

1672. February 6. MURRAY *against* MURRAY.

No 12.

IN a reduction and improbation, the Advocate alone cannot insist for certification, if the party's interest be taken off.

Fol. Dic. v. 1. p. 526. Stair.

* * * This case is No 18. p. 4799, *voce* FORUM COMPETENS.

1680. January 20.

The EARL of Southesk *against* The LAIRD of Melgum and Others.

No 13.

There are mutual declarators betwixt the Earl of Southesk and the Heritors, about the muir of Montromont. The Earl insisting to declare his right in this manner, viz. that King Robert III. granted an heritable right to John Tulloch, to keep the muir of Montromont, for the use of the King's hunting, and to exact *quatuor denarios* of the head of every beast pasturing thereon, and for every day's pulling of heather, and casting of turfs, with certain tofts in the muir used and wont, with power to rive out any part of the muir, and apply it to his own use; of this right there is no progress till the year 1581. And then there is a charter granted to one Wood of the keeping of the said muir, expressing seven tofts particularly, and bearing a power to labour the said muir, or any part thereof, for Wood's proper use. This charter is confirmed by the King in *anno* 1588, with a *novodamus*, whereof Southesk shows a progress unto himself, who stands infest in the same terms. The defenders crave their right of common pasturage and fuel through this whole muir, to be declared free of any burden; whereupon the Lords having ordained the parties to produce all the writs they would make use of, and appointed two of their number to visit the muir, and there to take witnesses for either party of their possessions and interruptions; which now coming to be advised, it did appear that this muir is of great extent about 20 miles in circuit, and that two tofts, one in the east, and one in the west end of the muir, having always been, and yet are labour-ed by the Earl and his authors past memory, that the Earl had used interrup-tions by hounding of the defender's goods, nine years before the said visitation; yet the defenders proved 50 years possession of promiscuous pasturage of the whole muir, but that there are particular parts of the muir, nearest to the He-ritors' property, called their Firths, from which they debarred others from pul-ling of heather, and casting of fuel, but pasturage was promiscuous through all, except only Ardivy, who proved not 40 years peaceable possession, before the Earl's interruption. The Heritors *alleged*, That they had proven sufficient-ly by their titles produced, that their predecessors and authors were infest in

In a compe-tition be-tween two rights, both connecting with the King, the Lords would not allow the advocate to concur with the one a-gainst the other, with-out a special warrant in writing.

No 12. the lands adjacent to the muir, with pasturage, feal and divot in the muir of Montromont, and that anterior to any right whereunto the Earl shows progress. *2do*, Though their rights were posterior, yet they are perfected by prescription and that free of any duty. *3tio*, The pursuer's right is not a right of property, but of keeping, with a power to rive out and appropriate, which is but a faculty, and not being made use of by possession or interruption these 40 years, it is excluded by prescription. *4to*, Though it were a right of property, yet an indefinite servitude of pasturage or fuel *afficit omnem glebam*, and hinders the proprietor, much more the keeper, from tillage, which in so far excludes the indefinite pasturage and fuelage. It was *answered* for Southesk, That he opposes his rights produced, whereby he hath express power to labour and appropriate any part of the muir, which at least must import that right, which the Roman law calls *de superficiebus*, and after which no constitution of a servitude could be effectual, and though it were effectual by anterior constitution or prescription, yet the import of a servitude burdening a property, must always be interpreted according to what the constituent could rationally be presumed to grant or permit, which could never be further extended than that the common pasturage should be with regard to, and such as his own pasturage, that is, upon all that is pasturable, which could not hinder him to till, but could only import that whatever were untilled, should be in common pasturage for the behoof of the dominant tenements; otherways the constitution of common pasturage to one heritor, for the use of a very small tenement, which could not fodder six cows, would not only bar the heritor from labouring what was not then actually laboured, but would bar him from granting posterior pasturages, which these heritors, nor no others did ever pretend to, and yet that little pasturage *afficit omnem glebam* in so far as pasturable; so that the import must be that the heritor is not hindered to do any thing by tillage, or granting other pasturages, so that there be sufficient for the first pasturage, which holds much clearer in the case of fuellage; and therefore the Lords in the case of the muir at the Path-head of Kirkcaldy, where several heritors of houses were infest, with privilege of feal and divot in that muir, yet the heritor was allowed to labour the muir, leaving sufficient for their feal and divot; and in this case, though the Earl should labour all the muir, the heritor hath no detriment as to the pasturage, for one acre which will be ploughed will be better than ten in the muir, and the one half must always lie ley; and it were a public inconveniency, if every servitude on such a vast subject, should make it for ever useless for tillage and improvement. *2do*, The pursuer's right is as keeper, the property remaining the King's, to which no man claimeth a right of property; and therefore albeit the pursuer and his authors had neglected the right, and suffered prescription, yet the King who is proprietor has interrupted by a proclamation, warranted by the Lords in *anno* 1628, ratified in the Parliament 1633; since which time there are not 40 years abating the years of the usurpation. It was *replied* for the heritors, That the tillage must be pre-

