

1705. November 28. KER of Greden against ISOBEL ABERNETHY.

In the competition for mails and duties of certain tenements in Edinburgh sometime belonging to George Abernethy, Greden craved to be preferred as adjudger from Thomas Abernethy, as charged to enter heir to George his grandfather.

It was *alleged* for Isobel; That George disposed the tenement in question to John Dunlop and Elisabeth Abernethy the disponent's daughter in conjunct-fee and liferent, and the heirs of the marriage, whereupon infestment followed in the year 1620, and that there were three daughters of that marriage who were infest, and from whom the said Isobel Abernethy has right by progress. It is true the contract of marriage after so long time is not produced, nor to be found; but the sasine with the progress downward are in process, by virtue whereof there has been possession ever since the year 1620, and so a right was prescribed.

It was *answered*; No regard to the sasine and the contract, because it is but the assertion of a notary; nor is there regard to be had to the subsequent sasines in favours of the heirs of the marriage, because they proceed on hasp and staple; and the act Parl. 1617 anent prescriptions does only sustain possession by sasines, proceeding on retours, or precepts of *clare constat*, which cannot be alleged in this case.

It was *replied*; That sasines by hasp and staple are equivalent to precepts of *clare constat*, because they proceed upon cognition of the blood, and thereupon the Bailie of the burgh gives state and sasine to the nearest heir, in the same way as superiors do give precepts expressing the relation; and if sasine by hasp and staple were not allowed, the act of prescription would have little or no effect in tenements within burgh.

The LORDS found, That a sasine by hasp and staple was equivalent to a sasine proceeding on a precept of *clare constat*.

1705. December 13.—IN the competition for mails and duties of certain tenements in Edinburgh betwixt Ker of Greden and Isobel Abernethy, the LORDS formerly found, (28th November 1705) That Isobel Abernethy's authors being infest by hasp and staple, the said infestments were equivalent to a precept of *clare constat*, and a good title for prescription; and Greden having *alleged* upon interruption by processes in the year 1694 within the 40 years of the infestment by hasp and staple, it was further *alleged* by the said Isobel Abernethy, that she and her authors had possessed ever since the 1620, by virtue of an infestment proceeding upon a contract of marriage betwixt Elisabeth Abernethy and Mr. John Dunlop, whereupon resignation being made in the hands of a Bailie in Edinburgh, infestment was given by the town's common clerk, and the in-

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A sasine on hasp and staple in tenements within burghs royal is a sufficient title for prescription, without producing the contract on which it proceeds. The contrary was found in the preceding case.

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strument bears the said Elisabeth, and her husband, and George Abernethy her father, who was unquestionably heritor, to have been all present.

It was *answered*; The said infestment is no good title of prescription, unless the contract of marriage, which was the warrant of it, were produced; because the act of Parl. 1617, requires charter and sasine for the title of prescription, or at least where there is no charter that there be sasines one or more standing together proceeding upon retours or precepts of *clare constat*. Here the LORDS indeed have found that sasine by hasp and staple is equivalent as if it had proceeded on a precept of *clare*, but that not being sufficient to complete the 40 years, the title of prescription cannot be drawn back to the infestment in the year 1620, without a charter, or the contract of marriage, as the warrant thereof.

It was *answered*; The same ground of law and reason that moved the Lords to sustain a sasine by hasp and staple to supply the want of a precept of *clare*, holds likewise good for sustaining the infestment on the contract of marriage, viz. that in the one case there is no other form in cognoscing the propinquity and infesting the heir within burgh, and in the other, there is no charter in use to be granted for infesting in tenements within burgh, nor any separate instrument of resignation; but the party having the writ containing a procuratory in their favours, applies to a Magistrate, and goes along to the ground of the land with the common clerk, and there resignation is made, and infestment taken at the same time, and an instrument extended for all, and in no case is there any separate charter of tenements within burgh; and by virtue of this infestment possession was attained and continued near 80 years unquestioned; and it is also remarkable, that Greden's own title against Thomas Abernethy is as charged to enter heir to Elisabeth his aunt, as well as George his grandfather, so that his own title doth in some measure acknowledge the right of Elisabeth, one of the the said Isobel Abernethy's authors.

“ THE LORDS found the sasine, according to the custom of tenements within burgh, to be a sufficient title of prescription.”

Fol. Dic. v. 2. p. 104. Dalrymple, No 65. p. 84. & No 68. p. 88.

* * Forbes reports this case :

1705. November 28.—In the action at the instance of Henry Ker of Greden against Isobel Abernethy, the LORDS found that a sasine by hasp and staple was equivalent to a sasine upon a precept of *clare constat*, and consequently a sufficient title of prescription; because the Bailies give sasine by hasp and staple upon production or certain knowledge of the parties' rights recorded in the registers of the burgh.

1705. December 25.—In the competition for mails and duties betwixt Henry Ker of Greden and Isobel Abernethy, she founded her preference upon a

sasine containing instruments of resignation, with 40 years continued possession on sasines by hasp and staple.

