

ship are, I think, appropriate to the law of the case.

The only matter on which I have any difficulty in giving an affirmative answer is that which is suggested by the terms of the second question. What is there asked is this—"Are occupiers within burgh entitled under the Roads and Bridges Act to the same exemptions as they were under the 87th, 88th, and 89th sections of the General Police and Improvement Act." Now, the word "occupiers," as here used, comprehends all occupiers whatever may be the size of the houses which they occupy, and whatever may be the rents paid for those houses, but the 87th section of the Police Act, which is the Act there referred to, provides that "the Commissioners shall assess the owners in place of the occupiers of all land or premises let at a rent under £4, and levy such assessment from such owners, but the Commissioners shall allow to such owners a deduction from such assessment equal to one-fourth of the amount thereof." Now, the General Police and Improvement Act did not impose an assessment on the lands and heritages, one-half to be paid by the owners and one-half by the occupiers. On the contrary, the occupiers, and the occupiers only, unless in exceptional circumstances for which provision was made, were to pay the whole. The 87th section provides that where the rent was less than £4 the occupiers were not to pay at all. The landlord was there to come in their place, and the landlord was to pay the assessment which, if the rent had been more than £4, would have been paid by the occupier, the landlord getting in consideration for the fact that he was paying something not properly his own, an abatement of one-fourth of the sum paid. In terms that section is inapplicable to the arrangement made in the Roads and Bridges Act. But when we look at clause 86 of the Roads and Bridges Act I think practically the same result is obtained. The Roads and Bridges Act provides that whatever the size of the house, and however small the rent paid may be, the occupier is to be put down as one of the two parties by whom the assessment is to be borne, and the landlord is the other. Now, the relief or exemption of the occupier cannot be procured in the way provided for by the General Police and Improvement Act. For what we find at the close of section 86 of the Roads and Bridges Act is this—"Provided that it shall be lawful for the local authority to relieve from assessment the occupiers of lands or heritages under the value of £4, as appearing on the valuation-roll, on ground of poverty." If this clause is to be read as obligatory on the Commissioners the same result ensues as would have ensued supposing the terms of this statute had been the same, for although the occupier is, in terms of the Roads and Bridges Act, to be put down as one of the parties on whom the assessment is to be levied, yet there is this power given to the Commissioners of making as complete exemption as that which was secured under the arrangement of the General Police Act. It is a discretionary power which is conferred on the Commissioners. If they see fit they may exempt parties from payment on the ground of poverty. They have to learn what the circumstances are, and act according to their discretion. That is a thing which seems to me

quite clear. In the case of the other Act there was no option. Parties under a certain rent had a right to be exempted. It was incumbent on those having the administration of that Act to make the exemption. Now, the proviso in the Roads and Bridges Act, to which I have referred, seems to me to amount to pretty much the same thing. Reading it as matter of obligation, the Commissioners are bound to come to the same conclusion—the conclusion, namely, that as all under £4 rent were exempted by the General Police and Improvement Act, so the occupant of a house the rent of which is less than £4, as entered in the valuation-roll, is entitled to exemption, which would put him in the same position. That seems to me to bring us to the same conclusion as your Lordship has suggested in the answer you have mentioned.

LORD RUTHERFURD CLARK—The only difficulty I have is with respect to the 5th question. I confess I do not see any sound distinction between the case under the Poor Law Statute and this case. I think we are bound to follow that decision. At the same time I am not sorry that your Lordships have seen your way to reach a much more equitable result.

The Court pronounced the following interlocutor:—

"The Lords . . . answer the second question in the affirmative, and the third and fourth in the negative; as regards the fifth, they are of opinion in the circumstances stated that the Commissioners are entitled to levy from the actual owners and occupiers severally liable such equal rate per pound as will produce the aggregate sum required for the purposes of the assessment: Find and declare accordingly: Find it unnecessary to answer the first question, and decern."

Counsel for First Parties—Baxter.

Counsel for Second and Third Parties—MacLennan.

Agent for all Parties—Marcus J. Brown, S.S.C.

Friday, February 4.

FIRST DIVISION.

THE EARL OF GLASGOW *v.* BOYLE.

Property—Consolidation of Dominium utile with Superiority—Prescription.

