

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ROBERTSON (General)—*Appellant*:ATHOL (Duke of)—*Respondent*.

Nov. 14, 16,
30, 1814.
May 10, 1815.

TITLE.—
PRESCRIP-
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Two cases of adjudication, without infestment in the one case, in the other with infestment but without any declarator of the expiry of the legal. The decret of adjudication was obtained in 1677, and that title was transferred to the Athol family in 1688. That family having thus got possession of the lands obtained two crown charters, the one in 1691, the other in 1725, including the lands in question, and held the peaceable and uninterrupted possession till 1803, when the title was challenged as depending only on the adjudication, and as being still redeemable because in the one case it was not followed by infestment, so that prescription would not run; and because in the other, though followed by infestment, there was no declarator of the expiry of the legal. Held by the Court below that the crown charters and forty years' possession formed a good title by prescription, and excluded all question on the subject. This decision affirmed above, the Lord Chancellor being also apparently of opinion that an adjudication with infestment and forty years' possession after the period of the expiry of the legal, though without a declarator, formed a good title by prescription independent of the crown charter.

TWO separate actions were, in 1803, raised by General Robertson, of Lude, against the Duke of Athol, the one to set aside the Duke's title to the lands of *Clunes and Strathgroy*, the other to set aside his title to the lands of *Inchmagrenoch*. The

facts as far as they concern the present purpose are these. The lands in question had, in 1677, been adjudged by Robertson of Fascally from an ancestor of Lude. Fascally obtained a charter of adjudication from the prebend of Dünkeld, superior of the lands of Inchmagrenoch, and was infeft in these lands, but he took no infeftment in the lands of Clunes and Strathgroy. In 1688 Fascally assigned and disposed the adjudication and lands mentioned in both cases to the then Marquis of Athol, who took no infeftment on this conveyance.

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But in 1691, John Lord Murray, afterwards first Duke of Athol, son of the Marquis, upon a deed of entail executed by his father, obtained a crown charter (which was produced) of “all and whole the Earldom of Athol, and of all and sundry the lands of the said Earldom with the pertinents.” This charter, upon which the grantee was regularly infeft, mentioned the lands of Inchmagrenoch *nominatim* as acquired by adjudication from Fascally, but did not specially mention the lands of Clunes and Strathgroy, these, as was contended, being included in the general description of the Earldom of Athol. In 1725 James, the second Duke of Athol, was served heir in special to his father, and was regularly infeft in the Earldom of Athol, and also in the lands of Inchmagrenoch, which were expressly mentioned in the precept; those of Clunes and Strathgroy not being specially named. In this manner the sasines were regularly continued from 1691 down to 1803, and during that period the family of Athol had been in uninterrupted and peaceable possession both of the

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lands of Clunes and Strathgroy, and of Inchmagrenoch.

Thus the titles stood at the period when the actions were brought, with this distinction between the two cases as far as respected the adjudication title, that there had been no infestment at all upon it in the case of Clunes and Strathgroy, but that there was an infestment upon it in the case of Inchmagrenoch, but no declarator of the expiry of the legal.

The Court of Session decided for the Duke of Athol in both cases, on the ground that the charter of 1691, or that of 1725, with infestment and forty years' peaceable and uninterrupted possession, formed a good title by the positive prescription to exclude all farther question; one Judge (Hermand) also observing with respect to Inchmagrenoch that an adjudication with infestment and forty years' peaceable uninterrupted possession after the period of the expiry of the legal, would form a good title by prescription, though there were no declarator.

