Barons of Exchequer of certain lands which had been forfeited in the person of the superior, the Earl of Linlithgow, to the vassals under the Clan Act. But the vassals had no *dominium utile* in the minerals, which belonged entirely to the forfeited Earl, and the Barons had no right to grant them. But on an averment that possession for forty years had followed on this grant, which, as conveying the surface, was habile to convey the minerals also, the title to prescribe was sustained, although the proof of possession failed. The passage I refer to in the opinion is as follows (p. 173):—"The positive prescription operates by excluding all inquiry beyond the forty years into the previous titles and rights to the lands, so that it is not competent to inquire, and consequently it cannot be known legally, whether lands possessed for forty years upon a good *ex facie* title were ever forfeited or not, and therefore all the prior history of these lands is excluded." On this case Mr Napier deduces the following proposition, among others:—"The exclusive nature of a prescriptive title is such as to debar all inquiry into the previous history and origin of the title produced, even though that inquiry might tend to illustrate what was in reality the particular or limited meaning of the *ex facie* general and unlimited terms of the charter and sasine produced" (Napier's Law of Prescription, 172); and such I take to be the unambiguous teaching of all the authorities.

It seems to me that if this be conceded, no further question remains. It has no doubt been argued, with much ingenuity but with little plausibility as I think, that the title made up by Russell, the trustee in succession, did not embrace part of the subject conveyed to Black, and that the omission of this portion proves that the whole was not conveyed to Russell.

For reasons I shall immediately mention, I think there is no foundation for this criticism in the fact. But even if the title of Russell, the trustee in succession, were held to be an original right disconnected from that of Black, it is clear that as forty years have passed since his infestment in 1828, it is as irrelevant to try to control it by the terms of the disposition to Black as to control the latter by the previous titles. But manifestly the possession of Russell is and could be nothing but the continuation of the possession of Black. His only title as trustee in succession is the disposition in 1818, in which he is simply a member of a destination. He is substituted to Black, and on the latter failing is entitled, whether he is feudally invested or not, or however he may be feudally invested, to continue the prescriptive possession. It is settled law that an heir in apparenay, or a singular successor who has not completed a title, is still entitled to continue possession on his predecessor's infestment, provided he can connect himself with it; and Mr Erskine's dictum, pointing apparently to a different conclusion, was overruled in the case of *Caitcheon*, M. 10,810, which has been followed ever since. That a disponee in succession—all the more when a trustee—must needs be able to connect himself with his predecessor, is too clear to need demonstration, even without the express words of the

Bankrupt Statute 1814 (section 31), which places the matter beyond question.

But, in conclusion, the supposed discrepancy between the disposition of 1818 and the adjudication of 1828 has no real foundation. How these shares were acquired by the two partners we do not know, and the Lord Ordinary is mistaken in saying that there is any admission on this subject on the part of the defender. But the conveyance of 1818 does not disclose whether these shares were held by the partners for themselves or for the company; and if the latter, the criticism, slender as it is, disappears.

I am for adhering to the Lord Ordinary's interlocutor.

**LORD DEAS**—This is a question of prescription under the Act 1617, c. 12.

The summons concludes for declarator that "All and whole four just and equal seventh parts or shares *pro indiviso* of all and whole these short roods of land lying near the north or east part of Inverkeithing, within the liberties of that burgh," bounded as therein mentioned, "pertain and belong heritably in property to the pursuer in virtue of his rights and titles" and "that the defender has no right in or to the said four just and equal seventh parts or shares *pro indiviso* of the said subjects."

In article 1st of his condescendence the pursuer sets forth that John Meiklejon, merchant in Inverkeithing, died in or about the year 1800, leaving five sons, James, Edward, John, Robert, and Andrew, and two daughters, Margaret and Mary, and that at the time of his death he was proprietor of and stood infest in All and whole the short roods of lands described in the summons, conform to instrument of sasine dated and recorded in the Burgh Register of Sasines on 5th July 1797 (being the short roods of land of which four just and equal seventh parts or shares *pro indiviso* are claimed by the pursuer).

In the subsequent articles of his condescendence the pursuer further sets forth that the deceased's eldest son James was cognosced and infest as heir to his father in, *inter alia*, the said short roods of lands, and thereupon, in implement of a contract of collation, resigned six just and equal seventh parts thereof in favour of his brothers and sisters, who were cognosced and infest therein conform to instrument of cognition &c., produced, dated 26th and duly recorded on 27th December 1800. In this way it is stated that the whole of said short roods of land were divided into seven equal shares or parts, the seven children of the deceased John Meiklejon senior becoming *pro indiviso* proprietors thereof.

The pursuer further states that to one of these seventh parts or shares he obtained a precept of *clare constat* from the magistrates, and was infest thereon in September 1875 as heir to Margaret, one of the seven, who was his grandmother; that to other three-seventh parts which had belonged to her brothers James, Edward, and John, precepts of *clare constat* were obtained by their heirs in 1876, and infestments expedite thereon, the result of which was that a John Meiklejon of the present generation became proprietor of three seventh shares, which he conveyed to the pursuer by disposition dated 11th, and recorded by way of infestment 15th August 1876, whereby the pursuer

became proprietor of the four seventh parts or shares now claimed by him.

