

SECT. V.

*Res meræ facultatis.*1671. November 23. ROLLAND of Disblair *against* LAIRD CRAIGIVAR.

No 35.
 Declarator
 not necessary
 for declaring
 the right of
 a jurisdiction,
 but the per-
 son having
 right may
 pursue for the
 casualties
 thereof any
 time within
 40 years.
 But to free
 one and his
 lands from the
 jurisdiction,
 it was found
 sufficient that
 he had not
 been inrolled
 or cited for 40
 years.

ROLLAND of Disblair having raised a suspension of double poinding against Craigivar, pretending to be heritable bailie of the regality of Lindores, beyond the Cairn of Mount, and the Sheriff of Aberdeen, both pretending jurisdiction over his lands; which suspension did not only bear a suspension of some particular acts of court, amerçiating the defenders for absence at head-court; but also did suspend all exercise of the jurisdiction thereafter till the suspension were discust; the reason of suspension against Craigivar was, That albeit the suspender's lands were within the regality of Lindores, yet, by the several acts of annexation, the lands are annexed to the Crown, and regalities are suppress, and such lands as were therein before are declared to be as the regality with other temporal lands in the shires where they lay; and albeit heritable baileries of regalities are excepted from the annexation, yet the charger shews no right to an heritable bailiery, but the defender hath been in use to answer to sheriff-head-courts these twenty years past, and the charger can claim no right, after so long desuetude, till, by way of action, he declare his right; *2do*, Albeit he could shew a sufficient right, yet the suspender hath prescribed freedom from his jurisdiction, and offers to prove, that these 40 years, he, his predecessors and authors, have been free thereof, and were never cited, nor called in the rolls of that regality court, or amerçiaded, till of late, but they were constantly called before the Sheriff-court, and answered to him. The charger *answered*, That he might insist upon the suspension, without any declarator, which is only requisite where a possessory judgment is competent, which is only in property, and therefore poindings of the ground upon annualrent or jurisdiction upon infestment, though they have lien over for 39 years, may be pursued before prescription, without declarator; and, as for the pursuer's right, he produces three infestments under the Great Seal, the first *in anno* 1618, bearing expressly the heritable bailiary of Lindores, beyond the Cairn of Mount, upon the resignation of the Lord Forbes, who was heritable Bailie before the annexation, and his right is excepted therein; in which infestments Logie-Fintray is erected to be the head burgh of the regality beyond the Cairn, in place of Newburgh; and as to the prescription, *1mo*, It is not competent against public rights constituted by the the King; *2do*, It cannot prescribe during the time of the usurpation, when regalities were unwarrantably suppress; *3tio*, It is interrupted, and the pursuer's right preserved, by holding of head courts, amerçiading absents, and

though this defender was not amerced, or in the rolls, yet the jurisdiction being exercised as to the greatest part, it is preserved as to the whole; *4to*, The defender hath acknowledged the jurisdiction by his compearance in the regality court, at the making of the stent-roll, and paying to the charger accordingly, who had no other title to convene the feuers, or to take payment, but as Bailie.

THE LORDS found the charger might insist in the suspension, without necessity of a declarator, and that his infestments produced were a sufficient title; but found the prescription competent against the same, which they qualified, that the suspender had been free for the space of 40 years, never being enrolled, or cited by the Bailie, but still by the Sheriff, not counting the years of usurpation; and found, that the Bailie's enrolling and calling of others could not hinder the suspender to prescribe his freedom, if he were constantly enrolled with the Sheriff; and found also the alleageance of interruption by the Bailie relevant, by calling the defender's predecessors or authors in the head courts of regality, or citing them at other times, but found not the alleageance of homologation, by compearance at the stent-roll, which could not be made by a Sheriff, relevant.

Fol. Dic. v. 2. p. 99. Stair, v. 2. p. 8.

* * * Gosford reports this case:

CRAIGIVAR, as heritable Bailie of Logie-Fintray, and some other lands, which were a part of the regality of Lindores, having fined Disblair and others for absence from his head court in *anno* 1669, they did suspend, upon this reason, That Craigivar's right was prescribed, in so far as they, nor their authors, had never been called at the regality head court by the space of 40 years; but, on the contrary, had been in constant use of compearing at the Sheriff's head courts during these years, whereby they had prescribed a freedom from the regality court. It was *answered* for the charger, That he offered to prove that his predecessors, as heritable Bailies, were in possession of their office by virtue of their infestments under the Great Seal, and did keep their head courts, and did call the feuers of the said regality, from the year of God 1620, until the year 1648, after which time all heritable bailiaries were suppress by the English; and they were not obliged to prove that the suspender's authors were particularly called; but he offered him to prove that the suspenders, and their authors, when taxations were imposed, did pay in their proportions to the Bailie for his relief, and did compear for making up of the stent roll of the taxation.—THE LORDS did find the reason of suspension relevant, notwithstanding of the answer, unless the charger would offer to prove, that, within 40 years (not counting the years that regalities were suppress) the suspenders, or their authors, were particularly at the head courts.

Gosford, MS. No 404. p. 203.