1770. *December* 6.

Miss ANNA BRUCE of *Arnot against* JAMES BRUCE-CARSTAIRS of Kinross.

No 90.
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.

In the year 1685, Sir William Bruce executed an entail of the estate of Kinross in favour of himself and his heirs-male; whom failing, in favour of another series of heirs mentioned. Upon this deed a charter was expede, infeftment followed, and the tailzie was recorded in the proper register.

Sir William likewise, in virtue of a charter from St Leonard's College in St Andrews, dated in 1682, stood infeft in the barony of Kirkness and Inch of St Sylvanus in Lochleven; the investitures of which were devised to him and his heirs and assignees whatsoever, and not included in his entail.

In the year 1687, Sir William, in his son's contract of marriage, disponed to him the barony of Kinross; and in some marginal notes, he also disponed the barony of Kirkness and St Serf's Inch in Lochleven. Sir John, the disponee, was immediately infeft base upon the precept contained in the contract.

Sir William died in 1709, his son Sir John in 1711, when Anne Bruce succeeded her brother, and made up proper titles to Kinross, but none to Kirkness and St Serf's Inch. In 1715, she was succeeded by her eldest son Sir Thomas Bruce, who made up his titles to the barony of Kinross upon the tailzie and marriage contract; but to the lands of Kirkness and St Serf's Inch, he made up his titles in fee-simple, having obtained from St Salvador's College, the superiors, a precept of *clare constat*, as nearest heir to his grandfather Sir William. In virtue thereof, in the year 1721, he was infeft; and upon his death, his brother Sir John having made up his titles in the same mode, in 1740 was infeft, and continued to possess till 1766; when the pursuer made up her titles to the said lands also upon a precept of *clare constat*, as heir to her father.

The defender having succeeded as heir of entail to the barony of Kinross, challenged the pursuer's right to the lands of Kirkness and St Serf's Inch; upon which she brought an action, for having it declared, that she had the undoubted right thereto. The defender founded upon the contract of marriage in 1687; by which he alleged, that these lands were settled upon the same series of heirs, and under the same limitations with the barony of Kinross. To which the pursuer *answered*, 1*mo*, That these subjects were not contained in the body of the contract, but in marginal notes adjected *ex post facto*, not probative or authenticated in terms of the act 1681; 2*do*, That Sir Thomas Bruce having, in 1721, made up his titles thereto in fee-simple, and he and his son having possessed the same for upwards of forty years, the pursuer's right as heir line was secured by the positive prescription.

The defender having condescended upon certain facts and deeds, which tended to show that these marginal notes had been truly added and subscribed

No 90. by Sir William Bruce, had been homologated by him as good and effectual, and that it had been the understanding of all parties, that these lands of Kirkness and St Serf's Inch were included in the contract, and settled upon the same series of heirs with the rest of the estate, the legal argument maintained by both parties came to be directed solely to the point of prescription.

The pursuer *pleaded*;

1*mo*, In order to complete a right by prescription, it was only necessary that the party possessed in the character of proprietor for the period required, and that there was in his person a proper title of property, bearing a date anterior to the commencement of the forty years. Both these requisites occurred in the present instance. Sir Thomas Bruce was infeft as absolute proprietor of the lands in virtue of the precept of *clare constat*; and as he and his successor had possessed them absolutely for forty years without acknowledging the right of any vassal, the full property was thereby vested in their persons; and the *dominum utile*, which had remained *in hæreditate jacente* of the pursuer's grand-uncle Sir John, thereby effectually extinguished and consolidated with the superiority.

The objection, that when Sir Thomas Bruce made up his titles to the lands in dispute, he carried no more than the right of superiority, so that his possession of the *dominium utile*, which remained *in hæreditate jacente* of Sir John, must be attributed to his right of apparency alone, left entirely out of view the legal effect of prescription. Though Sir Thomas's infeftment did originally carry no more than the right of superiority, yet as that infeftment was *ex facie* an absolute good right to the lands, without distinction of property or superiority, the possession that had followed was sufficient to make out the right. An infeftment indeed in the property, with any length of possession, would be insufficient, the title being not broad enough to comprehend the superiority; but as an infeftment in the superiority was, on the other hand, sufficiently broad to carry the whole lands, so possession of the *dominium utile*, conjoined therewith, was all that was required to establish a right by prescription to the whole.