Between 1800 and 1875 the pursuer does not allege that any step of title was made up by anyone through whom he claims.

As to the way in which the subjects have been in the meantime possessed, the pursuer avers in article 5 of his condescendence that the defender and his authors have wrongfully "taken possession of the whole of the said subjects and intromitted with the rents thereof for a period of over forty years prior to the term of Whitsunday 1879 without accounting in any way to the pursuer or his authors for their proportion of the same." He further says—"Said short roods were, along with other two properties in Inverkeithing, disposed in security to heritable creditors as far back as 1801. For payment of the interest due under the bonds so granted (which are herewith produced) the creditors therein undertook the duty of uplifting the rents of said subjects, the proprietors thereof being ultimately entitled to any balance upon their intromissions. During the whole currency, however, of said securities, no rents whatever were uplifted in respect of the short roods in question, which were possessed exclusively by the defender and his predecessors. Said securities, in so far as over the property of the pursuer, have now been discharged or extinguished. An account of the rents of the two subjects other than the short roods now in question has been rendered. No settlement, however, can be obtained from the defender for any part of his predecessors' intromissions with the proceeds of the subjects now in dispute."

These averments seem to imply that possession of the disputed subjects, by drawing the rents thereof, has been exclusively with the defender, his predecessors and authors, from about the year 1801 downwards. At all events, it is distinctly admitted that this has been so during the prescriptive period of 40 years, which is all we have here to do with.

All this however, it must be conceded, will not prevent the pursuer from vindicating his right and title to the subjects embraced in the family infestments of 1800, in so far as the pursuer has duly connected himself with the parties then infest as his predecessors and authors; for a right to heritable estate validly vested by infestment cannot be lost by the negative prescription unless gained by the positive.

It is incumbent, therefore, on the defender to show that he has a title to the disputed subjects fortified by the positive prescription.

Now, a party who has had prescriptive possession is always entitled to attribute that possession to whichever of his titles he conceives to be most favourable for himself. Accordingly Mr Erskine states (iii. 7, 6)—"Where one's possession of heritage may be supported on two different grounds or titles, the most ancient of which contains limitations on the possessor or his heirs which the latter is free from, it is lawful for the possessor to establish his right upon the unlimited title and ascribe his title thereto." This was expressly so found in the cases to which Mr Erskine refers—M. 10,947 and 4350.

In the argument in the present case the defender rested his prescriptive title upon a disposition dated 31st December 1818, and sasine thereon dated and recorded by way of infestment

on 23d April 1819. Both are produced in process. They are not narrated in the record, but I think that would be a useless formality at this stage of the proceedings, especially as the disposition and sasine forming the next steps of his progress, which he does not narrate in the record, would of themselves equally well serve to support his prescriptive possession. The disposition of 1818 bears to be granted by Jabez Auld and Andrew Meiklejon, merchants in Inverkeithing, as a company, and Jabez Auld, one of the partners of that company, as an individual. It narrates that the estates of the granters had been sequestrated under the Statute 54 Geo. III. c. 137; that David Black, James Russell, and James Crawford had been appointed trustees in succession on the sequestrated estate, and that Black having accepted, the Lords of Council and Session had ordained the granters to execute and deliver to him a disposition and conveyance of their whole estate and effects, heritable and moveable. The deed then proceeds, in obedience to this order, to dispose and convey to Black "and other trustees chosen in succession to him, as aforesaid, or to any other trustees who may be afterwards legally chosen by our said creditors, and to his or their assignees," the whole heritable and moveable estates belonging to the granters, either as a company or as individuals, with the whole writs and instructions thereof, and, in particular, All and whole "the several shares belonging to us" of All and whole certain houses and others therein mentioned (which are not now in dispute), and "also of All and whole these short roods of land lying near the north or east part of Inverkeithing, within the liberties of that burgh," bounded as particularly therein specified. On this disposition Black, as trustee in the sequestration, was infest, conform to instrument of sasine dated the 15th and duly recorded on 23d April 1819.

Although the pursuer claims only four out of the seven shares which were vested in the family of old Meiklejon by their infestment of 1800, he says that this is simply because he has not been able to connect himself with the other three members of that family and their shares, and as the defender claims all within the specified boundaries as having been conveyed to his author Black by the foresaid disposition, the pursuer contends (and I shall assume that he is right in that contention) that he is equally entitled to criticise and object to the terms of that disposition as if he himself were claiming, on the one hand, all that the defender is claiming on the other. On this footing the pursuer then argues, first, that the words our "several shares of these short roods of land" lying within the specified boundaries, cannot possibly mean the whole land within these boundaries; and second, that, at all events, while possession for 40 years upon an unambiguous title excludes all inquiry hostile to the possessor, it has not that effect any more than a shorter period of possession, where the title is ambiguous, which it is said to be here.

Now, as to the first of these objections, I see no impossibility whatever in Jabez Auld and Andrew Meiklejon as a company, and Jabez Auld as an individual, having acquired one or more of the shares of the *pro indiviso* subject from one or more of the members of the family of old Meiklejon at one time, and one or more

of the shares which belonged to another or others of that family at another time, until the whole seven shares were so acquired, when the "several shares" belonging to these parties (we neither know nor need to know in what proportions) would undoubtedly mean and comprehend the whole *pro indiviso* subject.

