SECT. II.

Title requisite to Heirs.

1671. *February* 15. The EARL of ARGYLE *against* The LAIRD of M'NAUGHTON.

No 85.
In the positive prescription, founded upon the possession of heirs, it is sufficient to produce the naked sasines, without either the precepts of *clare constat*, or retours upon which they are founded.

THE Earl of Argyle pursues the Laird of M'Naughton to remove from the lands of Benbowie, as being a part of the Earl's barony of Lochow. The defender *alleged* absolvitor, because he produces a sasine, dated *in anno* 1527, proceeding upon a precept of *clare constat* from the Earl of Argyle, in favours of Alexander M'Naughton as heir to Gilbert M'Naughton, of the four merk land of Benbowie, by virtue whereof, the said Alexander and his successors to this day have possessed, and so have a sufficient defence upon prescription by the act of Parliament 1617, anent prescription. The pursuer *answered*, That the defence is not relevant, as it is founded upon the naked sasine only, because by the said act of Parliament there is required to all prescriptions of land a title in writ, preceding the 40 years possession, which title is distinguished in two cases; *first*, In relation to rights acquired *titulo singulari*, whereunto is required not only a sasine, but a charter, which although they may be excluded by an anterior or better right, yet if possession hath been had thereafter, for the space of 40 years uninterrupted, it becomes an unquestionable right, and all other rights are excluded; but, *2dly*, A greater favour is shown as to the title of prescription of lands belonging to any party *titulo universali*, as heirs to their predecessors, in which there is no charter required, but sasines one or more continued, and standing together for the space of 40 years, either proceeding upon retours, or upon precepts of *clare constat*; so that the sasine in question proceeding upon a precept of *clare constat*, cannot be a sufficient title for precription, unless the precept of *clare constat*, which is the warrant thereof were produced. *2dly*, The said provision of the act requires that the sasine one or more must stand, and be continued for the space of 40 years, which cannot be alleged in this case, because by the defender's production it is clear that the said Alexander M'Naughton, to whom the sasine was granted, lived not for 40 years after the sasine, so that unless his heir had been entered, and had possessed by virtue of the heir's sasine to perfect the 40 years, the defence of prescription is not relevantly alleged. The defender *answered*, That his defence of prescription stands relevant upon this one sasine only; and he oppones the foresaid clause in the act of Parliament, where an heir's title of prescription is a sasine proceeding upon a retour or precept of *clare constat*, and does not mention that the sasine and precept shall be a sufficient title, as it does in the case of lands acquired, where it expressly requireth both a charter and sasine; and it had been as easy in this clause to have required a sasine, and retour or precept,

The sasine of an heir who did not himself possess the whole space of 40 years, never being renewed in his successors, who all of them continued to possess as apparent heirs, was found to be no sufficient title for prescription.

