

1703. *January 1.* SIR WILLIAM KEITH of LUDQUHAIRN *against* SINCLAIR of DIRREN.

IN a competition for the mails and duties of the lands of Scatland and Gangergall, lying in Caithness, betwixt Sir William Keith of Ludquhairn and Sinclair of Dirren. John Keith, being infest in these lands, dies in 1620, and leaves Hugh and Elizabeth, his son and daughter. Hugh, upon a precept of *clare constat* from the Earl of Caithness, superior, is infest in these lands in the said year 1620, and, having no children, conveys and disposes them to Nathaniel Keith, for Ludquhairn's behoof; who, in 1662, obtains a charter from the Earl of Caithness, containing a *novodamus*, whereupon he is infest in 1665. Sinclair of Dirren's right was, that Elizabeth, the daughter, served herself heir to John, the father, passing by Hugh her brother, as conceiving him either not infest, or not validly infest; and, in 1670, disposes her right to Dirren. In the debate, Ludquhairn craved preference, because he stood publicly infest in 1665; whereas Dirren's right was five years posterior, in 1670.

OBJECTED for Dirren,—That Luquhairn's right, as derived by progress from Hugh, was a *non habente potestatem*, and null, in so far as Hugh's seaisine wanted the precept of *clare constat* which was its warrant; and no such precept either was, or could be produced; and though Ludquhairn had raised a proving of the tenor thereof, yet, knowing he would succumb, he had desisted; *2do*. The seaisine itself was null, not being registrate, though three years posterior to the Act of Parliament for registrations, in 1617; *3tio*. No progress from Nathaniel Keith to Ludquhairn produced.

It was ANSWERED to the *first*,—By the 24th Act of Parliament 1594, where one produces a seaisine and instructs forty years' possession, there is no need of producing either procuratories or instruments of resignation, or precepts of *clare constat*, and other warrants of their seaisines; so that Act dispenses with his want of the precept of *clare constat*: Likeas, by a warrant produced under the Earl of Caithness's hand, it appears that same precept of *clare* was given up to Dirren; so he is *in pessimo dolo* to obtrude the want of it: and, by letters under Dundas's and Davidson's hands, it appears it was then extant; which are sufficient documents, without proving the tenor: and Ludquhairn being validly infest in 1665, prior to Dirren, it is sufficient to exclude him, without going any farther back.

To the *second*, Of the seaisines not being registrate, it was ANSWERED,—That the Act of Parliament 1617 had not taken its full effect in 1620, in the remote shire of Caithness, neither is a place for that shire mentioned in the Act of Parliament: Likeas, an unregistrate seaisine is good against Elizabeth and Dirren, her assignee, she being heir; as was found, *23d November 1671, Rorison against Sinclair*.

To the *third*, Nathaniel Keith was sufficiently denuded by an adjudication led against him.

REPLIED for Dirren,—That the Act of Parliament 1594 only dispenses with the production of precepts of *clare constat*, where there has been a clear uninterrupted possession by the space of forty years; which cannot be instructed here in Hugh Keith's person. Neither is this supplied by the Earl of Caithness's charter to Ludquhairn in 1662; for either that was given as an original right,

or as a step and connexion in Hugh Keith's progress : An original right it cannot be, in regard it bears expressly to be granted by the Earl as superior only ; neither does it appear that the property was any wise returned or consolidated with the superiority. As an intervening connecting step in the conveyances it is as little ; because Hugh's and Nathaniel's, to which it is relative, are not produced ; *et sic non creditur referenti nisi constet de relato*.

DUPLIED for Ludquhairn,---That a *talis qualis possessio* satisfies the Act of Parliament 1594 ; and it is evidently proven, that either Hugh Keith himself, or one Denoon, an appriser from him, possessed all that time ; and Elizabeth's right designs the lands as possessed by these two. And as to Dirren's quarrelling Ludquhairn's infestment in 1665, it is *jus tertii* to him, his own right being defective : seeing it bears Elizabeth, his author, was interdicted to Sinclair of Brim, and others ; whereas, only Brim consents, albeit the word *others*, being plural, imports there has been at least three interdictors ; and, so the plurality not subscribing with her, the right is null, and that this is *jus tertii*. See 19th November 1624, *Laird of Lag against Tenants* ; 16th June 1665 ; and 23d December 1668.

The Lords having considered this case, on the Lord Tillicoultry's report, they thought both the progresses lame and defective ; and Dirren founding on a possessory judgment, the Lords repelled it *in hoc statu processus*, it not being proposed in the Act. And, before answer to the nullity of the seasine for want of registration, they ordained trial to be made in the particular register of Inverness, if, about the year 1620, the seasines of the lands in Caithness used to be register there ; and, likewise, the general register at Edinburgh serving for the whole kingdom, if at that time any Caithness seasines can be found inserted there. And, as to the forty years' possession required by the Act of Parliament 1594, resolved to hear them farther, if it must be a peaceable plenary possession, or if a *talis qualis* be sufficient ; or if it was competent to Dirren, the defender, unless he were in possession himself.

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1703. *January 5.* JAMES FERGUSON *against* WALTER WELSH and WILLIAM DOUGLAS.

JAMES Ferguson, being employed by the manufactories to prosecute the execution of the laws against export, pursues Walter Welsh and William Douglas, merchants in Dalkeith, for shipping aboard fifty-two packs of wool to be transported abroad, contrary to the Acts of Parliament in 1701, before the water-bailie of Leith, as having an admiralty jurisdiction, and there obtains a decret, confiscating the goods and fining them ; whereof they raise reduction and suspension, on sundry nullities : And the affair coming to be debated as if they were *in libello*, the manufactories insisted on thir grounds, That they were known to be notour exporters of wool, and that they stealed it into the ship in the night-time ; that they covered up all the packs with coals above them, that the wool might not be seen ; that there was no charter-party : and the skipper and crew, being examined, confessed that they had got a permit, in case of their being challenged, to say they were only going with it to Aberdeen ; but if they happened not to be questioned, then they were to transport it abroad over seas.