A deed of entail executed in 1715 contained, *inter alia*, the superiority of the lands of B. The *dominium utile* of these lands was soon afterwards acquired by one who subsequently in 1733 succeeded as heir under the entail; he took no infetment, either on the entail or on the disposition of the lands of B, but possessed the latter on apparenry till his death in 1741. His son made up separate titles under the entail and the disposition, and was infet in both. His son, again, thereafter made up the title under the entail only, and was infet, and possessed the lands of B for more than

forty years along with the entailed estate. Held that by said possession the *dominium utile* of B had not been consolidated with the superiority, and so brought within the fetters of the entail, but that a subsequent heir was still entitled to make up fee-simple title to the lands of B.

This was a Special Case in which the question raised was whether the *dominium utile* of certain lands called Bellichevan and Culoch had or had not come by consolidation to be embraced in the fetters of a strict entail which admittedly, when originally executed, included the superiority only of the said lands.

The Kelburne entail, dated and recorded in the Register of Tailzies in July 1715, was made by David, first Earl of Glasgow, in favour of his son John, Lord Boyle, and a series of heirs of tailzie therein mentioned. The entail embraced the superiority of certain lands called Bellichevan and Culoch, as part and pertinent of the lands of Portry, mentioned in the bond of tailzie. The *dominium utile* of these lands was not contained in the original entail. It was acquired by the said John, Lord Boyle, afterwards (second) Earl of Glasgow, by disposition dated 31st March 1721, and recorded in the Books of Council and Session 11th January 1751, from James Boyle of Bellichevan, who then possessed the lands on apperency. The disposition was in favour of the said John, Lord Boyle, and his heirs and assignees whomsoever, not of the series of heirs set forth in the entail. John, Lord Boyle, was never infeft on the disposition, but possessed the said lands from the date of his acquiring them down to his death in 1741. In the year 1733 he had succeeded to his father David under said deed of entail, but never took infeftment thereunder.

In 1742 John, third Earl of Glasgow, son of John, second Earl, expedite a general service to his father, and he afterwards expedite an instrument of sasine, dated 19th September and recorded in the General Register of Sasines at Edinburgh 30th October 1765, following on the precept contained in the disposition by James Boyle in favour of his father, and on the retour of his service as heir in general to his father.

This John, the third Earl, was succeeded in 1775 by his son George, the fourth Earl, who completed no separate title to the lands of Bellichevan and Culoch, but made up a title to the entailed lands by instrument of sasine, recorded 30th May 1780, and possessed the lands of Bellichevan and Culoch along with the entailed estate down to his death in 1843.

George, fourth Earl, was succeeded in 1843 by his son James, fifth Earl of Glasgow.

In the year 1853 the law-agent of Earl James, duly authorised by a commission granted in his favour by the Earl, executed a combined charter of confirmation and precept of *clare constat* dated 5th May 1853. The charter of confirmation confirmed the lands and the disposition granted in 1721 by James Boyle in favour of John, Lord Boyle, and his heirs and assignees whomsoever, the retour of the service of John, third Earl of Glasgow, as heir in general to his father John, Lord Boyle, and the infeftment following thereon in 1765, to be holden the said lands and others immediately of the said James, Earl of Glasgow, and his successors, superiors

thereof, in free blench farm for ever. The precept of *clare constat* stated that it appeared that John, third Earl of Glasgow, died last vest and seized in the said lands under the titles above narrated, and that James, then Earl of Glasgow, was nearest and lawful heir of his grandfather, the said Earl John, in the said lands and others. Upon this precept James, fifth Earl of Glasgow, was infeft, conform to instrument of sasine in his favour recorded in the General Register of Sasines at Edinburgh 10th May 1853. He possessed the said lands from 1843 until his death in 1869. The present (6th) Earl of Glasgow succeeded his brother, and was served heir of tailzie and provision to him by decree of special service dated 21st and recorded in Chancery 29th June in the Division of the General Register of Sasines for the counties of Ayr and Bute 27th July, all in the year 1869. The late (5th) Earl did not leave his fee-simple lands to the present (6th) Earl. The latter entered into negotiations with his brother's trustees for the purchase of these, and a question was then raised as to whether the lands of Bellichevan and Culoch belonged to the late Earl in fee-simple or were held by him under the entail. The negotiations ended in a compromise. The present (6th) Earl paid the debts then affecting the fee of the said lands—including Bellichevan and Culoch—but he did not make up any separate title to the lands of Bellichevan and Culoch. He possessed the said lands up to 1885. In that year he granted a trust-disposition of his lands and estate, including Kelburne, to two trustees. With consent of the trustees he proposed to sell part of Kelburne, including Bellichevan and Culoch.