The grounds of appeal from these decisions were in substance that the adjudication assigned by Fascally was the only title under which the Athol family possessed, as appeared from their own charters, and that it was not competent for the adjudger to attribute his possession to any other title to the prejudice of the party on whose right of property the adjudication depended. *Blackburn v. Gibson*, Du. 1628.—*Dickson v. M'ulloch*, Fount. 1686.—*Carnegie v. Magistrates of Montrose*, 4 Dict. 1777. That as in the one case there was no infestment, and in neither case any declarator

of the expiry of the legal, the title was still redeemable, the effect of the statute (1617, c. 12.) being merely to preclude all challenge of this title as an adjudication, but not to convert a redeemable into an irredeemable title; that the charter and infestment of 1691, the retour and saisine of 1725, &c., afforded no ground of title by prescription, because in that charter and subsequent titles the title to Inchmagrenoch was described as a title by adjudication acquired from Fascally, and Clunes and Strathgroy were not specially mentioned; but supposing they were comprehended under the general description of the Earldom of Athol, the charter, &c. both as to these lands and Inchmagrenoch, could only give the superiority, and it had been decided that the property was not *ipso jure* consolidated with the superiority, and here there had been no resignation *ad remanentiam*. *Bald v. Buchanan*, 1786.

It was answered for the Respondent that Clunes and Strathgroy were included in the Earldom of Athol (which did not appear to be very seriously disputed) granted by charter 1691, and that at any rate Respondent's predecessor, John Lord Murray, had right to them by a previous charter of 1683, with which Respondent connected by progress, and that under a charter containing *in gremio* a right to the whole property, and infestment, with continued peaceable possession for forty years complete, he had an unchallengeable right by the positive prescription which precluded all further inquiry. *Millar v. Dickson*, 7th Feb. 1766.—*Middleton v. Dunmore*, 22d Dec. 1774.—That, supposing

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the inquiry were competent, and it appeared that the possession had commenced on the adjudication, the Respondent was entitled now to ascribe the possession to the charter 1691, and subsequent investitures. Ersk. b. 2. t. 1. s. 30.—*Smith v. Gray*, 1752, Kilk.—That with respect to Inchmagrenoch, if it had been necessary to resort to that plea, an adjudication with infestment and forty years' possession from the period of expiry of the legal, though without declarator, formed a good prescriptive title. *Johnston v. Balfour*, 1745.—*Caitchiou v. Ramsay*, 1791, 4 Dict.—*Ormiston v. Hill*, 1809.—*Gedde v. Baker*, 1745, Kilk.—(Vid. Ersk. b. 2. t. 8. s. 14.)

Romilly, Leach, and J. P. Grant for Appellant; *Horner and Adam, Jun.* for Respondent.

Nov. 30, 1814.
Judgment.

Lord Eldon (C.) The first of these cases is one in which there was an adjudication with no infestment upon that adjudication, but where there was a crown charter and more than forty years' peaceable and uninterrupted possession; and the question is, whether the crown charter, connected with the adjudication and possession, forms a good title by prescription. The other is a case in which, independent of the crown charter, there was an adjudication followed by infestment, but no declarator of the expiry of the legal, though there was an adverse possession for forty years subsequent to the period of the expiry of the legal, and the question was whether there too there was a good title by prescription. If there were a necessity for deciding

these cases now, I should say that my opinion, my individual opinion, is that both of these cases are rightly decided. But it is not my intention to move your Lordships to go to judgment on either of them now, for this reason, that while with respect to a point upon which one would think there could be no more doubt in the law of Scotland, than there can be that this table stands here—I mean the question whether an adjudication with infestment and forty years' possession after the period of the expiry of the legal, without any declarator of the expiry of the legal, forms a good title by prescription—it has been on one side roundly asserted at the bar that it is not a good title by prescription, it has been on the other side positively asserted that it is a good title by prescription, and universally known to be so. And yet in point of actual authority brought before us, it is a little difficult to decide which side asserts rightly. Whenever a case is so circumstanced with respect to the law of Scotland, I have always felt it, since I have had the honour of giving your Lordships advice on these subjects, a positive duty imposed upon me to prosecute to the utmost those inquiries which I have it in my power to make, in order to ascertain how the matter really stands. And therefore though my own opinion at this moment is—I desire nevertheless it may be understood that it is an opinion subject to correction—that in the one case the adjudication with the crown charter and possession, and in the other the adjudication with infestment and forty years' possession after the period of the expiry of the legal, though without declarator, do make a good title by prescription, yet it is not my

