

No 170.

curator, and with great unanimity sustained the defence of prescription, being of opinion that this defence was clearly founded upon the act 1617. The ruinous consequences of the first interlocutor made a deep impression upon the Judges. If a man cannot acquire by the positive prescription, unless there be a person existing who can object to it, the necessary consequence is, that 400 years instead of 40 may not be sufficient to secure a family in the possession of their estate. If an heir-apparent make up a wrong title, as is supposed in the present case, he and his successors can be no better than heirs-apparent, till the succession divide and produce a competitor to the successor in possession. At that rate, every debt contracted antecedent to the act 1695, every contract of marriage entered into, and every sale made, would be null and void. This could not be the meaning of the act 1617. It is true the act 1695 respecting the debts of an heir-apparent affords some remedy, but far from being sufficient. The most onerous deeds will not avail if the heir die before he has been three years in possession. Supposing infeftments upon the estate equal to the value, yet if the next heir, discovering the original defect in the title, shall obtain a regular infeftment, and contract heritable debts upon which infeftments follow, these latter debts will be preferable upon the estate; for the prior debts being granted by an heir-apparent, cannot affect the estate, but only the person of the heir passing by.

Sel. Dec. No 239. p. 312.

1774. December 22.

GEORGE MIDDLETON of Lethemdolles and DAVID PATERSON of Bannockburn
against JOHN EARL of DUNMORE.

No 171.

Possession for forty years, founded on a disposition from the superior who had attained possession in virtue of the clan act, found sufficient to establish a prescriptive right.

THE lands of Lethem and Lethemdolles were vested by infeftment in the person of Robert Rollo of Powhouse, in the year 1699, holden by him of Hugh Wallace of Ingleston, the superior; and which he continued to possess by that tenure, till, having been concerned in the rebellion 1715, he and his son James were both tried and convicted of high treason, whereby his estate became forfeited.

Hugh Wallace the superior meaning to take the benefit of the clan act, upon the 30th May 1717, granted a precept for infefting himself in the lands of Lethem, and he was infeft accordingly 3d June said year.

Mr Wallace entered a claim to the lands of Lethem before the Commissioners of Enquiry; but no procedure thereupon appears, nor does it appear that he took any step as to the lands of Lethemdolles.

Mr Graham of Airth acquired the foresaid lands of Lethem and Lethemdolles from Mr Hugh Wallace the superior; and having been thereupon infeft in 1720, upon a charter from the Duchess of Hamilton, Hugh Wallace's immediate superior, he, with consent of Hugh Wallace, granted a feu-charter of the whole

to Robert Rollo, Sheriff-clerk of Clackmannan, as trustee for the three daughters of the foresaid Robert Rollo, the forfeiting person.

James Rollo, son of the said Robert Rollo, was rehabilitated by acts of Parliament, whereupon the daughters, with the consent of their trustee, in 1739 granted a conveyance of the lands to the said James Rollo, and assigned him to the charter and precept granted by Mr Graham in 1720, upon which no infestment had hitherto followed.

In February 1750, David Rollo, son of James, established a title to the foresaid right, which stood in the person of his father, by a service as heir in general to him; and having sold the whole lands to Dr James Dundas, he, upon the 24th May 1750, executed a disposition in favours of Dr Dundas, bearing an assignment to the writs and evidents of the lands, and, in particular, to the charter 1720.

Dr Dundas, in virtue of the precept in that charter, was infest upon the 16th January 1750; and the pursuer George Middleton was served heir in general to Dr Dundas his uncle, and obtained from William Graham of Airth, the superior, a precept of *clare constat*, of date 4th February, and in virtue thereof was infest upon the 5th February 1759.

