DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR DAVID DALRYMPLE, LORD HAILES.

1766. *March* 8. JANET MILLAR and OTHERS *against* MARY DICKSON, Widow of GEORGE MUIRHEAD.

PRESCRIPTION.

Possession of Lands upon Infeftments proceeding on Precepts from a Wrong Superior, sufficient to give Right to the Subjects by the Positive Prescription.
The Possession of a Disponee joins to the Possession of his Author to complete Prescription.

[*Faculty Collection, Vol. IV. p.* 367 ; *Dictionary,* 10,937.]

THE parson's lands of the parsonage of Biggar belonged to the parson of Biggar, and were feued out by him in 1590. The proprietors of this feu made up their titles under the parsons of Biggar, as superiors; and particularly, in 1655, Mr John Muirhead, advocate, obtained a charter of resignation from the parson of Biggar, to be held of him and his successors. On this charter Mr John Muirhead was infeft. In consequence of the 23d statute, Parliament 1690, concerning patronages, the superiority of the parson's lands became vested in the Crown. Nevertheless, in 1711, George Muirhead, grandson and apparent heir of Mr John Muirhead, the person last infeft, instead of entering with the Crown, took a precept of *clare constat* from the Earl of Wigton, patron of the church of Biggar, for infefting himself and his heirs in the parson's lands, and upon this precept he was infeft 3d May 1711.

On this erroneous title, and on it only, George Muirhead possessed for 39 years and nine months.

After his death, Mary Dickson, his gratuitous disponee, continued, though not infeft, to possess the parson's lands for three months more without challenge, whereby a peaceable possession of 40 years, from the date of George Muirhead's infeftment, was completed. Janet Millar and others, heirs of line, served and retoured to Mr John Muirhead, the vassal last infeft, under the parson of Biggar, insisted, in an action of reduction and declarator, for setting aside the right of Mary Dickson. In this action appearance was made for Lady Clementina Elphinstone, the heir of John Earl of Wigton, who claimed the superiority, as well as for Mary Dickson, who claimed the property of the parson's lands.

On the 6th August 1765, "On report of the Lord Elliock, the Lords found that the lands in question held of the parson of Biggar *qua* parson, and that the precept taken, and title made up, by George Muirhead, in the year 1711, was erroneous and void."

All parties acquiesced in this interlocutor, so that the remaining question to be determined between the pursuers and Mary Dickson, resolved into this:—George Muirhead was infeft upon a precept from a wrong superior: upon this single title he possessed for 39 years and nine months, and his disponee completed the possession of 40 years before any challenge was brought,—Whether did George Muirhead and his disponee thereby acquire right to the lands by positive prescription.

ARGUMENT FOR THE PURSUERS:—

The pursuers pleaded, 1*mo*, An apparent heir cannot gratuitously dispone his estate. George Muirhead lived and died in a state of apparency, so therefore he could not gratuitously dispone his estate. Here the only proposition requiring proof is, that George Muirhead lived and died in a state of apparency.

It has been determined, by a judgment of this Court, to which Mary Dickson herself was a party, that the Crown became superior of the parson's lands in 1690, was superior in 1711, and so continues unto this day. It has, in like manner, been determined that the title in 1711, derived from the Earl of Wigton, was erroneous and void. From this it follows, that the lands have been in non-entry ever since the death of Mr John Muirhead, the vassal last infeft under the true superior: and that the Crown might at any time, during the life of George Muirhead, have insisted in a declarator of non-entry against him, and have compelled him to enter as its immediate vassal. If, during the life of George Muirhead, the Crown had no vassal, and if it might have insisted against him in a declarator of non-entry, then during his life George Muirhead was no other than an apparent heir.

Hence, also, it is impossible that any one can make a title to this estate by connecting himself with George Muirhead: On the contrary, he must connect himself with Mr John Muirhead, the vassal who died last infeft under the parson of Biggar. It may be admitted that the onerous deeds of George Muirhead would have been effectual in consequence of his title of possession, but it will not from thence follow that his gratuitous deeds are equally effectual. The law has established registers for the security of onerous credi-

tors, not of gratuitous disponees. When it appears, from the registers, that one has an infeftment on a warrant apparently valid, continued and unchallenged for 40 years, an onerous creditor is not bound to inquire farther back into the title of the superior, by whom such infeftment was granted. When an onerous creditor uses all the precaution that is incumbent on him, he is thereby secured in law: but the case of a gratuitous disponee is different. He does not advance his money, he does not contract, he has no occasion to look into the registers, nor indeed were they established for his security; and thus the titles in George Muirhead might be sufficient, by positive prescription, to validate his onerous deeds, though not his gratuitous.

