

No 152.

Duplied for the defender; The defence proponed by him was not *peremptoria causa*, such as infers a representation, but only an objection against the pursuer's title to the apprising, which is peremptory of the instance, and may be proponed without acknowledging the passive titles; seeing the pursuer's title must be instructed, before process can be sustained at his instance; *2do*, Tho' the defence had been such a peremptory as owned the passive titles, it could not fix the defender; because no passive title is libelled, but that of charged to enter heir, and no charge is produced: For the proponing peremptories does only free the pursuer from the trouble of proving the passive titles libelled; and the libel cannot be now amended in such a fundamental, though sometimes an amendment in circumstantialis is allowed.

THE LORDS found no process against the defender, in regard there were no passive titles libelled against him as representing his mother, but as charged to enter heir, and no such is produced: And they would not allow the pursuer to amend his libel.

Forbes, p. 365.

1713. February II.

MARGARET LUNDY and Mr GEORGE HENRY her Husband *against*
The LORD SINCLAIR.

No 153.
Found in conformity to
Stuart against
Lamont, No
149. p. 12060,
That one cannot be allowed to allege
prescription denying the
passive titles.

THE Lord Sinclair's grandfather granted a bond of 2000 merks *in anno* 1648, which being confirmed in a testament *ad non executu* by Margaret and Mary Lundies his daughters, the said Margaret now insists against the Lord Sinclair, as representing his grandfather, for payment.

The defender denying the passive titles, *alleged*, The bond was prescribed.

It was *answered*; Prescription being a peremptory defence, relieves the pursuer from proving the passive titles; and therefore the defender cannot be allowed to allege prescription, and at the same time deny the passive titles.

Replied; A defence *in facto* requiring probation, cannot be admitted without acknowledging the passive titles; but *in jure* it may, when the defence arises from the pursuer's title produced, as if a bond were null, wanting writer's name and witnesses, or prescribed; which appears, by comparing the bond with the summons; and there is neither law nor practice to hinder apparent heirs to allege any thing that is competent *in jure*: On the contrary, it was found, 10th December 1674, Auchintoul *contra* Innes, observed by my Lord Dirleton, No 141. p. 12055, that a defender proponing a defence *in jure*, viz. that the annuities were discharged by a late proclamation, does not confess the passive; but if he did propone a defence upon a right in the person of his predecessor, it would exclude him.

It was *duplicated*; The decision marked by Dicleton meets not the case; for there the proclamation founded upon, discharging the right of the Crown to the annuities, was as a public law, which could be elided by no exception; whereas the defence of prescription is elided by deduction of minorities and interruption, which requires probation. And it was found, 15th December 1671, Hamilton of Kinkel *contra* Aiton of Kinaldie, § 12, *h. t.*, that the pursuer was not obliged to prove the passive titles, if the defender adhered to his peremptory; and 12th December 1672, Brodie of Lethem *contra* Douglas of Mulderg, No 8. p. 2172., in a process of proving the tenor, concluding payment on the passive titles, it was objected, that the defender could not oppose the tenor without representing; which was indeed repelled, but upon this specialty, that he was called as apparent heir, and the pursuer, though he had libelled payment, was not then insisting upon that conclusion.

It was *triplicated*; An allegiance instantly verified is always receivable, without acknowledging the passive titles, when the allegiance arises from the pursuer's titles, and upon the right of the defunct, as payment or compensation; and it alters not the case, that the allegiance may be elided by a reply, which happens frequently in all allegiances, which law and form require to be instantly verified upon the proposer's part; and in all such cases, the contrary party may elide the allegiance upon a reply in fact: And in this case, the pursuer may take the same term to prove the passive titles, and minority or interruption, by processes; and the case of Hamilton of Kinkel meets not the present point, because there, though prescription was proponed, yet that allegiance was dropt, and other peremptories proponed, requiring probation.

It was *quadruplicated*; That the many fraudulent practices of apparent heirs have been the occasion of many laws of late to obviate these frauds, and rendering the laws more effectual and certain, for procuring payment both against the original debtors and their representatives; and accordingly, the Lords, by their practice, have proceeded much more strictly than of old; and the later laws and practice have proved of great advantage to creditors and commerce; and it is very reasonable that this question, which hath not hitherto been so fully cleared, be now determined to be a certain known rule in time coming; and seeing the defender unquestionably possesses his predecessor's estate, and that the titles of his possession are known to him, and in such cases titles are made up in the most private latent way to cover from creditors, it is not reasonable nor just, that the pursuer should be put to the necessity of a probation, both for eliding the peremptory now alleged on, and also to prove the passive titles, especially seeing, if the defender do not truly represent, he is not concerned whether the debt be prescribed or not; nor will it be of any benefit to the pursuer to prove interruption; and if he do represent by covered conveyances, it is not reasonable to put the pursuer to the necessity of a probation for proving thereof, unless the defender will put the whole issue of the cause upon it.

No 153. "THE LORDS found the defender could not be allowed to allege prescription, denying the passive titles; but allowed him to put the issue of the cause either upon the allegiance of prescription, or upon the passive titles."

Dalrymple, No 98. p. 138.

* * Forbes reports this case:

IN an action at the instance of Margaret Lundy and her Husband, as executor to George Lundy clerk of Dysart, against Henry Lord Sinclair, as representing John Lord Sinclair, for payment of 2000 merks contained in Lord John's bond granted to George Lundy; the LORDS found, that the defender could not be allowed to propone prescription of the bond, without acknowledging the passive titles;

Albeit it was *alleged* for the defender; That any person convened upon the passive titles, in a constitution of a debt due by a defunct, may not only deny the passive titles, but also his being called as defender entitles him to object against the relevancy of the libel, and manner of probation. And though the debt pursued for be constituted against the defunct by a bond, the defender may, without representing, object any nullities *in jure* that are instantly verified, 10th December 1674, Auchintoul *contra* Innes, No 141. p. 12055; 12th December 1672, Brodie *contra* Douglass, No 8. p. 2172; and prescription is such a nullity;

In respect it was *answered* for the pursuer; Proposing a peremptory defence liberates him from proving the passive titles; seeing, if the defender do not represent the defunct, he hath no manner of interest to object against the pursuer's title. There is no parity betwixt the decision 10th November 1674, Auchintoul *contra* Innes, and the present case; for there the defence upon the King's proclamation discharging annuities, was in favours of all the King's lieges liable in annuities; and the defender's denying the passive titles was superfluous in that case; whereas proposing prescription upon a bond, is the same upon the matter, as to allege upon a discharge thereof, prescription being in law a virtual or implicit discharge, no less inconsistent with denying the passive titles than an express one. Again, there is far less parity betwixt the case of a good bond and that of a null one, which in effect is no bond. Nor doth the calling a person as defender warrant him to act as a contradictor, and yet to be no contradictor; which behoved to be owned, if one were allowed to propone a peremptory defence, and at the same time to deny the passive titles. But that this cannot be, is cleared by a notable decision, 15th December 1671, Hamilton of Kinkell *contra* Aiton of Kinaldie, § 12, *h. t.*

Forbes, p. 660.

* * A similar decision was pronounced, 23d June 1715, Forrest against Carstairs' Representatives, No 302. p. 11098, *voce* PRESCRIPTION.