It is not necessary, in my opinion, that a party who pleads prescription should produce a title which *ex facie* comprehends everything he claims under it. If its terms be such as *may* comprehend the whole, and prescriptive possession of the whole follows, that is sufficient. After 40 years' possession he cannot be called upon either to support that title or to contradict it by producing any older title or titles he may be possessed of. Nor can his position be varied by any production of older titles made by his opponent. The presumption in such a case as the present, that all titles necessary to warrant the conveyance by the granters of the disposition of 1818 had existed, is under the statute *presumptio juris et de jure*.

If there be thus, as I think there is, a good answer to the objection of incongruity alleged against the disposition of 1818, there must, *multo majus*, be a good answer to the objection of alleged vagueness in that disposition. Whatever subjects the disposition is habile to convey are to be held (after prescriptive possession) *presumptio juris et de jure* to be conveyed by it, just as I have said all titles necessary to warrant the granting of the disposition are to be held *presumptio juris et de jure* to have existed.

All this might safely enough be inferred from the statute of 1617 itself. The object of that statute bears to have been the fatherly care of His Majesty—to remove the griefs of his subjects by "cutting off all occasion of pleas, and to put them in certainty of their heritage in all time coming;" and upon this narrative it is enacted that those who have possessed upon their titles without lawful interruption for 40 years shall never be troubled by His Majesty, "nor by any other person pretending right to the same by virtue of prior infeftments, public or private, nor upon no other ground, reason, or argument competent of law except for falsehood," meaning, of course, forgery.

Accordingly Mr Erskine, commenting on the statute (iii. 7, 4), says—"Charter and sasine (comprehending of course disposition and sasine) if they be formal deeds, will of themselves support the prescription without the necessity of producing the grounds of the charter, or even though, if extant, they were reducible upon nullities;" and against the objection of vagueness in the terms of the charter or disposition he gives the conclusive instance of a right or subject being carried as part and pertinent, although the competitor has been specially infeft in that right or subject without possession within the 40 years. For this he cites the cases of *Grant* in 1677, M. 10,876, and *Earl of Leven v. Finlay* in 1711, M. 10,816, and to these we have now to add the modern case of *The Magistrates of Perth v. The Earl of Wemyss*, relative to a large island in the Tay, Nov. 19, 1829, 8 S. 82.

If *ex facie* of the disposition we were to find no description of the subjects at all, but reference made to the prior titles generally or to a particular prior deed, as containing that description, I by no means say that the prior titles or prior deed

might not be looked at in a question as to the identity of the subjects; but that is too delicate a question of circumstances to be speculated upon here, where there is nothing of the kind.

Of course if the disputed subjects cannot be claimed without contradicting the terms of the prescriptive deed, as in the case of a bounding charter, no length of possession can establish that claim. But in the present case the fact that the disposition is a bounding charter is favourable, and not unfavourable, to the defender, for the disposition to his author Black purports to convey to Black and his successors all within the specified boundaries.

When I was a student of law, now some 60 years ago, under Professor (afterwards Baron) Hume, I am very sure that if there had been a case in which a title, followed by prescriptive possession, had been held open to inquiry simply because it might possibly be read in two ways, he would have known of it, and if he had known of it he would undoubtedly have mentioned it, which from my notes I can say he did not do. I have not myself known of such a case, and none has been cited to us. The course of decisions from the date of the statute downwards has been in a spirit adverse to any such construction of it. The statute has always been regarded as having introduced a beneficial limitation favourable to the security of land rights, and has been construed accordingly.

For instance, in cases of *jus regale*, which can only flow from the Crown, we find in Kames' Fol. Dict. ii. 108, two cases reported thus—"Forty years' possession with a title from a subject found sufficient to establish a Fair though the king alone can constitute Fairs, the prescription inferring a *presumptio juris et de jure* that the right was originally derived from the king—*Stair*, Dec. 2, 1679—*Farquharson contra Earl of Aboyne*. The like with regard to a right of ferry-boat—Dec. 22, 1731—*Tarbat contra Bogle*."

The case of *Farquharson* is reported in Morrison 4147. It appears from a short notice of the case of *Tarbat*, *ibid* 4167, that the question there arose between the proprietor of the ferry-boat and the proprietor of the fishings carrying across passengers in the fishing boats. But I find from my notes of Professor Hume's lectures, that the case was cited by him with reference to the report by Kames, accompanied by the following remarks of his own—"Intrinsic nullities which appear on the face of the deeds themselves effectually cut off the plea of prescription. Of this sort are the want of symbols in the delivery of sasine, disconformity to the precept, &c. But the nullity must be such as cannot be done away by other evidence. Thus, if one has a charter from a subject-superior giving him a right of ferry—and to this it is objected that a right of ferry can be granted only by the Crown—it may be answered that though a right of ferry can only proceed from the Crown, yet it may be transmitted by one person to another, and as no inquiry can be made before the 40 years, this must be assumed to be the fact of the case—*Tarbat v. Bogle*, Dec. 22, 1731, Kames' Fol. Dict. ii. 108. The same holds as to a barony—*Scott v. Stewart*, July 1, 1779; *Miller v. Dickson*, Feb. 7, 1766. In this last case the precept of *clare constat* was said to have proceeded from a person not the superior, but the date thereof being beyond the 40 years it

was found this could not be inquired into." In further illustration of the same principle he elsewhere observed—"Prescription renders a title good though it was of itself originally invalid; as although it proceeded from a minor, or a bankrupt, or was obtained by force, or through fear or the like—these being circumstances which do not appear on the face of the title."