Mr Boyle of Shewalton and his two sons were the parties next in succession in the entail of Kelburne. Mr Boyle contended that in virtue of the prescriptive possession upon the superiority title by Earl George from 1775 to 1843, the base feudal right was extinguished and consolidated as effectually as if resignation *ad remanentiam* had taken place, and that the property of the said lands was therefore included in the entail as well as the mere superiority.

The Earl of Glasgow, on the other hand, maintained that there had been no consolidation, the property of the lands having been held on a different destination from the superiority, and the possession by Earl George having been of the superiority only under his entailed title.

This Special Case was adjusted, to which the Earl of Glasgow was the first party, and Mr Boyle and his sons, as next heirs of entail, were the second parties, the question being—"Does the entail of Kelburne include the superiority only of the lands of Bellichevan and Culoch, or has the *dominium utile* of these lands come by consolidation to be embraced in the entail?"

Argued for the first parties—A certain amount of confusion seemed to arise in this branch of the law from mixing up two classes of cases—(a) The case where a person had a right to one estate by two titles. This had no application to the present case, which was not a proper case of double title. (b) The case where a person had a right to two different estates by two different titles. That was the case here. As to the first class of cases—(1) Where a person has right to an estate under two absolute titles, prescription cannot run—*Smith and Bogle v.*

Gray, June 30, 1752, M. 10,803; *Durham v. Durham*, November 24, 1802, M. 11,220; *Zuille v. Morrison*, March 4, 1813, F.C. (2) Where a person has two titles to the same subject, one limited and the other unlimited, he may work off the former by prescriptive possession upon the latter—*M'Dougal v. M'Dougal (Makerston Entail)*, July 10, 1739, M. 10,947; *Bruce v. Bruce-Carstairs (Kinross Entail)*, December 6, 1770, M. 10,803. (3) Where a person having two titles to one subject does not make up a feudal title to either, prescription does not run—*Welsh Maxwell v. Welsh Maxwell*, June 21, 1808, M. App. voce "Prescription," No. 8. With regard to the second class of cases, where a person has right to two estates under two titles, under what circumstances would consolidation operate? There was no such thing as consolidation *ipso jure*. It must operate either by resignation *ad remanentiam* or by prescription—*Bald v. Buchanan*, March 8, 1786, M. 15,084. This was but an illustration of a much wider doctrine, of which the general principle was that a man cannot prescribe against himself, and so, where two titles exist, it comes to be a question of presumption, to which title possession is to be ascribed. In the present case, there was no obligation on the heirs to possess only on the entail, as their interest was distinctly the other way, and further the two fees were not destined throughout to the same series of heirs—See Lord Mackenzie's *dicta* in *Wilson v. Pollock*, *infra*. The presumption was therefore in favour of ascribing possession to the fee-simple title. This was quite in accordance with *Bontine v. Graham*, March 2, 1837, 15 S. 711—*affd.* August 6, 1840, 1 Rob. App. 347, and *Wilson v. Pollock*, November 29, 1839, 2 D. 157. But it was said that the case of *Lord Elibank v. Campbell and Purves*, November 21, 1833, 12 S. 74, went further than the other cases. There, consolidation operated to bring the fee-simple estate under the fetters of the entail. But it differed essentially from the present case, because the deed of reconveyance really constituted no separate title at all, and the judgment proceeded on that ground—*Lord Elibank v. Campbell and Purves*, *supra*, 3 Ross' L.C. 548, 599, 2 Ross' L.C. 591. (2) The terms of the deed of entail imposed an obligation on the heirs to possess under the entail. (3) There the property was included *per expressum* in the deed of entail; and (4) the destination throughout was to the same series of heirs. So strong was the presumption against merger of the fee-simple, that even where there was resignation *ad remanentiam* into the hands of the heir of entail in possession, that would not bring the property within the fetters until followed by prescription—*Heron v. Duke of Queensberry*, April 27, 1733, 3 Pat. App. 98. It was of no moment that the possession on the unlimited title had been on apparenay; prescription would not be barred on that account—*Duke of Hamilton v. Westenra*, November 14, 1827, 6 S. 44. Where two titles exist in the same person, the law would in *dubio* presume that his possession was to be attributed to the most beneficial to him (here the unlimited). This proposition was supported by the *dicta* of three eminent Judges, *per* Lord President Blair in *Oliphant Murray v. Ramsay & Co.*, January 17, 1811, F.C., *per* Lord President Hope in *Maule v. Maule*, March 4, 1829, 7 S. 527; *per* Lord Cuninghame in *Dalrymple v.*