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intention to move your Lordships so to decide till we meet again; and if in the interim I should see any reason to alter my opinion, I shall then most readily state to your Lordships the grounds of the opinion I have this day given, and the reasons which have induced me to change it. It may perhaps be right however to say that I really cannot perceive where, in what statute at least, is to be found prescribed the necessity for that declarator of the expiry of the legal; and speaking by analogy with reference to what passes in our own Courts, if you can consider an adjudication as in the nature of a mortgage, the practice is familiar enough. By our mortgages the money is to be paid within a given time, and if it be not paid within the time the instrument upon the face of it declares that the title of the mortgagor is gone. But we nevertheless hold that the title of the mortgagor is not gone without a judgment of a Court of Equity that it is gone. And accordingly, when a party wishes to have that title, which upon the face of it is declared to be absolute, in substance and in fact absolute, he applies to a Court of Equity for (I may use the very words) a declarator of the expiry of the legal, that is, to have it declared that if the other party does not pay the money in six months he is totally foreclosed, and that which is described in the instrument as a legal title shall be considered as an equitable title also. But where length of time is to form the title, although there be no such decree of foreclosure, no such declarator, if I may say so, of the expiry of the legal, yet if there is an adverse possession for twenty years, that shuts out all question, and dispenses

with any such decree or declarator; and my present impression is that it may be so in Scotland, I say my present impression, guarding myself to the extent I have done.

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Lord Eldon (C.) There are two cases, in which General Robertson of Lude is Appellant, and the Duke of Athol is Respondent, and which were heard previous to the Christmas recess, now standing for your Lordships' judgment; both of them raising questions of very great importance with respect to the law of Scotland; the one relative to the title to an estate called Inchmagrenoch, or some such name, the other relative to the title to two estates called Clunes and Strathgroy, where, as your Lordships will recollect, the argument turned principally on the effect of forty years' possession under titles originating in adjudication, in the one case followed by infestment, in the other, as was contended, not followed by infestment. And the question was, whether the Duke of Athol had in both cases acquired a good title to the lands in question. I hinted to your Lordships on a former occasion, the inclination of my opinion that the Judgment of the Court below was correct. But I thought it my duty before calling upon your Lordships to come to a final decision upon these cases, to make such farther inquiry as appeared to me to be useful, considering the importance of the points which occurred in these causes; and I accordingly solicited assistance in a way which I believe has not been unusual with those who have held the situation which I have at present the honour to hold; and I have also perused very important papers sub-

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mitted to me in another way. And upon the best consideration which I have been enabled to bestow upon these causes (and I can assure your Lordships I have bestowed a great deal upon them) I cannot offer your Lordships my advice to reverse either of these Judgments. I see by the papers that costs have been claimed in both cases; but where points of so much importance arose for consideration I cannot say that it was at all improper to bring these cases before your Lordships for your opinion; and therefore I should propose to your Lordships to affirm the judgments, but without costs.

Judgments *affirmed*.

Agent for Appellant, CAMPBELL,
Agent for Respondent, FRASER.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER,

PHAYRE—*Appellant*.

Representatives of PEREE—*Respondents*.

Feb. 17,
June 28, 1815.

TRUST.—
FRAUD.

A trust fund of 15000*l.*, created under a marriage settlement by which certain lands were limited to the husband for life, remainder to the first and other sons in tail, with a power to the husband of leasing for forty-one years, or three lives at the best rent, was directed by the deed to be laid out with all convenient speed, in the purchase of lands in fee simple, to be conveyed and limited to the same uses as the other lands mentioned in the settlement, and in the mean time the trustees were empowered with the