The case of *Scott v. Stewart*, referred to by Professor Hume, is a case of great importance. It will be found in Morison, 13,519.

The defender in that case produced as his prescriptive title to the lands an absolute disposition dated in 1706 by Charles Stewart to his son John, with sasine upon it in 1709. The title was challenged in a reduction and declarator by Scott, who alleged that the lands had belonged to his ancestors, and had been simply wadsetted by them to the defender's authors, and that he (Scott) was vested in the right of reversion. The disposition of 1706 by Stewart to his son directed infettment to be given at the manor place of Rigton, "and that in the name of the hail above designed lands and others above disposed, which I for me and my heirs *quoviscunque titulo* declare and ordain to be sufficient, as if infettment had passed upon every particular of the lands." The objection to the sasine was that such a dispensation could only flow from the Crown, and that not only was there no evidence of it, but that the terms of the clause in the disposition implied that it had no other authority than that of the granter of the deed. The answer was that after possession for 40 years a clause of dispensation capable of being transmitted must be presumed to have existed in the prior Crown titles, which the defender could no longer be called on to produce. The interlocutor of the Court, which was adhered to on a reclaiming petition and answers, was "that the defender has produced sufficient to exclude and therefore assolvie him from the process of reduction."

The case of *Miller v. Dickson*, 7th February 1766, referred to, is also reported in Morison, 10,937 *et seq.*, and is, in like manner, of great importance. John Muirhead, advocate, died validly entered and infett in the lands called Parsons lands, and George Muirhead, his grandson, by wrong advice, obtained a precept of *clare constat* in 1711 from the Earl of Wigtown, said to be superior, in place of taking it from the parson of Biggar, the true superior under the then existing statute law. On this erroneous precept George Muirhead took infettment and possessed the lands till his death without issue in 1751, a period of thirty-nine years and nine months, when his widow Mary Dickson continued the possession for a period more than sufficient to complete the forty years, in virtue of a gratuitous disposition left by him in her favour. Thereafter the heirs of line of John Muirhead, advocate, made up titles to him, and brought a reduction and declarator against Mary Dickson, the widow, pleading that her husband as heir-apparent could not alienate the estate gratuitously, that his infettment on the erroneous precept was a nullity, and that as they could not claim the estate in the lifetime of her husband, who was a nearer heir than themselves, prescription could not begin to run against them till his death.

In the course of the process it came to be conceded that, apart from the effect of prescription,

the validity of the precept and infettment in favour of the defender's husband could not be maintained. The Court at first repelled the plea of prescription on the ground of *non valentes agere* during George Muirhead's lifetime, but on advising a reclaiming petition and answers, they (as the report bears) "with great unanimity," on 7th February 1766, "found the precept of *clare constat*, with the infettment thereon in favour of George Muirhead, is a habile title for prescription: Found it competent for the defender in this case to found upon her own and George Muirhead's possession in order to make out her plea of prescription; and repel the pursuer's objections thereto, founded on the precept of *clare* being granted by a wrong superior, in respect prescription is sufficient to sopite that defect, and remit to the Lord Ordinary to hear parties on the fact how long the peaceable possession continued, and to do therein as he shall see cause." "And to this interlocutor the Court adhered, March 6, 1766, upon advising a petition for Janet Miller, &c., with answers for Mary Dickson (p. 10,942)."

The established rule as to salmon-fishings affords another remarkable instance of the effect given to prescriptive possession. Mr Erskine says (ii. 6, 15)—"Salmon-fishing is also a *jus regale*, and therefore is not carried by a charter without an express clause. Yet by our uniform practice the common clause *cum piscationibus* is a sufficient title for constituting a right to salmon fishing by prescription; so that where the vassal hath been in the uninterrupted possession of it for forty years, such possession, joined to the general clause, establishes a right to that *regale*."

This doctrine has the sanction of many decisions. Thus, in the case of the *Heritors of the Fishing of the Don v. The Town of Aberdeen*, January 26, 1665, M. 10,840, in a declarator by the heritors having salmon-fishings in the upper waters of the Don, to have the town's cruives put down, the report bears that it was pleaded "that the town of Aberdeen hath no right to cruives, but is only infett *cum piscationibus et piscariis*, and within such a bounds which cannot carry salmon-fishing, being *inter regalia*, much less cruives. It was answered that such a clause, granted to an incorporation or community, or being *in baronia*, with immemorial possession, is sufficient. . . . The Lords found the town of Aberdeen's title to cruives, albeit conceived, but conform to the first clause with long possession was sufficient."