2*do*, It was of no moment though the possession of Sir John and his brother had originally commenced upon apparency; and that this, and not their infeftment in the superiority, was the only good title they had to possess the *dominium utile*. Though Sir Thomas and his brother had not been apparent heirs in this property, yet the possession they had attained in virtue of their infeftments would have established the prescriptive right; and if that would have been the case had they been mere strangers, with more reason must it do so when they were apparent heirs in the subject.

Whenever a person had various titles to a subject, he was presumed to possess upon all, and was entitled to ascribe his possession to that which was most beneficial. When title and possession concurred, it was of no moment in what manner possession had been first acquired; after the course of prescription was run, there was no room for arguing in virtue of what title the possession had

been obtained; for, if there was a habile title, and possession of the subject had actually followed, it was all that was required. This was laid down by Bankton, B. 2. T. 12. par. 49. and according to the judgment of the House of Lords, in the case of Campbell of Ottar, it had been found, that the possession of the person who claimed and made out the prescriptive right was good, though ascribed to the title of another. See TAILZIE. No 90.

3*tio*, The argument, that, as Sir Thomas and Sir John had a right to the lands, both in consequence of the marriage-contract, and as heirs of line under the former investiture, and as no person could prescribe against himself, so prescription could not begin to run while they lived, admitted of very easy solution. Had these persons been unlimited fiars under both titles, there might not have been *termini habiles* for prescription; but when, by one of the titles, they were laid under fetters and limitations, there was clearly room for prescribing upon the other. There was a positive *adjectio dominii*; and the acquirer, instead of prescribing against himself, was establishing a right to himself, and his heirs of line, against the heirs of entail the creditors imposed upon him by the tailzie.

4*to*, The principle maintained, that, as both titles vested in the person of Sir John and his brother, the remoter heirs of entail were, consequently, *non valentes agere* while they lived, did not apply to the present question. Where a person was unlimited fiar of an estate, the remoter heirs were creditors to him in nothing, and had, of course, no title to pursue under the settlement; but where the heir in possession was laid under fetters, all the substitutes were creditors under the settlements, and action lay at their instance for implement. According to the defender's supposition, therefore, that the lands in question fell under the tailzie, action was competent at the instance of all, or any of the substitutes, against Sir John and his brother, to complete the investitures in their persons, in terms of that deed; which would have effectually prevented them from acquiring, by prescription, an unlimited right to the estate. The most remote heirs of entail were at all times, therefore, *valentes agere*; and this afforded a sufficient answer to the decisions founded on, of the Earl of Dundonald in 1726, No 3. p. 1262.; and Smith *contra* Gray in 1755, No 89. p. 10803.; as the heir in possession was not, in these cases, laid under any limitations; but being absolute proprietor of the estate, could acquire nothing by prescription.

The defender *pleaded*;

1*mo*, By Sir John's base infeftment in the lands of Kirkness and St Serf's Inch, no more remained with Sir William than the bare superiority. This was *in hæreditate jacente* of him at his death in 1709, and remained so till taken up by his grandson, Sir Thomas, in 1721, upon the precept of *clare constat* from St Leonard's College. But, as the fee or *dominium utile* of these lands had been established in the person of John, by his infeftment upon the precept in the marriage-contract, it remained in his *hæreditas jacens*; and the succeeding

No 90. heirs, *viz.* Anne Bruce his sister, Sir Thomas her son, and the last Sir John, possessed the same upon their apparency. Such being the state of the case, the legal question came to be, Whether Sir Thomas's and the last Sir John's possession was to be ascribed to the title to the *dominium utile*, which gave a just and legal right to the rents, or to the title to the superiority, which gave no such right? The solution of this question did not appear to admit of any difficulty, as it was a fixed rule in law, that possession must always be ascribed to that right which was the preferable title upon which it could be maintained.