Earl of Stair, March 10, 1841, 3 D. 837; see also Bell's Prin., sec. 2020.

The second parties argued—Since Lord Glasgow had a standing infeftment on the superiority title, consolidation was operated so soon as the forty years expired, the effect of the possession being to extinguish the base fee as if there had been resignation followed by prescriptive possession—Bell's Prin., secs. 689, 821, 2009; *Campbell of Otter v. Wilson*, December 19, 1765, 5 Br. Supp. 916; *Earl of Dunmore v. Middleton*, 5 Br. Supp. 614; Menzies (3d ed.), 665; M. Bell's Convey. (3d ed.) 786; Sandford on Succession, ii. 146; *id.* on Entails, 480; *Lord Elibank v. Campbell*, November 21, 1833, 3 Ross L.C. 534; and *Gray, Smith, and Bogle*, June 30, 1752, 2 Ross' L.C. 577, and notes, where all the cases are collected. The title to the superiority was the only feudal title which the heirs of entail possessed upon. There was no authority to the effect that a title of apparenay could avail in a case of prescription. Apparenay was personal until it had been feudalised—Napier on Prescription, 189, 237. The argument founded on the difference between the two series of heirs rested solely on Lord Mackenzie's *dictum* in *Wilson v. Pollock*, March 29, 1839, 2 D. 157. Mr Ross, 3 L.C. 581, indicated an opposite opinion—M. Bell's Convey. (3d ed.), 778.

At advising—

LORD PRESIDENT—The material facts of this case are as follows:—The Kelburne entail is dated 2d July 1715, and was made by David, first Earl of Glasgow. It contains among other parcels of lands the lands of Bellichevan and Culoch. But prior to the date of the entail these lands had been feued out to be held of the entailer or his ancestors as immediate lawful superiors. The *dominium utile* therefore was not and could not be comprehended in the entail, and the conveyance of Bellichevan and Culoch to the heirs of entail carried the *dominium directum* only.

The second Earl of Glasgow before he succeeded to the title and estates acquired the *dominium utile*, and in 1721 took a disposition in favour of himself and his heirs and assignees whomsoever. He was not infeft, but in 1742 his son, the third Earl, exped a general service to his father, thereby acquiring right to the unexecuted precept in the disposition of 1721, and completed his title to the *dominium utile* by infeftment on that precept in 1765. The third Earl had thus a title to the *dominium directum* under the entail, and a separate title to the *dominium utile* in favour of himself and his heirs-general under the infeftment of 1765.

From that date and down to 1853 the Earls of Glasgow have possessed the lands, both property and superiority, of Bellichevan and Culoch, being all of them not only heirs of entail under the entail of 1715, but also heirs-general under the disposition of 1742 and infeftment of 1765. No consolidation of the property and superiority has taken place by resignation or otherwise, unless consolidation has been operated by prescription as contended for by the second party. The last investiture of the *dominium utile* prior to 1853 is the infeftment taken by the third Earl, while on the other hand each succeeding Earl has made up a title to the entailed estate. In this state of the facts the second party contends that

the heir of entail having possessed on the superiority title of the entail for more than forty years, the base fee has been extinguished and consolidation has been effected as completely as if there had been resignation *ad remanentiam* followed by forty years' possession. And this position would be impregnable if the heirs of the entail had during the prescriptive period only one title to which their possession could be ascribed. But possession of the *dominium utile* began in 1765 upon the infestment of the third Earl, which was a fee-simple title, and although neither the fourth nor the fifth Earls were infest in the *dominium utile* till the years of prescription had run, they had a title of possession quite as good as heirs-general, viz., the title of apperency, and there are no acts of possession alleged of such a nature as to be ascribable to one of these titles more than to the other. When, therefore, in 1853 the fifth Earl by his commissioner executed a charter of confirmation and precept of *clare* in his own favour, confirming the disposition of 1721 in favour of the second Earl, the retour of service of the third Earl as heir-general to his father, and his infestment of 1765, the first parties contend that he had a good prescriptive fee-simple title to the base fee by virtue of this same forty years' possession which is founded on by the second parties in favour of the heir of entail. I am of opinion that the contention of the first parties must be sustained, because it is founded on two well-established principles or rules of law.