The same doctrine was recognised in the case of the *Earl of Southesk v. Lady Earlshall*, February 22, 1667, M. 10,842; and in the next case, *Fullerton v. The Earl of Eglinton*, February 7, 1672, M. 10,843-4, the point was expressly decided. The dispute in this last case was as to the fishing in the water of Irving. Fullerton stood infett in the lands of Dreghorn, on one side of the water, *cum piscatione salmonum*, and the Earl stood infett in the barony of Robertson, on the other side of the water, *cum piscationibus*, and pleaded his immemorial possession of salmon fishing on both sides of the water. It was replied that salmon-fishing, being *inter regalia*, did require a special sasine, and was not comprehended under the name of barony. But the report bears—"The Lords did sustain the defence notwithstanding of the reply, and found an infettment *in baronia cum piscationibus* to be a



sufficient title to acquire a right of salmon-fishing by forty years' possession."

In the case of *Brown v. The Town of Kircudbright*, December 6, 1678, M. 10,844, Brown had a grant of his lands from the Bishop of Galloway, with salmon-fishing in an adjoining pool in the Dee. The town stood infert in the burgh and burgh lands *cum piscationibus*. It was proved that the town had prescriptively fished for salmon in the pool with two boats and Brown with one. As to the effect to be given to the bishop's charter, the precedent of *Farquharson's* case (M. 4147) was followed, holding that conveyance by a subject to the right to a fair, followed by possession of the right for forty years, was sufficient to establish *presumptione juris et de jure* that the right had originally been conferred on the bishop by the king, and as to the extent of the right of fishing in the pool, it was held that the town was entitled to fish with two boats and Brown with one, as they had been in use to do during the prescriptive period.

It is true that in all of these cases as to salmon-fishings the clause *cum piscationibus* occurred in titles to lands which had *nomen universitatis*, being either within a royal burgh or a barony, but I do not see that this should prevent them from being examples of the great effect attributable to prescriptive possession under the statute of 1617, both as construing the title and establishing the right. In the cases of fairs and ferries I do not observe that the element of *nomen universitatis* is said to have been present.

As to the defender's titles subsequent to the sasine in favour of Black of April 1819, Mr Erskine no doubt says (iii. 7, 5)—"Possession must by the said statute be continued through the whole course of prescription upon the title of sasines. No part therefore of the possession of a singular successor upon a bare personal right, as a charter or disposition, can be computed to make up the years of prescription. And this is also the case of an heir's possession before he hath completed his title by sasine." This, however, is a misapprehension. The contrary was authoritatively decided where the predecessor had been infert on a charter, although the heir himself, whose possession was added, possessed simply on apparency—*Marchmont v. The Earl of Home*, July 28, 1724, M. 10,797, and *Caitcheon v. Ramsay* (decided on memorials), January 22, 1791, M. 10,810. In the case already cited—*Miller v. Dickson*, February 7, 1766, the same decision was given as to the possession of a disponent, and this was confirmed in *Middleton v. The Earl of Dummore*, December 22, 1774, F.C., and M. 10,944, where it is expressly stated that the disponent was not infert. And lastly, in *Craufurd v. Durham*, December 20, 1822, F.C., it was held, as the rubric bears, that "a singular successor, founding on a minute of sale by an apparent heir uninfert, is entitled to plead the positive prescription if he can connect himself with a sasine.

As to the supposed discrepancy between the title of Russell, who succeeded Black as trustee, and the title of Black himself, I cannot regard it as of the slightest consequence in any view of the deeds and sasines that can be taken. I think Russell got all that Black had to give, and if it had been otherwise, I know of no rule which requires a party founding upon an unobjection-

able charter and sasine as his prescriptive title to defend the regularity and formality of every step of his subsequent progress against a party who has had no possession, which he might no doubt have to do if the question were between competitors upon an equal footing with each other.

If there were any defect in any of these transmissions, the defender would be entitled to have these defects supplied, and the pursuer would have no right or title whatever to interfere in that matter.

I have never had any doubt in the present case that the Lord Ordinary's interlocutor fell to be adhered to, and the judgment to that effect is likely, I understand, to be unanimous. But the security of land rights throughout the kingdom is too important a subject, when breathed upon at all, to be treated lightly, which must be my excuse for the length of these observations.

**LORD ORMDALE**—If the description in the defender's titles had been such as in itself to show that the whole subjects claimed by him could not be comprehended by it—if, for example, it had been to the effect that he had only one seventh share of the subjects—he could not prescribe a right to more than that share; but as the description in the present instance is "All and whole the several shares," it appears to me, in concurrence with the Lord Ordinary and my Lord Justice-Clerk and Lord Deas, that it is sufficient with the requisite possession and title to be the foundation of a prescriptive right in the defender to all he claims.

It was said, however, that there was ambiguity and doubt in the description as to the precise meaning of the expression "several shares," or, in other words, an uncertainty as to whether they comprehend the whole or only part of the disputed subjects; but any such ambiguity or doubt or uncertainty may be, in my opinion, completely cleared up by possession for the prescriptive period, and after such possession, following on a habile title, all inquiry into prior rights or titles for the purpose of contradicting or defeating the prescriptive title is incompetent.