The question of prescription might have merited a different construction, if the same persons who obtained the precepts of *clare*, as heirs to Sir William in the superiority, had not, at the same time, been apparent heirs in the property. Their possession, in that case, could have been ascribed only to their right to the superiority; but where both titles and rights were thus united and vested in one and the same person, the possession could be ascribed only to the preferable right, *viz.* the right of apparency to the property, which was the true legal title of possession. In this view, there were no *termini habiles* for the positive prescription; every idea of prescription necessarily supposed two persons to be parties thereto, and two independent separate rights; the one to be acquired, the other to be lost. But this could not hold in the present instance; both titles coincided in the same person; and the one could not be set up to establish a prescriptive right against the other. The infeftments also, upon the precepts of *clare constat*, in the right of superiority, could not be used to invert the possession previously obtained, and so long continued, upon the title of apparency: And hence neither Sir Thomas, nor the late Sir John, could, in virtue of these precepts and infeftments, be deemed to have acquired a right by the positive prescription against themselves, or those who, in progress of time, were to take the fee of these lands as their heirs of provision.

2*do*, It was an established principle in law, that, *contra non valentem agere non currit præscriptio.* It was necessarily supposed, that there must be some person having both title and interest to interrupt; and so long, therefore, as the party interested was disabled, his right could not be hurt. But when a party in possession was vested with both titles, *viz.* as heir of line and of provision, the remoter heirs of provision were *non valentes agere* in the strictest sense; they had neither title nor interest to remove the heir in possession, or to compel him to say upon what title he possessed. If he had a double title, he would ascribe his possession to both or either; and when these came to separate, the heir in the one would not be permitted to plead the positive prescription in bar, and to ascribe the possession held under both, to the one title in preference to the other; 26th January 1726, Marquis of Clydesdale *contra* Earl of Dundonald, No 3. p. 1262.; 30th June 1752, Smith *contra* Gray, No 89. p. 10803.

No 90.

In the circumstances of this case, accordingly, there was nothing the remoter heirs of provision could have done to interrupt the prescription; neither Sir Thomas, nor the last Sir John, had done any thing which could be the subject of challenge at the instance of these remoter heirs; the obtaining of the precept of *clare constat* in 1721, was a necessary measure to vest in Sir Thomas the superiority, previous to his making up titles as heir of provision in the property; and as he was entitled to the possession of the property under his right of apparency as heir to his uncle Sir John, the remoter heirs could not, by an action, have compelled him to complete his titles thereto sooner than he should think proper. Remote heirs were not required to bring actions from which no immediate benefit could arise, merely to serve as interruptions; 28th February 1666, Earl of Lauderdale *contra* Viscount of Oxenford, &c. *infra*, *h. t.* There was no ground, in the present case, upon which an action could have been brought; so that as, during the lives of the last Sir Thomas and Sir John, the remote heir was *non valens agere cum effectu*, he could not, upon the doctrine of prescription, be cut out from the right which had now accrued.

It was *observed* upon the Bench, That, in the positive prescription, no enquiry into the *initium possessionis* was necessary. Though one had entered as a tenant, and had afterwards acquired the property *a non domino*, yet prescription would run and establish the right. 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; their creditors would have been authorised to carry off the lands, as an unlimited fee, by adjudication; and, upon the same principle must they, as a fee-simple, descend to the heir of line.

The following judgment was pronounced: (6th December 1770) "Upon report of Lord Kames, and having advised informations and memorials *hinc inde*, the LORDS find, that the defender has condescended on acts of homologation, sufficient to remove the objection, that the marginal notes in the marriage-contract, 1687, were not tested, in terms of the act 1681; but, in respect of the infeftment in the person of Sir Thomas Bruce on the precept of *clare* 1721, and of the infeftment in the person of Sir John, on the precept of *clare* 1740, and of their possession of the island of St Servanus upon said infeftments for more than 40 years, find, that the pursuer, as heir of Sir John, has right to said island, in virtue of the positive prescription."

Lord Ordinary, *Kames*. For Miss Bruce, *Sol. H. Dundas, Macqueen, Swinton*.
For Bruce Carstairs, *Lockhart, Rae*. Clerk, *Kirkpatrick*.

R. H. *Fac. Col. No 53. p. 150.*

*** This case was appealed:—The House of Lords ORDERED and ADJUDGED that the interlocutor complained of to be affirmed.