2do, The positive prescription, here pleaded, is not properly qualified in terms of the statute 1617.—That statute, which introduced the positive prescription, has also described the titles requisite thereto. It requires that singular successors, such as Mary Dickson, produce a charter granted, to them or their predecessors, by their superiors or authors, preceding the entry of the 40 years' possession, with the instrument of seasine following thereon. Mary Dickson, in support of her plea of the positive prescription, must produce such title as the statute requires. Now she has not produced any charter of the lands, preceding the entry of the 40 years' possession; which, however, the statute expressly requires to be produced. It may be acknowledged that a disposition, or any other deed importing a conveyance of property, is held as equivalent to a charter: but a precept of *clare constat* is no such deed. It is not a conveyance of lands, but a warrant to deliver possession of lands, whereof the property is supposed to have been formerly conveyed.

3tio, Mary Dickson cannot plead possession in terms of the statute 1617. George Muirhead had two titles in his person,—that of apparent heir, which was unexceptionable; and that upon the precept and infeftment 1711, which has been found erroneous and void.

His possession commenced on his apparency. It will not be presumed in law that he intended to invert the cause of his own possession, to sanctify his error in taking infeftment from a false superior, to prejudice his true superior, and to expose himself and his heirs to the consequence of disclamation. His possession therefore must be imputed to his apparency, which was a title safe and unexceptionable; not to the precept of seasine, which was a title exposed to danger, and erroneous in itself. In this view of the case George Muirhead never possessed upon a charter, even supposing the precept of *clare constat* to be equivalent to a charter; and so there is no room left for the plea of positive prescription by the statute 1617.

4to, Prescription supposes two things, 1*st*, That the person who prescribes is acquiring something; 2*d*, That he is acquiring in a manner agreeable to the title on which he founds. Now, 1*st*, The prescription supposed to have been running during the life of George Muirhead, was no *acquiring* prescription. George Muirhead was the undoubted heir of his grandfather; his right, if formally completed, would have given him the absolute property of the parson's lands: by his titles, 1711, he could acquire no better right than what was inherent in him. Positive prescription is *adjectio dominii per continuationem possessionis:* When nothing can be acquired, there can be no *adjectio dominii.* Indeed, this would have been a losing rather than a gainful prescription; for

thereby George Muirhead would have changed the Crown for a subject superior. *2d*, If, in positive prescription, one must acquire in a manner agreeable to the title on which he founds, then the only thing which George Muirhead could have acquired, was a right to hold the lands of the Earl of Wigton; but the Court has found, that his title for this is void, so that there was nothing which he could acquire upon that title. But granting that prescription were, in this case, qualified by a proper title, and supported by the possession requisite, such prescription cannot be pleaded against the pursuers. In prescription, there are required, 1*st*, A person against whom it may run; 2*d*, A right which that person has in him, but which he is losing by the course of prescription; 3*d*, A power in that person, whereby he may interrupt the prescription. Now, in this case, there is none of all these requisites. As to the *first*, during the life of George Muirhead, there was no person against whom prescription could run. Although he might have prescribed against extraneous persons, he could not against himself nor against his right heirs, who were named in the precept and infeftment. Where all the titles in the proprietor stand unlimited to heirs-general, he cannot prescribe upon one title against another. And so it was expressly determined, 12*th November* 1751, *Gray* against *Smith*. As to the *second* and *third*;—During the life of George Muirhead, there was no right in the heirs which they could lose. Where an estate is an entailed, there is a right vested in the heirs, and there is an obligation to them on the proprietor: the heirs may make this right effectual by action, or may lose it by omitting to bring such action, and the proprietor may be relieved from his obligation by means of the negative prescription, if the heirs do not insist against him. Upon this principle the cases Mackerston, Kirkness, and Kinaldie were decided. But where an estate is not entailed, there is no more than a hope of succession in the heirs: they cannot insist in action for having their hope of succession declared and secured; nor is the proprietor under any obligation to them, whereof he may be relieved by the negative prescription.

Argument for the Defender. The statute 1617 introduced positive prescription, for quieting the minds of possessors, for terminating contentions, and for securing property. A law so salutary ought not to be narrowed by interpretation. According to the pursuer's argument, if but one heir should be as ill advised in making up his titles as George Muirhead was, all subsequent heirs, for a thousand years, would remain in a state of apparency, and, of consequence, all their marriage settlements would be void: and supposing the statute 1695 not to have passed, all their onerous contracts would be equally void; and even the statute 1695 would only save the creditors of such apparent heirs as had possessed for three years. But more particularly, in answer to the pursuer's plea, they urge, "That George Muirhead, notwithstanding his infeftment, lived and died in a state of apparency." This is so far true, that, as he did not live to complete the prescription of forty years, he could not be said to have acquired the property of the lands. But this is the case of every one infeft upon a charter or disposition from a person not having right until possession for forty years is completed. The pursuers, however, admit, "That George Muirhead might, upon the title of his onerous infeftment, have acquired a right to the lands sufficient for validating his onerous deeds." This admission is fatal to their argument; for positive prescription, if it gives