In regard to possession, the pursuer does not even say, and has not offered to prove, that he or his alleged authors ever had any possession at all of the subjects in dispute, or any portion of them, prior to the constitution of the present action in May 1879. On the contrary, he not only admits, but makes it matter of averment in the 5th article of his condescendence, that the defender has had possession of the whole subjects in dispute for forty years prior to the term of Whitsunday 1879.

It is in this state of the fact as regards possession that the pursuer after so many years desires to oust the defender, and to have it found that he is proprietor of the subjects or part of them. It is true that mere possession is not enough to entitle the defender to absolvitor from the pursuer's action in respect of his plea founded on the positive prescription under the Act 1617, c. 12. He must also show that his possession followed on a good and sufficient title—that is, on what, according to the latitude of construction, established by decided cases, of the Act, is equivalent to charter and sasine. As the defender must be regarded as being in the position of a singular

successor, it is necessary that it should be shown that the possession on which he founds followed on a charter or what is according to established law and practice a warrant, which must with reference to such a question as the present be taken to be equivalent to a charter completed by sasine.

Now, there is here the decree of adjudication in favour of James Russell as trustee on the sequestrated estates of Auld & Meiklejon and Jabez Auld, with the sasine which followed thereon. The subjects being burgage situated within the royal burgh of Inverkeithing, the decree of adjudication was a sufficient warrant for the sasine which followed, and it is referred to as such in Russell's sasine, which is produced; and it is of no consequence that the decree of adjudication itself has not been produced, because at the debate it was stated on the part of the pursuer that he did not dispute its existence or insist for its production, being satisfied that it could at once be obtained from the public records on payment of some fees which might possibly fall upon himself.

It must therefore be held that the defender has been in possession for the prescriptive period on a habile title, commencing with Russell's decree of adjudication and sasine. And for my own part I prefer not to go back to Black's title, for the reason that Black's title, although produced, is not founded on by the defender in the record, and that he neither says that the possession of himself or of his authors flowed from it, or that he has connected himself with it in any sufficient way—in the way that seems to be necessary according to the case of *Lady Mary Lindsay Crawford v. Durham*, Dec. 20, 1822, F.C.

My opinion, therefore, coincides with that of the Lord Justice-Clerk and Lord Deas in the result at which they have arrived, and also proceeds partly, although not wholly, upon the same considerations.

LORD MURE—In this case it is not disputed that the defender has had possession of the subjects for the full prescriptive period, and that is alleged by the pursuer in his condescendence. But while this is admitted, it is asserted that the terms of his title were not sufficient to enable him to prescribe a title to the whole subjects, for it only bears to convey "All and whole the several shares which belonged to the said Jabez Auld and Andrew Meiklejon," and which belonged to Russell as trustee foresaid, and does not bear to convey the whole subject. The words are no doubt ambiguous, and it is possible that they were only intended to convey a limited number of shares. That, however, is one but not the only construction of which they are capable, and having regard to the pursuer's allegation as to the division of the subject into seven parts among the family of John Meiklejon senior, it is not impossible that Andrew Meiklejon, who was one of that family, and Jabez Auld, who married another of them, may before 1818 have acquired the remaining shares. Whether or not that was so may be cleared up by the 40 years' exclusive possession which has followed, and in applying that rule we have the authority of all the cases as to salmon-fishings, and as to "parts and pertinents," which show what particular subjects may be acquired by possession under a title including parts and pertinents, and how salmon-

fishings may be acquired by use and possession on a "fishing" title. I think the case of the *Magistrates of Perth v. Lord Wemyss and Others* introduced a rule for the application of the statute of prescription which may be safely applied in the present case.

LORD GIFFORD—I concur in the result at which your Lordships have arrived, and I agree in the general principles on which your Lordships have proceeded, although I differ a little in some details.

There are two sasines on which the defender founds as being the title on which his prescriptive possession has followed—first, a sasine in favour of David Black as trustee on the sequestrated estate of Jabez Auld and Andrew Meiklejon, and of the said Jabez Auld as an individual, recorded 23d April 1819; and second, a sasine in favour of James Russell as trustee in succession on the said sequestration, which sasine was recorded on 1st December 1827. Both sasines are thus dated and recorded long previous to the commencement of the 40 years' possession upon which the defender relies. Now, I think that the defender is entitled to ground upon both or upon either of these sasines, both of which are sufficiently supported by relative charters or warrants. The warrant of the first is the disposition and assignation by the bankrupts, and the warrant of the second sasine is the decree of adjudication in favour of Russell as trustee in succession in the sequestration. I think the defender is in right of both these sasines. No doubt it is objected that Russell, the second trustee, has not feudally connected himself with Black, the first trustee, and has not taken any feudal right out of Black. Now, this may be so, but it rather appears that the provisions in the Bankrupt Act then in force dispense with the necessity of his doing so, for it makes the right of a trustee in succession take effect *eo ipso* on the failure of the first trustee, and without the trustee in succession making up any title whatever. But I think this question really immaterial, because even if the second trustee has not feudally connected himself with his predecessor the first trustee, I think it quite clear that the second trustee had a personal right to the subjects and to Black's sasine therein—a personal right which the second trustee or any successor might at any time make real and feudalise in his person by adjudication and sasine or otherwise. But without the right of the second trustee being feudalised or connected feudally with Black's infertment, I think the personal right to the subjects would be quite sufficient to entitle Russell or his disponees or assignees to plead prescription on their possession, and to refer that possession to Black's infertment, to which as well as to the whole progress of titles they had right.