Upon these titles George Middleton sold the lands to the Earl of Dunmore, by minute of sale; and the Earl having objected to the validity of the progress, an action was brought at the instance of Mr Middleton and David Paterson (formerly Rollo) his author in these lands, concluding to have it found and declared, that the pursuer had an unexceptionable right to the lands, and, in consequence, that the defender should be decreed to pay the price; or otherwise, that the sale should be dissolved. The Officers of State, for the interests of the Crown, were called as defenders in the action. No appearance, however, was made on behalf of the Crown: But appearance having been made for the Earl, parties were heard upon the exceptions taken to the progress.

It was maintained, on behalf of the pursuer, That he had a good right to the lands, in respect that he derived the same by a regular progress from the superior, who had a good right thereto, in virtue of the clan act; and *2do*, he maintained, That supposing the superior's right under the clan act had been originally defective, in respect of the directions therein prescribed not having been complied with, (which the defenders contended) that the right is now secured by the positive prescription against any challenge, either at the instance of the Crown or any other person whatever, in consequence of the possession which the pursuers and their ancestors and authors have enjoyed, without any interruption, for the space of 54 years upon a habile title of prescription.

This being the case, there is no room now for an enquiry how or in what manner the possession was first attained. If they have had 40 years peaceable possession as proprietors, and if they can produce a charter and sasine prior to that possession, they sufficiently comply with the requisites of the statute 1617. At the same time, the fact was, that Mr Graham attained possession in virtue

No 171. of the clan act ; for that it does appear, *1mo*, That a factory was granted by Mr Graham of Airth to Robert Rollo, the Sheriff-clerk, upon the 29th September 1719, which proceeds on a recital of Mr Graham's being superior and heritable proprietor of these lands, and that he had acquired the property by the clan act ; and authorising Robert Rollo to uplift the rents for crops and years 1717, 1718, and all precedings, and also for the then current year, and in time coming, during the granter's pleasure ; and the factor is taken bound to account to Mr Graham for his intromissions.

2do, It appears that Robert Rollo entered on the office in consequence of this factory, from a stated accompt in process between him and John Callander, a tenant in Lethemdolles, in which the rents of these lands, for crops 1715, 1716, 1717, and 1718, are specially charged, and a mutual discharge subjoined, subscribed by Rollo the factor and Callendar the tenant, dated Airth, 1st January 1720 ; and it is instructed, from the charter by Mr Graham, that the year following he conveyed the lands to Robert Rollo, for behoof of the daughters of the forfeiting person, to be held by him of Mr Graham, the disponee. And the lands have been uniformly possessed by Robert Rollo, and those in his right, from that time to the present, without any challenge or interruption from any mortal whatever.

Nor can it make any difference, that the title of Mr Graham's disponee remained personal down to the 1750 : It is sufficient that the lands were possessed for 40 years by persons who can connect with the charter and sasine which is founded upon and produced as the title of prescription ; and it is of no moment whether that connection be established by deeds clothed with infeftment, or by deeds merely personal, or even by simple apparency. These propositions the pursuers hold to be clearly founded in the statute 1617 : And they hold it to be equally clear, that, after 40 years possession of the *dominium utile*, it is no good objection that no more was vested in Mr Graham, by the infeftment in his person, than the right of superiority.

Prescription is only necessary to supply the want of right in the granter of a deed, and to remove any burdens or objections to which the right might have been otherwise liable ; but as the right of the superior is a right to the lands *ex facie* simple and absolute, as a grant of superiority is truly a grant of the lands themselves, and as the right of the vassal is no more than a burden upon the *dominium directum*, so when the superior, in virtue of his infeftment of the lands, has had the full possession of the *dominium utile* for the space of 40 years, without any challenge or interruption, the vassal's right is thereby totally at an end, and the superior's right is effectually disburdened of it ; his possession of the *dominium utile* for the space of 40 years is as effectual for extinguishing the right of the vassal, as a resignation made by the vassal *ad perpetuam remanentiam*.

THE COURT gave judgment, " finding the progress sufficient."

Ast. Macqueen.

Ajt. D. of Faculty.

Clerk, Campbell.

Fol. Dic. v. 4. p. 95. Fac. Col. No 146. p. 380.