judicial to their pasturage, it being granted to so many heritors, to whom the use is requisite, for their property will reach all that can arise by the pasturage of the whole muir, and their fuellage is necessary for them and their tenants, there being no moss within many miles, nor in this muir, which is a channelly dry ground, and will be no more than sufficient to yield them thin turf in the surface. And as to the King's interest, there is no warrant for the Advocate's concurrence, but the King being author to both parties, the Advocate cannot concur with the one against the other, without special warrant. And as to the interruption by the King, both by the Lords and by the act of Parliament, it is limited to teinds, superiority of kirk-lands, and to his Majesty's annexed and un-annexed property, whereof the farms of feu-farms have been counted for in Exchequer since the year 1445, which is the first annexation of property to the Crown; and it cannot be pretended, that ever count was made in Exchequer for this muir, for any office therein, and the said limitation was necessary, otherwise all the lands in Scotland being presumed once to be the King's, and to have flowed from him, he might call all the rights in question, against which the act of prescription, for securing the lieges' right against all disquiet, was introduced. But here the King hath no interest in question, for all acknowledge the right of property under the superfice, and the right of tillage of the whole superfice is disposed by the King to the Earl's authors, and if the King were in the field, almost all the heritors have most express infeftments from the King of pasturage and fuel in the muir of Montromont, which would exclude the King by point of right without prescription. It was *duplied* for the heritor, That the consequence of this debate is of great importance, for if common pasturage exclude tillage, recent grants by the King of tillage may draw in question all the commonties in Scotland; and as to the clause in the King's interruption, it can be meant only of the King's property, which was liable to farm or feu-farm, or otherwise rights of property, given ward or blench, could not be preserved to the King. It was *triplied* for the Earl, That where common pasturage is granted where no tillage hath been of before, or where the commonty is inclosed, and one herd serves for all, the design there appears for the interest of the proper lands to continue *in statu quo*; but here tillage being anterior to the pasturage, and where the pasturage will not be prejudged by the tillage, there is neither general nor particular inconvenience, and it were absurd to leave so great a tract of land muir upon pretence of fuel.

THE LORDS would not allow the advocate to insist on the King's interest, without a special warrant in writ, and the point of the King's interruption was not insisted in; but the LORDS found, that not only the power to till, but actual tillage had ever been, and is yet continued in this muir, and began before the heritor's right of pasturage; and found, that it did not hinder the Earl to labour any part of the muir he pleaseth, it being always subject to the heritor's pasturage, wherever it was unplowed; and they granted commission to two of their number to design the fittest places in the muir, that might be sufficient.

No 12.

for the heritors, their successors and tenants, to be for fuel to them, without any pasturage. See SERVITUDE.

Fol. Dic. v. 1. p. 525. Stair, v. 2. p. 740.

. Fountainhall reports this case:

1679. December 18.—THE mutual declarators betwixt the Earl of Southesk and the Lairds of Guthrie, Melgond, and the other heritors adjacent to the muir of Montromont, were debated, the Duke of Albany being present. See the full dispute in the informations. I shall only resume a little here. *Alleged* for the King and Southesk, That the heritors could not prescribe either property or commony in this muir by their immemorial possession, because the said muir is a part of the King's property, reserved for his diversion and game in hunting; and they could not prescribe against the King, because the act of prescription was only introduced in 1617, and in 1630 there was an edictal interruption and citation used in behalf of his Majesty at the market-cross of Edinburgh; and during the late rebellion, no prescription could run, because the King was then *non valens agere*, and so the heritors have not had 40 years peaceable possession to introduce prescription. *Replied*, The 12th act of Parl. 1633, anent the King's interruption, and the King and Monteith against—March 29. 1639, *voce* PRESCRIPTION, show, that the said interruption related to no other lands but to such as were the King's annexed property, or was such uncontroverted unannexed property as was counted for in Exchequer since August 1445, or to changing of holdings since 1540; but this muir is none of these, *ergo*, the interruption is not concerned here. *Duplied*, By act 14th, Parl. 1600, the King's officers their negligence cannot prejudge him; and this muir was counted for by the Sheriff, at least should have been counted for: That Cato said very well, *contra rempublicam et Deos immortales nulla currit præscriptio*, Craig, p. 122. That the King is only administrator of his property, and so cannot prejudge his successor. And, on the 9th December current, the LORDS found the deeds of the late Earl of Dundee, as Constable, could not prejudge his successor in that office, and that he could discharge no more but during his own lifetime. And the King is presumed proprietor of this muir, because *jure coronæ* he stands seised in all the lands in Scotland, whereto a subject cannot show a right, seeing King Malcom Canmore gave it all out; and he needs not condescend *quomodo* it came into his Majesty's hands, whether by inheritance, forfeiture, succession, or excambion, or as annexed or unannexed property, or patrimony of the Crown. This interruption was a dangerous point; and ready to create and beget fears and jealousies in the minds of the subjects; that the King, by this door, might sometimes incroach upon their properties, which they thought secure by the grand prescription of 40 years, and the losing of it may be a funest and pernicious preparative. And King Charles I. secured against these apprehensions, by his restricting the said interruption to

the cases foresaid. And these gentlemen have been as loyal to his Majesty and his predecessors as Southesk or any others have been. And the excellent narrative of the act anent prescription in 1617, c. 12. is worthy of our consideration. And in Dury, there is an express decision, 22d July 1634, Forrester, *voce* PRESCRIPTION, where it was found, that personal fees and prestations might prescribe by an immemorial immunity and desuetude from payment thereof. As for the act of Parliament in 1633, anent the edictal interruption, it must be so interpreted *ut evitetur absurdum*, and in some laws *legislator plus dicit quam sentit*, but here *plus sentit quam dicit*; but *statuta sunt strictissima, et in propriissimo sensu accipienda*, and not to be extended, especially where it uses *verba taxativa*, such as *allenary, &c.* *Vide Sutholt Dissertat.* I find by the feudal law, that *præscriptio contra coronam et jura regalia est strictissime interpretanda*. This cause, because of the greatness of the probation, having taken up the Lords three several afternoons, the LORDS at last, on the 20th January 1680, “fully advised it, and found, that the muir of Montromont was a part of the King’s property, the circumjacent heritors pretending only pasturage therein; but find it not to be instructed to be a part of the King’s annexed property; and find the most ancient right produced for the Earl of Southesk, pursuer, to which he instructs a right by progress and connection in his person, to be the charter granted by Thomas Tulloch to Christian Wardlaw in liferent, and to David Wood, her second son, in fee, whereon infeftment followed the penult day of March 1583; and therefore find the exceptions founded on the defender’s charters, (whereto they produce a progress) bearing expressly pasturage in the muir of Montromont, to be sufficient, because these charters are all before March 1583; and find, that such of the defenders as produce an original right and progress thereto, after the pursuer’s infeftment in *anno* 1583, and before the King’s charter in 1588, during which time, the pursuer’s author’s right was only a right of keeping the muir, that the same gives the defenders a right of pasturage, of pulling heather, and of casting fuel, feal, and divot, they paying the dues after specified to the pursuer, viz. as in Tulloch’s old infeftment from King Robert; but find by the charter in 1588, bearing a *novodamus*, and a confirmation of the Woods’ former right, that the pursuers had gotten then not only the right of keeping, but also of labouring and pasturing in the muir at their pleasure; and find, that no right of the defenders after the charter in 1588, can defend them, except by prescription.” Then having advised the probation by witnesses, “the LORDS found by the depositions, that the Earl of Southesk’s interruptions being nine years before the taking of the testimonies; that the Lairds of Melgond, Auldbar, Tillyquhadland, Tumin, Pitmowis, and Guthrie, have been 40 years in possession of common pasturage promiscuously through the said muir, before the said interruptions; and that they had particular bounds in the muir called Firths; in all which there was promiscuous pasturage, but wherein the several heritors re-

No 12.

