

ing hindered not the apprisers to pursue the heir of the debtor for the same debt; and that, notwithstanding thereof, the creditor might comprise the heir's lands, and poind his goods for satisfaction. And Lord Stair, in the above passage, taking notice of this decision, observes specially, 'But here the appriser had attained no possession.' From which it is plain, Lord Stair understands, that possession is the criterion to constitute the adjudication a right of property or a right in security: For if the appriser had in that case attained possession, he must have kept the lands apprised in satisfaction *pro tanto* of his debt, and could neither have comprised the heir's lands nor poinded his goods; whereas, by not entering to possession, and waving his privilege to take the property, he kept up his adjudication only as a security and burden upon the property.

From this reasoning, the consequence is direct, that the adjudication in question being only a security or burden, is, like other securities and burdens, subject to the negative prescription.

2dly, The rule established in the case of Perth does not apply to the present case. When a man pleads the negative prescription, who has no title in him but merely that of possession, who can plead no right but *possideo quia possideo*, he will not be heard; and on this principle the decision of the Town of Perth went. But when one can shew a right to the subject, he may then plead the negative prescription. And in the present case, Nasmyth having adjudged the right of reversion competent to the original debtor, and got the possession, may plead every right which his author could have pleaded.

"THE LORDS found Anderson's adjudication prescribed."

For Anderson, *Arch. Murray, Lockhart.*

Alt. J. Dalrymple.

J. D.

Fol. Dic. v. 4. p. 88. Fac. Col. No 105. p. 186.

1758. June 16.

THE MANAGERS OF KING JAMES VI.'S HOSPITAL IN PERTH, *against* THE MAGISTRATES AND TOWN COUNCIL OF PERTH.

By the most ancient charters of the borough of Perth, there was a feu-duty of L. 80 Sterling payable to the Crown.

Before the Reformation, L. 69 : 8 : 8d. Sterling, part of the said feu-duty, was granted in alms by the Crown to the prior and convent of St Andrew's, and other religious houses.

After the Reformation, King James VI. by a charter dated 9th August 1569, granted "to the poor members of Jesus Christ residing within the town and territory of Perth," all lands, tenements, revenues, &c. which had belonged to the Carthusian friars, the Dominican friars, and other religious houses within the said town and territory; "as also rents or revenues whatever, which had been paid

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The managers of an hospital had for many years neglected to take up a fund due to them by a burgh. The magistrates had, however, annually taken credit for the sum as due to the hospital. In a declarator of the right

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at the in-
stance of the
magistrates,
the defence of
prescription
was repelled.

from the town or territory of Perth, to any religious houses within the kingdom of Scotland." By virtue of this grant, the poor of Perth had, *inter alia*, right to the L. 69 : 8 : 8d. Sterling, part of the town's feu-duty, which had been granted to the prior of St Andrew's, &c.

This grant was confirmed by another charter from the Crown, and ratified in Parliament 1587, and again by a third charter in 1592. By these charters, the whole subjects thereby granted, were united and incorporated by the name of "the King's Hospital in Perth;" and put under the administration of hospital-masters, to be annually chosen by the ministers and elders of Perth; who were enjoined strictly to apply the funds solely to the sustenance of the poor of the hospital; and bound to account for their management, "*non solum superintendentibus ac commissionariis patriæ, ac ministris et senioribus dicti burgi, sed etiam in nostro scaccario, prout ad idem requisiti fuerint.*"

In 1600, the borough of Perth obtained a charter from the same King, commonly called the *Town's Great Charter*, ratifying all the town's former rights. This charter recites the King's gift to the hospital and poor of the town, before the acts of annexation of the above L. 69 : 8 : 8d. Sterling, part of the town's feu-duty, and another gift of the residue of the feu-duty to the community itself, *ad sustentationem pontis de Tay*.—The *Reddendo* of this charter bears, "*Reddendo inde annuatim præfati præpositi, balivi, &c. nobis, et successoribus nostris, dictam summam octoginta librarum, monetæ Sterlingarum.—De quibus dictis firmis burgalibus dictæ summæ octoginta librarum, monetæ Sterlingarum, nos, cum avisamento, &c. nunc, ut ante et prius, dedimus, concessimus, &c. prout, tenore præsentis cartæ nostræ, damus, &c. præfatis hospitali et pauperibus dict. nostri burgi de Perth, in puram perpetuam eleemosynam, dictam summam sexaginta novem librarum,*" &c. The charter, in the same manner, confirms the grant of the residue of the feu-duty to the community, and authorises the Court of Exchequer to give credit and allowance, in accounting for the feu-duty, of the sums so allocated to the hospital and community, *tanquam solut.*

Managers had, from time to time, been elected for the administration of the hospital-funds; but they either knew nothing of the hospital's right to this part of the town's feu-duty, or neglected to recover it, till the 1756. The Magistrates of the town had, in the mean time, fitted accounts annually in Exchequer; and in discharge of their feu-duty of L. 80 Sterling, had regularly taken credit for the above-mentioned sum of L. 69 : 8 : 8d. Sterling, as "payable to the poor of the hospital of the said borough, granted in perpetual alms, and which was in use to be paid to the prior of St Andrew's," &c.; as also, for the sum of L. 10 : 11 : 4d. Sterling, granted for repairing the bridge of Tay. But from the 1743 downwards, the style of their *Æques* was altered, and bore only, that the town was allowed L. 69 : 8 : 8d., "granted in perpetual alms, and which was in use to be paid to the prior of St Andrew's," &c.