Alleged for Greden; By the act of Parliament 1617, the 40 years possession to ground a prescription, must proceed either upon a charter and sasine, or sasine on a retour or precept of *clare constat*; therefore Abernethy's sasines are not a sufficient title of prescription, more than they would be a sufficient ordinary title; seeing these are but the assertions of a notary, and the grounds of them might be taken away by certification in an improbation, June 21. 1672, Mitchel *contra* Cowie, *voce* Proof; whereas, the others have a charter, precept, or retour, for their warrant.

Answered for Isobel Abernethy; Infestments upon resignation in burgage lands do not require separate charters, nor yet do infestments by hasp and staple require either retour or precept of *clare*; because they are not given as other sasines by any person as Bailie in that part, nor extended by a common notary, but the Bailie of the burgh as superior with the same breath receives resignation and gives infestment, or grants sasine by hasp and staple, (which is the burgher-retour,) upon production or certain knowledge of the parties' rights, or of their propinquity of blood to the last infest; conform to which infestment, the town-clerk *virtute officii*, and not as an ordinary notary, extends a judicial instrument. It was for this reason, and the more easy conveyance of small tenements within burgh, that when the act 16th, Parliament 1617, required the registration of sasines, burgage sasines were excepted, the clerk's prothocal being the town's record; and when that act of Parliament was corrected by the act 1681, a second book of register is only appointed for distinction sake; for in old time, very little solemnity was used in infesting in burgage tenements, as appears from *Leges Burgorum, cap. 56*. But that ancient simplicity happening to be abused by the taking of sasines privately in town without either Bailie or clerk, the act 27th, Parl. 1. James VI. ordained that no sasine be given within burgh but by one of the Bailies and common clerk thereof; nor is it strange that the attest of a clerk in his office, being a notary, should supply the want of a procuratory of resignation; seeing that, by our ancient law, was *instrumentum publicum*, and made full faith. *2do*, Though a naked instrument of sasine were no title of prescription *per se*, as but one single act or assertion; yet where such a sasine unreduced hath been continued by subsequent sasines on retours, or by hasp and staple, it must found prescription, because confirmed by the authority of an inquest who are not presumed to proceed merely upon the sasine, but upon knowledge of the ground and warrant thereof. *3tio*, It hath not been yet decided how far sasines by hasp and staple should be sustained in removings and mails and duties, where no better titles are competing; but then the argument doth not hold equally in the case of prescription as in ordinary titles. Since, for instance, a sasine on retour without a warrant would not be sustained as an ordinary title, though it be a good title of prescription. It is not to the purpose that certification in an improbation might be obtained

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against the warrant of a sasine by hasp and staple; for prescription excludes not improbation, or the necessity of producing grounds and warrants; but even in improbation, a burgage sasine would be good without production of a charter, Arg. Decis. December 14. 1671, Duff and Brown *contra* Forbes, *voce* PROOF; yea, charters under the Great Seal, that are sustained without producing either the procuratory which is the deed of the party, or the signature passed in Exchequer which is the superior's deed, are but the attests of persons in office; therefore, in burgage tenements, resignation made and infeftment given by the Bailie to the parties personally, attested by the clerk in his office, ought to be sustained in matter of prescription, without necessity of the Bailie's subscription or production of the party's procuratory; so that within burgh, sasines upon resignation have the effect of a charter precept and sasine, and sasines in favours of heirs by hasp and staple have the effect of sasines and retours, or precepts of *clare*.

THE LORDS sustained prescription upon the sasine in burgage lands containing instruments of resignation with continued possession on sasines by hasp and staple.

Forbes, p. 46. & 56.

SECT. IV.

Title of Part and Pertinent.

1711. February 22. EARL OF LEVEN *against* JAMES FINDLAY of Balchristie.

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Forty years uninterrupted possession of land, as part and pertinent of that expressed in the possessor's infeftment, relevant to declare the property to belong to him, even in competition with one specially infeft in the same land.

IN the process of declarator at the Earl of Leven's instance, against James Findlay, the Lords sustained it relevant for the pursuer, to declare the Links of Balchristie to pertain in property to him as heretor of the lands of Drummeldrie, that he prove forty years uninterrupted possession of the said links, as part and pertinent of his lands of Drummeldrie; notwithstanding that the defender produced a special infeftment of the lands of Balchristie and links thereof, in favours of his authors *in anno* 1601; unless he offer to prove possession, or other interruption, conform to the decisions November 17th 1671, Young *against* Carmichael, No 14. p. 9636.; and 20th February 1675, Countess of Murray *against* Weems. No 15. p. 9636.; and Stair, Instit. B. 2. T. 3. § 73. Because, seeing it is not to be supposed that any person could be infeft in every part of his lands *per expressum*, it is sufficient to instruct forty years possession of lands reputed part and pertinent of those specially named in his infeftment. For otherwise, it were easy for any man to pro-