No 85. whereas it doth only require a sasine on a retour or precept; so that the sasine relating the retour or precept is sufficient, and by long course of time sufficiently instructs the being of the retour or precept. As to the second answer, the meaning of the act of Parliament by a sasine one or more standing together, is that the said sasine be not reduced; for our law doth ordinarily oppose standing and falling by reduction, so that albeit the party seased died within 40 years after the sasine, his apparent heir continued his possession; and being one person in law with him, did possess by his sasine, and if it were otherwise understood, many absurdities would follow; for if a person were infeft as heir, and did possess 39 years, thereafter dying, then if his heir were not infeft within the year, he should have no title of prescription, though within the 40th year six heirs consequently with infeft, all their six sasines with 39 years possession, though their apparent heir should continue 100 years thereafter in possession, would not induce prescription; yea, taking the act literally, it can never have effect, unless the heir infeft live and possess after his infeftment 40 years, which is very rare; for if there be more heirs that succeed, there must be still an interval betwixt the death of the one, and the sasine of the other, and so the sasines could not be said to be continued, but discontinued or interrupted; for possession is not continued, if the possessor cease to possess one year; so that prescription being of common interest and advantage to the lieges, the same ought to be ampliate in the interpretation thereof, and not straitened. The pursuer *answered*, That he opponed the clear words of the act of Parliament, which does not only require 40 years continual possession, but also that it be by sasines standing, continuing together 40 years, and that upon very solid reason; for if both charter and sasine be required for a title to prescription in rights acquired, it canot be imagined that a single sasine should be sufficient in rights devolved by succession, without requiring any thing in place of the charter; so that if neither the precept nor retour be required, nor yet the continuance of the sasine, either standing in the person of the first heir, or renewed in the persons of the subsequent heirs, which certainly is of purpose put to astruct the right in place of a charter, or adminicle of the sasine, and therefore the standing of the sasines is not here opposed to their being reduced, but their falling by the death of the person infeft, whereby according to the ordinary terms of law, the fee falleth in ward or non-entry in the hands of the superior, neither can a subsequent heir possess by the sasine of a prior heir, because sasines are not given to heirs, but to the individual person seased; but charters and other rights given to parties and their heirs may be a title to their heirs to possess, but not a naked sasine: and as to the inconvenience, it would be far greater if one single sasine were sufficient, and would open the door to all forgery, after parties and witnesses are dead; but if more sasines be required, if the first person die, it is much more difficult to forge diverse sasines by diverse notaries, and diverse witnesses, which may be redargued by the hand-writing of some of the notaries, or survivance of some of the witnesses; and what is

No 85.

alleged upon a sasine continuing 39 years, or of six subsequent sasines within that time, is easily retorted by consideration of one sasine, whereby the party infeft lived and bruiked but a year, whether that would be a sufficient title for prescription, or if six consequent sasines proceeding upon charters and 39 years posssession, yea, or 100 years possession, all which would make no title of prescription, unless a charter were also produced, as is clear by the act; so we are not to consider equivalencies, but in a statute must take it as it is made, and not make it; and as for the inconvenience alleged that there must necessarily be intervals, it imports not, for the continuance of sasines is not required to be so exact as the continuance of possession, but subsequent heirs being infeft, albeit there be an interval, their sasine, as in many other cases, will be drawn back to the death of their predecessor, if there be no *medium impedimentum* by any process intented in the *interim*; so that at least there must be a sasine standing when the possession began, and a sasine standing when the first 40 years is complete, but here there was no sasine renewed, though there be 100 years after the first 40 years, and a full progress as to all other lands.

THE LORDS found, that there was no necessity to produce, or instruct that there was a precept or retour, otherwise than by the relation of the sasine, but found that the sasine not having 40 years possession, by the life and bruiking of the person seased, and never being renewed in his successors, is not a sufficient title of prescription, and therefore repelled the defence. In this process the defender was permitted to allege the lands in question to be part and pertinent of his other lands, whereof he shew a full progress, and alleged a continual possession, by doing all deeds of property that the subject was capable of; and the pursuer alleging that these lands were severally kend and known from all the defender's lands contained in the said progress, and that he and his predecessors had exercised all acts of property that could be done in the case of a forrestry, such as the lands in question; and that after the defender's alleging on a several infeftment, by the foresaid sasine, and so acknowledging these lands to be *separatum tenementum*, he could not return to allege part and pertinent so considerable a tract of ground, six or seven miles long; yet the LORDS would prefer neither party to the probation; but before answer, ordained either party to adduce witnesses anent their possession, and the several specialities by them alleged, that by the probation the Lords might see the just inserest of either party, which might resolve into a promiscuous commonty, or into a property to the one, and a pasturage or servitude to the other.

Fol. Dic. v. 2. *p.* 103. *Stair, v.* 1. *p.* 720.

