For Mrs Nicholson, Ilay Campbell, H. Dundas. *Alt.* A. Lockhart, J. M'Claurin, *Advocatus. Reporter*, Hailes.

1771. *February* 18. Affirmed on appeal.

1770. *November* 2, and *December* 6. MISS ANNE BRUCE of Arnot *against* JAMES BRUCE CARSTAIRS of Kinross.

PRESCRIPTION—TAILYIE.

An Infeftment in fee-simple, upon a precept of *clare constat* in the superiority of lands contained in a deed of entail, with possession maintained of said lands for 40 years, but which, *quoad* the property thereof, had been originally acquired upon a different title, *viz.*, the right of apparency, found sufficient by prescription to work off the limitations of the entail, and to establish a right both to superiority and property in fee-simple.

[*Fac. Coll. V.* 150; *Dict.* 10,805.]

November 2. Being in the Outer-House, I did not hear the first part of the reasoning upon the bench. I only learnt that the President had changed his opinion, and now held that the argument upon prescription was good.

PITFOUR. Our prescription of forty years is like the *prescriptio longissimi temporis* of the Roman law. It requires no *bona fides*. Thus, if a tenant, possessing under a tack, should obtain a charter of property from the Crown, and, by the carelessness of the master, should pay no rent for 40 years, his right under the charter will be effectual, notwithstanding his *initium possessionis* was a temporary right—and that he could have no pretence of *bona fides*. By our law, all that is required is a charter and possession.

MONBODDO. The fact of possession is clear. My only doubt was whether the possession ought to be ascribed to the infeftment on the precept of *clare constat*, or to the right of apparency. From the arguments in Miss Bruce's memorial, I am become a convert to her, and think that the possession must be ascribed to the infeftment.

COALSTON. I have always considered the question as to imputing possession, where there are two rights, to be of great difficulty. It is true that there must be no inquiry into the *initium possessionis;* but that does not affect the present question. When the same person has a right of property, under separate titles, he may ascribe his possession to that title which is most beneficial. The creditors of Sir Thomas, or Sir John, might also have done so. But my difficulty is, how far the one heir can do this to the prejudice of the other.

JUSTICE-CLERK. In modern practice, the right of apparency has become a stronger title than it was anciently. According to the feudal constitutions, the heir apparent had no interest in the estate. When a person has a complete and perfect title, as Sir John Bruce had, and at the same time an imperfect right of apparency, as apparency is, it is natural to ascribe his possession to the perfect title, and not to the imperfect right. During the 45 years that Sir Thomas and Sir John possessed, they must have had frequent occasion of ascribing their right to the feudal title, by removing tenants; for, as heirs-apparent, they had no right to remove tenants. If there was an estate in fee-simple, belonging to Sir John Bruce, as Lord Coalston admits, how can it be said that the fee-simple descends to the heir of entail, and not to the heir of line?

On the 22d November 1770, the Lords sustained the defence of positive prescription.

Act. R. M'Queen. *Alt.* A. Lockhart. *Reporter*, Kaimes.

December 6. COALSTON. The island is not in the body of the contract. The marginal note is not probative. Yet Sir William Bruce might have homologated, and did homologate. This appears from the possession by John Bruce and other circumstances. It is true that limitations in tailyies cannot be extended. The homologation would not subject to irritancies as to strangers, but would as to heirs.

AUCHINLECK. The transaction in 1703, when *The Earl of Morton* disponed the apprisings, is an actual deed disponing the island to heirs-male of tailyie, in corroboration of former rights. This shows that the island was supposed to belong to the family.

PITFOUR. I doubt how far we can make up a right to lands from intention. That may come in another way by means of the marginal note, informal, but homologated. This may do, but I cannot separate it from the tailyie, and say that it is null as to the tailyie, and yet good as to the dispositive part.

COALSTON. That question is not before us at present.

ALEMORE. The deed has been homologated. All the family transactions, during the life of Sir William, proceed upon the supposition of the disposal of the island being valid. I think that homologation would be good against strangers as well as *intra familiam.* We do not extend tailyies when we say that, in law, the homologation of a null deed is effectual.

GARDENSTON. No estate can be taken from the heir merely by intention.

On the 6th December 1770, "the Lords found that the defender has condescended on acts of homologation sufficient to remove the objection that the marginal note is not properly tested;" and assoilyied from the removing—altering Lord Kaimes's interlocutor.

Act. J. Swinton, R. M'Queen. *Alt.* A. Lockhart, D. Rae, &c.

1772. *April 7.* Affirmed on appeal.