served to themselves the right of pulling of heather, and casting of turfs, and excluded others therefrom; and ordain them to continue their possession of fuelling in manner underwritten; and find that Speed of Ardivy has not proved 40 year's possession before the said interruptions; and find, that within the space of 40 years before the present Earl's interruptions, the Earl's predecessors were in possession of 12 pennies Scots for each cart-load of heather, and of 12 pennies for each day's casting of turfs with a spade; and find nothing proved of any duty for pasturage of beasts exacted within these 40 years." Then on 20th January 1680, after a new debate, the LORDS found, "That there having been tillage in this muir before the constitution of the servitude of pasturage or fuel, and the same not being a muir inclosed, that these servitudes cannot exclude the pursuer from tillage in any part of the muir, providing that whensoever after that which hath been or shall be laboured, shall be grass, that then the defenders shall have common pasturage therein promiscuously with the pursuer; and, as for fueling, find, that the defenders ought to have places assigned to them for fuel, feal, and divot, for fire, fulzie, thatching, and repairing of their houses, in the most convenient places of the muir, or the firths, or elsewhere, that may be sufficient for securing of fuel to them, their tenants, and successors; and discharge any tillage of these places that shall be designed for fuel; and grant commission to the Lords Newton and Pitmedden to meet upon the ground of the muir, and to design these places, and to consider how the pursuer may labour the muir, where it is labourable, with least prejudice and emulation of the adjacent heritors; and to visit the muir to that effect, and to settle the parties thereanent; and if they cannot settle them, to report to the LORDS the 1st of June; as also find, that the Laird Ogilvie of Pitmowis hath encroached on the muir, by riving out and labouring two riggs length in breadth, and a quarter of a mile in length at Pickerton, and that Guthrie hath done the like at the Heugh-head; and discern them to desist from labouring the same in time coming; and remit to the Lord Register and Forret to consider every one of the defenders, their rights and the progress, whether their charters bear *cum communi pastura in mora de Montromont* before the pursuer's charter in 1583, at least before his *novodamus* in 1588:" which the LORDS found gave him a right of property in the muir, so as he might till and labour it, providing he did not wrong servitudes, either constitute by infestments before that charter 1588, or servitudes introduced since by the grand prescription of 40 years possession uninterrupted; for he may have the property, and they servitudes; and they are compatible rights, and ought not to prejudice one another; but *uti possidetis ita possideatis, Vide l. 13. D. De Usufr.* See 21st June 1667, Watson, *voce* SERVITUDE. "As also they ordained the said two Lords to consider their progress, and the connection of their rights, at least the space of 54 years." For, *imo*, There must be a 40 year's progress of writs produced to found

a prescription by possession. Then *2do*, The Earl's nine years of interruption must be discounted; then the five years since the summons was raised, making in all 54 years.

No 12.

Fountainhall, v. 1. p. 69.

1693. February 2. HIS MAJESTY'S ADVOCATE *against* MONCRIEFF.

No 13.

THE King's Advocate cannot prosecute any action at the King's instance, tending to challenge the right of any of his Majesty's subjects, without a special mandate to that effect, though he may give his concurrence to a process brought by one subject against another.

Fol. Dic. v. 1. p. 525. Fountainhall.

* * This case is No 2. p. 3460., *voce* DESUETUDE.

1727. December 28. STEVEN *against* DUNDAS.

No 14.

A party, upon a signed information, as guilty of forgery, being committed to prison by the King's Advocate, and no day being fixed for his trial, within sixty days, conform to the act of Parliament, was liberated of course: Thereupon, he insisted against the King's Advocate to exhibit the information, which the LORDS found the Advocate obliged to do. See APPENDIX.

Fol. Dic. v. 1. p. 526.

1735. July 25.

EARL of BREADALBANE and HIS MAJESTY'S ADVOCATE *against* MENZIES of Culdares.

No 15.

THOUGH in reductions of grants from the Crown, custom has required a special warrant, yet it was found, that the King's Advocate, without any special warrant, might insist in a declarator of the boundaries of the King's forest, because this is only protecting the rights of the Crown from encroachments, not cutting down the right of private parties. See APPENDIX.

Fol. Dic. v. 1. p. 525.

1766. June. SIR JOHN GORDON *against* HIS MAJESTY'S ADVOCATE.

No 16.

SIR JOHN GORDON of Invergordon brought a complaint before the Court of Justiciary against his Majesty's Advocate, " for a breach of duty, in refusing

The Court refused to interpose its authority to