*** Gosford reports this case:

IN a removing pursued at Argyle's instance against M'Naughton, from the lands of Benbowie and forrest thereof, wherein the Earl was infeft as part and pertinent of the barony of Lochow; it was *alleged* for the defender, That he

No 85. could not be removed, because he was heir or apparent heir to Alexander Macnaughton his predecessor, who was infeft in Benbowie *in anno* 1527, upon a precept of *clare constat* granted by the then Earl of Argyle, and by virtue thereof he and his predecessors who were apparent heirs to the said Alexander have been in continual possession past memory of man; and for verifying of his allegeance, did produce a sasine granted to the said Alexander. It was *replied* for the pursuer, That the allegeance founded upon the said sasine could not be sustained to infer prescription, because a naked sasine was not a valid title, being only *assertio notarii*, without any warrant or adminicle; whereas, prescriptions being of their own nature odious, require that the entry to the possession should be by virtue of such a right as should be sufficient *ad translationem dominii*, which, albeit it were not sufficient against a prior and better right, yet being clad with forty years possession without interruption, the law does sustain it *in odium prioris domini, et ne incerta sint rerum dominia*; *ado*, The sasine required is not such a title as is required by the act of Parliament 1627 anent prescriptions; for by that act there is a distinction made of heritable rights and the manner of their conveyance, viz. such as are by charters and sasine, in which case there is a necessity to produce the charter which is the warrant of the sasine, which being produced *in medium tituli*, in respect that the sasine being so strongly adminiculate, the person infeft and his heirs or apparent heirs being forty years in peaceable possession, their right is unquestionable by prescription. The second manner of conveyance is by sasine following upon retours, or precepts of *clare constat*, as to which the act of Parliament requires, that there should be sasines one or more standing continued together by the space of forty years; whereas the defender produces only one sasine granted to Alexander M'Naughton *in anno* 1527, which Alexander died before the year 1554, as it appears by a new precept of *clare constat* granted to the said Alexander's heirs the year of God foresaid, bearing him to be heir to the said Alexander in several other lands, without mentioning the lands of Benbowie; and therefore, that sasine never having been renewed in the person of any heirs, and not being clad with forty years possession, cannot be such a title as is required by the act of Parliament, which, in place of a charter to adminiculate a sasine upon a disposition, requires sasines one or more standing continued together by the space of forty years, flowing upon retours or precepts of *clare constat*, otherwise it were of a most dangerous consequence, and the undoubted inheritance of any person might be taken from them without their own deed, by the simple assertion of a notary, which might open a door to forgery and falsehood, and the sasine being kept latent for many years, the forgery could never be discovered, it not being produced till after the death of the notary and witnesses; and therefore it cannot be imagined in common reason but that the act of Parliament requiring a sasine one or more standing continued together by the space of forty years, ordains that to be equivalent to a charter granted by a disponer under his own hand, which cannot be imagined, if one naked

sasine should be sustained, albeit the person infeft died within two or three years thereafter. To this it was *duplied* for the defender, That his defence founded upon the said sasine (with immemorial possession, stood relevant notwithstanding of the reply; 1*mo*, Because the said act of Parliament anent prescriptions being a fundamental law introduced for the security of the lieges, who by reason of war, minority, or other accidents, might lose their securities and evidents, it ought to receive favourable interpretation; and the heirs or apparent heirs of any person infeft, producing a valid sasine in the person of any of their predecessors, and proving immemorial possession of the lands therein contained, the law does not require that the precept or retour itself should be produced to adminuculate the same, but it is sufficient to allege forty years possession in place thereof; and an apparent heir being hæres, aut gerens se pro hærede censetur una et eadem persona cum defuncto, and there being a sasine produced in any of their persons, clad with forty years possession, wherein the heirs or apparent heirs have succeeded, it was all that is required by the act of Parliament; 2*do*, As to the difference mentioned in the act of Parliament of heritable rights and conveyances, whereas to sasines flowing upon precepts of *clare constat* or retours these words are added, 'sasines one or more continued or standing toge-'ther,' the meaning thereof is, that the sasine one or more being clad with forty years possession, and standing unreduced or quarrelled by any person during that time, it shall be a title of prescription; there being nothing mentioned in the act that every apparent heir should produce his sasine upon a precept of *clare constat*; but on the contrary, if that should be interpreted to be the meaning of the act, this absurdity would follow, that if within the space of twenty or thirty years there should be four or five apparent heirs entered and infeft by preceptsof *clare constat*, and that the apparent heirs who were not infeft should continue their possession by the space of forty years thereafter, yet all these sasines not being clad with forty years possession in the persons of those infeft, should be no valid title to their apparent heirs, albeit they continued in the peaceable possession past memory of man; and as to the inconveniency that sasines may be forged, it is of no weight, seeing if falsehood be intended, it is as easy to forge two or three sasines, they being all dated before the age of man now living, as to forge one; and since the act of Parliament anent the registration of sasines, there can be no danger or hazard upon that account, seeing none can be kept latent without being declared void or null, and being put *in publica custodia*, may be improven, if they be false and feigned. No 85.