I am further of opinion, however, that the plea of prescription as urged by the defender is really the same whether the possession is ascribed to the one sasine or to the other. I think the result will be same whether the prescriptive possession is ascribed to Black's sasine or to Russell's.

On the main question I agree that the title founded on, whether it be the sasine in favour of Black or that in favour of Russell, is sufficient, when followed by forty years' possession, to make

the defender's right to the whole subjects indefeasible and unchallenged. The Statute 1617, cap. 12, provides that the forty years' possession which is to create an unchallengeable right shall be in virtue of infeftments with due warrant. In this view I am disposed to think that the question may be put in this form—Is the description of the subjects contained in the sasines, or in either of them, sufficient to embrace the whole subjects which the defender or his author have actually possessed for sixty years, or at least for more than forty years? If the description in the sasines is general enough or wide enough to embrace the whole subject possessed, and if there has been prescriptive possession, then the statute makes the right unchallengeable. If the sasine and the possession are inconsistent or irreconcilable, then to that extent the possession cannot be held to be in virtue of the sasine, and so far the statute does not apply. Accordingly, if the charter and infeftment are a boundary title, and something has been possessed beyond or outside the boundary, and so excluded from the title, prescription will not apply to possession of anything excluded from the boundary title—so if in the present case the infeftments had been restricted to only part of the subject, as if it had been an infeftment in only one-half *pro indiviso* of the subject, I think it clear that on such a sasine there could never be prescriptive possession of the whole subjects—possession of the whole is quite irreconcilable with an infeftment only on one-half. But that is not the nature of the sasines relied on in the present case. In both sasines the right flows from at least two parties, and the trustee, and trustee in succession, are infeft in the "several shares" which belonged to the bankrupt. There is nothing in the deeds to tell us or to indicate what share or shares belonged to the one party, and what share or shares belonged to the other party, and, what is still more important, there is nothing to indicate or even to render probable that "the several shares" conveyed did not, taken together, constitute the whole subject. They may possibly have done so, and this seems to me to be quite enough to support the title as sufficient to found the long prescription. Further illustrations were given by some of your Lordships in the cases of infeftments with parts and pertinents, infeftments with fishings generally, and similar cases where ambiguous titles, or titles admitting of possible limitations or of doubtful extent, have been held to be explained by forty years' uniform possession.

I think the Lord Ordinary's judgment should be affirmed

LORD SHAND—I concur with your Lordships in holding that the interlocutor of the Lord Ordinary ought to be affirmed, and the grounds of my opinion may be stated in a few sentences.

The defender has not founded his defences, as stated on record, on the disposition of 1818 and sasine of 1819 in favour of his author David Black. He could now do so by an amendment of the record, but any such amendment seems to me to be unnecessary, for I think the decree of adjudication of 1824 and sasine following in 1827 in favour of the defender's author James Russell is equally good with the disposition of 1818 as the foundation of a prescriptive right to the whole property in dis-

pute if followed by the requisite possession. The decree of adjudication carries right to the "several shares" of the property in question which belonged to Auld & Meiklejon and Jabez Auld. The words "several shares" do not in themselves define the extent of the conveyance or adjudication, for they may mean, and may have been used to carry, either the whole or certain shares less than the whole of the property. This ambiguity must accordingly have been cleared up during the currency of the years of prescription, being now the period of twenty years, by a reference to the earlier titles, the terms of which would show the extent of the rights of Auld & Meiklejon and Jabez Auld respectively.

After the lapse of the prescriptive period I am of opinion the defender became entitled to object to any reference to the earlier titles or other inquiry by evidence of any kind with the view of showing that his right did not include the whole property in respect of the possession of the whole which admittedly took place during that period. The title of 1818 was habile and sufficient as the foundation of a prescriptive right to the whole subject, because its language is broad enough to include a right to the whole. The meaning of the deed has been construed by the possession for the prescriptive period in the same way, and on the same principle, as the word "fishings" will be construed to mean salmon-fishings after the requisite use and possession of salmon-fishings for the prescriptive period, and the term "pertinents" will include subjects possessed under the title for the requisite period, to the exclusion of all inquiry as to whether their subjects originally fell within the conveyance. The effect of the possession following on a habile title is to exclude all inquiry to contradict the right which the possession attests to the exclusion of all other evidences,—*tantum prescriptum quantum possessum*.

LORD PRESIDENT—When this case was argued in the First Division it appeared to us to raise a question of interest and importance.

Possession for 40 years under a charter and sasine has not only the effect expressly given to it by the statute of prescription, but it has also the effect of construing the title on which possession has followed, and of removing any ambiguities which may attach to the description of the property in that title. Doubts were raised, however, whether as evidence to construe the ambiguous title, the possession, though it may be the best and strongest, is exclusive of all other evidence, or whether other evidence, such as a prior, contemporaneous, or subsequent title, might not be resorted to either to fortify or contradict the inference arising from the possession. That doubt is now authoritatively set at rest by the opinions now delivered by your Lordships, and in these opinions I concur. I hold it to be now settled law that a charter and sasine containing a description which can be so construed as to embrace an entire subject, though it may also be so construed as to embrace part of it only, if followed by 40 years' uninterrupted and exclusive possession of the whole, will, under the Statute 1617, c. 12, exclude all inquiry, and protect the person holding it against all challenge from any person holding even an express title

prior in date to the whole or any part of the subject.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Asher—Shaw. Agent—R. W. Wallace, W.S.