1. The first of these two rules is, that possession for forty years, following upon a disposition and assine, will make a good prescriptive title, although part of the forty years' possession has been by an apparent heir or heirs uninfest.

For some time in the course of the last century the judgments of the Court on this question fluctuated, but in the case of *Caitehon* in 1791, M. 10,810, the question arose purely for decision, and resulted in the establishment of the rule I have stated. The rule there settled has not since been departed from, but, on the contrary, is confirmed by subsequent authorities, of which *Neilson v. Erskine*, 2 S. 216, and *Hamilton v. Westenra*, 6 S. 44, may be taken as examples.

2. The second rule to which I refer is that when a person has two titles to the same lands, to either of which his prescriptive possession may be ascribed, the one title being unlimited and the other limited (as by an entail), the presumption is in favour of freedom, and he is entitled to ascribe the possession to the fee-simple title, and to hold the lands in fee-simple accordingly, unless the nature of the possession is not consistent with the title to which he seeks to ascribe it. The principle on which this rule is founded is very clearly expounded by Lord Kilkerran in reporting the case of *Smith & Bogle v. Gray* in 1752, M. 10,803. After explaining that while the heir in both titles is the same, no question can arise, he proceeds to say, that where the succession "comes to split" the question is resolved by a distinction that if by both rights the possessor is unlimited far the prescription cannot run by possession on the one title against the other; but if one of the titles be an unlimited right and the other be a limited right, e.g., by a tailzie or a clause of retour, then if the possession has been for forty years upon

the unlimited title, the limitation in the other title will be wrought out by prescription.

Again, in the case of *Bruce v. Carstairs* in 1770, M. 18,805, the rule is thus applied by the Court—"In the present case there were two titles in the same person, the one limited, the other not. The parties were in these circumstances entitled to ascribe their possession to, and to plead upon, the unlimited title. The creditors would have been entitled to carry off the lands as an unlimited fee by adjudication, and upon the same principle must they, i.e., the lands, as a fee-simple descend to the heir of line. This judgment was appealed, and affirmed by the House of Lords."

It is only necessary in conclusion to notice the case of *Elibank v. Campbell*, 12 S. 74, on which in the argument the second parties mainly relied. In that case, no doubt, the operation of the positive prescription following on the entail was held to have effected a consolidation of the *dominium utile* of the lands of Stantalane (which had been feued out for a temporary purpose by the entailor to his law-agent prior to the date of the entail) with the *dominium directum* of the same lands, which was within the entail. But the circumstances afford a complete contrast to those of the present case. The entailor's law-agent had within a few weeks of the creation of the base fee reconveyed to the entailor by disposition with procuratory and precept, on which, however, no title was ever made up by the entailor or any of the heirs of entail. But for the reconveyance there can be no doubt that the prescriptive possession of the *dominium utile* of Stantalane must be ascribed to the tailzied title, for the heirs who possessed had, and could have, no other, and the Judges seem to have been all of opinion that the execution of the reconveyance by the law-agent with nothing following on it gave them no separate title to the lands. But even supposing that the reconveyance gave them a separate title on which prescriptive possession might follow, they were taken bound by the conditions of the entail to use any separate rights they might happen to acquire or possess for strengthening and supporting the entail, and for no other purpose whatever. In these essential particulars the case of *Lord Elibank* differs from the present, and has therefore in my opinion no application as an authority here.

The other Judges concurred.

The Court found that the entail of Kelburne included the superiority only of the lands of Bellchewan and Culoch, and not the *dominium utile*.

Counsel for First Parties—D. F. Mackintosh, Q.C. — Dundas. Agents—J. & F. Anderson, W.S.

Counsel for Second Parties — Pearson — Graham Murray. Agents — Tods, Murray, & Jamieson, W.S.