THE LORDS having fully considered this case, which was never before decided, and the act of Parliament anent prescriptions, and the true meaning thereof, did repel the defence founded upon the sasine produced, upon these considerations chiefly; That it was granted near 100 years before the act of Parliament, and that since the act of Parliament never any apparent heir had raised brieves to be served and retoured, nor required the superior to enter them by precepts of *clare constat* now by the space of fifty years and above since the act of Par-

No. 85. liament, and that it were of a most dangerous consequence to sustain a naked sasine that was never adminiculate during all that time; as likewise, that the possession had not been as undoubted and only proprietors of the said lands, but confest on both sides that it was a mixed possession by the Earls of Argyle and the Lairds of M'Naughton jointly, the Earls of Argyle not only being superiors, and having the universal privilege of a forrestry by hunting and keeping of deer, but likewise having sheels, houses, and steadings of mares and kine in several places, as well as the Lairds of M'Naughton. But as to the manner of possession, and how far it might operate, after a great debate, the Lords, before answer, ordained witnesses to be led by both parties.

Gosford, MS. No 335. *p.* 154.

1680. *June* 25. Earl of Queensberry *against* Earl of Annandale.

No 86.
It was found, that the sasine of an heir who did not himself possess the whole forty years, never being renewed to his successors, who all of them continued to possess as apparent heirs, was no sufficient title of prescription.

In an improbation pursued by the Earl of Queensberry against the Earl of Annandale, the pursuer excluding the defender with a decreet of certification obtained against his author in 1619, *alleged* against it, That it was null, because the Lord Crighton was only called thereto, and not Irvine of Bonshaw, in whose favours Crighton was denuded; 2*do*, That it was prescribed. *Answered* to the *first*, There needed no other be called but Crighton, for he was the immediate vassal, and he was not bound to know Bonshaw the sub-vassal; And as to the *second*, The certification in 1619 interrupted the prescription. The Lords sustained the certification in 1619, in respect the immediate vassal was cited; and repelled the prescription, because of the interruption produced: As also, the Lords found a sasine not sufficient without the precept of *clare constat*, its ground, albeit Annandale offered to prove they were forty years in possession by virtue thereof, unless they would say that he whose sasine it was lived and possessed forty years by virtue thereof; for the possession of his successor within these forty years would not make up the prescription, unless it be proved that that successor was likewise infeft: Yet the Lords, after the certification, found it relevant for Annandale to prove, that the lands controverted were parts and pertinent of the lordship of Johnston, and to Queensberry to prove they were a part of the lordship of Torthorrel, and allowed a mutual probation.

Fol. Dic. v. 2. *p.* 103. *Fountainhall, MS.*

1739. *November* 9. Purdie *against* Lord Torphichen.

No 87. In a competition about the property of a land-estate, one of the parties founded upon the positive prescription, and produced instruments of sasine in the person of his author and his predecessor, standing together for the space of 40