Some of the managers having at length discovered, that the hospital had right to that part of the feu-duty by the town's charter, they brought an action against the Magistrates and Town-council, for declaring that right, and for recovering payment of the said annual sum for forty years bypast, and in time coming.

The chief defences proponed for the Town were, *1mo*, That the hospital's right to this part of the town's feu-duty was cut off by the negative prescription; and, *2do*, That the Town at least could not be liable in bygones or arrears, as the same were *bona fide consumpti*.

Answered for the pursuers, to the *first* defence, *1mo*, It is incompetent for the borough to plead the negative prescription. This being part of the feu-duty contained in the Town's charter, which has been ever since their title of possession, the right to it is incapable of being lost by such prescription. And supposing, in a question between the hospital and the Crown, prescription might be proponable by the latter; yet it is *jus tertii* for the Town to plead it here. *2do*, The hospital's right has been acknowledged as subsisting, in all the *Æques* fitted by the Magistrates in Exchequer down to the 1743; and the same allowance has been taken in the *Æques* fitted since that time, though the mention of the hospital in them has been unwarrantably omitted.

Replied for the Town, *1mo*, The hospital is in the same case as Lords of Erection, who have right to feu-duties, though the superiorities remain in the Crown. The Crown was here absolutely divested of the right now claimed by the hospital; and as the hospital could effectually discharge a right which was granted to it *in perpetuum*; so it could lose that right by the negative prescription, which is a legal discharge. The hospital is not the superior of the town, which has no stronger connection with it, than with any third party, who has a real burden upon their lands. Where a right is constituted by a charter in favour of the superior, it cannot be lost while the vassal possesses, because the superior possesses by him; but where it is in favour of a third party, the vassal holds nothing of such party, nor possesses for him; and therefore the right of that third party, *tanquam quilibet*, may be cut off by the negative prescription. The question here is not as to the Crown's claim to the feu-duty, but with respect to the hospital's right thereto; and if such right is lost, it must be decisive of the cause. And, *2do*, The *Æques* fitted in Exchequer show, that the Crown-officers considered the Crown as totally divested of this feu-duty. By the charter 1600, these Officers were directed to discharge the Town of this L. 69 : 8 : 8d. *tanquam solut.* to the hospital, as the Crown was to have no further interest therein. The *Æques* do not prove, that this annuity was paid to the hospital; so cannot stop prescription. And besides, the hospital was not party to them; and the law requires document to be taken by the party who is the creditor, for interrupting prescription.

Duplied for the Hospital, This is not a separate right, liable to prescription. The whole feu-duty by the charter is made payable to the Crown; but a part

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of it only allocated for support of the hospital, whose managers are also accountable in Exchequer. The Officers of the Exchequer, in counting, ought therefore to have demanded production of a receipt, as allowance was only meant to be given, if the money was actually paid to the hospital, as if it were paid to the Crown. The real right to the whole feu-duty still remained in the Crown as superior, and could not be lost by the negative prescription, unless acquired to some other by the positive; which is not pretended. The hospital is not a third party, or assignee to the Crown's right; but is only a donatar to part of the profits of it; and therefore, so long as the Town continues liable in the feu-duty to the Crown, it must be bound to pay this part of it to the hospital, as a condition of their own charter. This is agreeable to the decisions in the cases of Lord Hatton *contra* the Town of Dundee, 9th December 1679, No 83. p. 10272.; and the Earl of Findlater *contra* the Town of Banff, decided in 1752 (not reported.) Even supposing the hospital's right to be merely personal, and liable to be extinguished by the negative prescription, still the Town could not thereby receive any benefit. As the Crown would in such event be entitled to the feu-duty in question by virtue of the charter; consequently it must be incompetent for the Town to plead an objection against the hospital, which would not be available to it against the Crown.

As to the other question, relative to the hospital's claim for the bygone feu-duties, supposing the right itself to be subsisting;

Pleaded for the Town, No demand was made for 150 years past. The Magistrates of boroughs are annually changed, and have seldom occasion to examine their ancient rights. Here they followed the example of their predecessors; and *bona fide* bestowed this feu-duty upon the common exigencies of the community.

Answered for the Hospital, The right appeared *in gremio* of the Town's great charter, and was noticed in every clearance made by the Town in Exchequer. It cannot be presumed, therefore, to have been unknown to the Magistrates, who are barred from pleading a *bona fides* under such circumstances.

"THE LORDS repelled the defence of the negative prescription; and found, that the hospital has right to the L. 69 : 8 : 8d. in question; and remitted to the Ordinary to hear parties with respect to bygonés."

Reporter, *Kilkerran*. Act. *Macintosh, Dav. Dalrymple, Williamson, Lockhart, Ferguson*.
Alt. *Jo. Craigie, And. Pringle*, Advocatus. Clerk, *Kirkpatrick*.

D. R.

Fol. Dic. v. 4. p. 89. Fac. Col. No 107. p. 190.