Counsel for Defender (Respondent)—Scott—Kinnear. Agents—Wotherspoon & Mack, S.S.C.

Friday, March 5.

## FIRST DIVISION.

[Lord Young, Ordinary.

### LORD BLANTYRE v. THE CLYDE NAVIGATION TRUSTEES.

*River—Dredging—Powers of Statutory Trustees.*

*Held*, upon a construction of the Clyde Navigation Consolidation Act 1858, secs. 76 and 84, that the Clyde Navigation Trustees were entitled to carry on dredging operations on a part of the river Clyde between high and low water-mark, which had been found to belong in property to the riparian proprietor, without prejudice however to any claim of compensation for damage which might be sustained by the latter.

This was a note of suspension and interdict by Lord Blantyre, proprietor of the lands of Erskine and others, on the banks of the Clyde, and the Master of Blantyre, as heir-of-entail next entitled to succeed, against the Clyde Navigation Trustees incorporated by "The Clyde Navigation Consolidation Act 1858." The object of it was to prevent the respondents "from entering upon, taking, occupying, using, or removing, or otherwise interfering with any part of the soil" within certain areas forming the shore and bank of the river Clyde between high water-mark and low water-mark *ex adverso* of the complainers' estate of Erskine. The complainers, *inter alia*, averred that under the Act 3 and 4 Vict. cap. 118, which dealt with the Clyde navigation, the Clyde Trustees' powers of compulsory purchase expired in eight years after the date of its passing, so far as regarded the lands in which the area in question was included. Further, the complainers' right of property in that ground was established in an action of declarator raised in the Court of Session on 11th December 1875. The Lord Ordinary (CURRIEHL'S) interlocutor in that case was affirmed by the First Division on 19th December 1877, *ante* vol. xv. p. 382, and by the House of Lords on appeal on 19th June 1879, *ante*, vol. xvi. p. 661. The decree bore that the complainers "are proprietors of the foreshores of the river Clyde *ex adverso* of said lands, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the Trustees of the Clyde Navigation by their Acts of Parliament." The complainers now averred that notwithstanding that decree, and the expiry of the respondents' powers to take lands under the Act, the respondents had recently illegally and without authority entered upon and begun to re-

move by dredging and selling or carrying out to sea a portion of the ground in question without their consent.

The Clyde Trustees answered, *inter alia*, that by section 76 of the Clyde Navigation Consolidation Act 1858 the undertaking of the Trustees was defined as consisting, *inter alia*, of "deepening, straightening, enlarging, widening, or confining, dredging, scouring, improving, and cleansing the river and harbour until a depth of at least 17 feet at neap tides has been attained in every part thereof; the altering, directing, or making the channel of the river through any land, soil, or ground, part of the present or former course or bed of the river," &c. By sec. 84 of that Act it was further provided that "it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof . . . to the extent authorised by the recited Acts and by this Act," viz., to the depth of 17 feet at neap tides. The respondents admitted that they did not take under their compulsory powers of purchase the ground in question, but they stated that they were not bound to do so. They had, since 1840, and down to the present time, been in the habit of carrying on dredging operations upon the area in question; their right to do so was now for the first time questioned. The operations now complained of consisted of widening the deepened channel *ex adverso* of the complainers' lands of Erskine. "The site of these operations is in the estuary of the Clyde, and the portion of the *solum* which is to be removed for the purpose of widening the channel is far below high water-mark. Before the earlier operations of the respondents were commenced, the whole of that space was permanently under water, and the effect of these operations has been to confine the deep channel within its present limits." They further denied that they required the consent of the complainers to carry on these dredging operations, or that the statutory limit of eight years applied to their operations on the area in question. The respondents referred to an action of declarator raised against them by Lord Blantyre in 1864, which, as regarded some of its conclusions, was still in dependence, and to a suspension and interdict raised by his Lordship against them in 1866—5 Macph. 508, and 9 Macph. (H. of L.) 6.

The complainers pleaded—" (1) The ground in question being the property of the complainers, and the Clyde Trustees having no right to take or acquire the same, or to dredge thereupon, without the complainers' consent, the complainers are entitled to interdict as craved. (2) The operations complained of being illegal, unwarrantable, and unauthorised, the complainers are entitled to have the interdict made perpetual."

The respondents pleaded, *inter alia*—" (3) The complainers' rights to the foreshore in question are subject to the rights of navigation and other rights which the public have over the same, and to the rights conferred on the respondents by their statutes, and also to the rights created by the royal charters granted to the magistrates of Glasgow. (4) The respondents are entitled at common law, and *separatim*, under the foresaid statutes and royal charters, to widen and deepen the channel of the river by dredging the area of foreshore marked 131 to the depth of 17 feet. (5) The respondents' statutory powers (now expired) of taking and acquiring land compulsorily,