any right, gives a right of property, and must thereby validate deeds gratuitous as well as onerous. *Secundo*, The pursuers urge, "That George Muirhead could not prescribe upon the first alternative of the statute 1617; for that the statute requires, for title, a charter and seasine, to which a precept of *clare constat* and seasine are not equivalent." It is answered, That, according to the established interpretation of the statute 1617, a procuratory of resignation, precept of *clare constat*, or any warrant for the seasine, is accounted equivalent to a charter. From the pursuers' argument, it follows, that, if George Muirhead had been infeft upon a disposition from the meanest of the people, whom he knew to have no right, he could have acquired by prescription, although he could not when infeft upon a precept from the Earl of Wigton, whom he considered as his superior in the lands. Whereas, were there any difference between a precept of *clare constat*, and any other warrant for taking infeftment, the preference ought to be in favour of the precept of *clare constat;* for it is more equitable to favour him who takes an estate as belonging to his predecessor, than him who takes a disposition from one having not so much as a putative right therein. The meaning of the statute 1617 is plain. When there is produced a warrant for the seasine, such as a charter, procuratory of resignation, or precept of *clare constat*, then a possession of forty years is sufficient; and although the person infeft should die before the lapse of the forty years, no new seasine is required in his heir, or in any other person continuing to possess under his right. But when a seasine, proceeding on a retour or precept of *clare constat*, is produced, without the retour or precept which is the warrant of such seasine, then there is required, by the statute, continued possession for forty years by the person infeft; or, if he die before the lapse of that period, another seasine in the person of his heir or disponee. *Tertio*, As to what is urged for the pursuers, "That George Muirhead must be held to have possessed upon his apparency only, not upon his infeftment," it is plainly an erroneous plea. Apparency is no title of property, and he who entered upon a precept of *clare constat*, can never be supposed to have declined the connecting himself with his predecessor last infeft, or to have sought to be considered in any other light than that of a proprietor infeft. *Quarto*, As to what is urged, "That George Muirhead could not prescribe, because he could acquire no better right than what was inherent in him as heir to his grandfather," it is answered, That this argument proceeds upon the erroneous supposition, that the positive prescription, like the negative, must run against a particular person, who loses what the other acquires, and who is *valens agere* to interrupt the prescription. The positive prescription is *adjectio dominii per continuationem possessionis:* it inquires not whether there is one who loses what the other gains, nor whether the loser was *valens agere* or not, excepting always the single case of minority. The negative prescription, on the contrary, does of necessity suppose a person who loses his right, by neglecting to prosecute it for forty years, and, of consequence, requires that such person be *valens agere*. But, if it were necessary to point out the particular persons against whom George Muirhead did acquire a right by positive prescription, it is answered, that they were the heirs of his predecessor: It varies not the case that the title of the heirs of George Muirhead and of his predecessors happened to center in the same persons. These heirs lost, by the

negative prescription, the right which they would have had to take the estate as heirs to his predecessor, and to set aside his gratuitous deeds; and they were *valentes agere* by a process of declarator. Thus George Muirhead gained, by prescription, a feudal right to the estate, and consequently the power of disponing it gratuitously: the heirs of his predecessors lost, by prescription, the right of taking up the estate as *in hæreditate jacente* of George's predecessors, of passing George by, and of disowning his gratuitous deeds. The case, *Gray* against *Smith*, is not in point. *There* the heirs who possessed had two rights in their person, one by service as heirs of line, the other by disposition. And when a man has two rights in his person, there seems no reason for setting up the one as a title of prescription to overthrow the other. If the disposition could overthrow the service, the service might overthrow the disposition, and *vice versa*. But, here, George Muirhead had but one right to the parson's lands, his infeftment upon the precept 1711.

On the 6th August 1765, "The Lords repelled the defence of prescription, and decerned."

On the 7th February 1766, "The Lords found the precept of *clare constat*, with infeftment thereon, in favour of George Muirhead, is a habile title for prescription: found it competent for the defender, in this case, to found upon her own and George Muirhead's possession, in order to make out her plea of prescription; and repelled the pursuers' objection thereto, founded on the precept of *clare* being granted by a wrong superior, in respect prescription is sufficient to sopite that defect."

On the 8th march 1766, upon advising a reclaiming petition with answers, "The Lords adhered."

Act. G. Wallace. A. Lockhart. *Alt.* J. Burnet. *Rep.* Elliock.

The Judges had given their opinions at full length when this case was formerly under their consideration: they did not resume their opinions at the last advising, only the President declared that he differed from the judgment of the 7th February, and was for returning to the judgment of the 6th August 1765.

1766. *March* 8. CAPTAIN ROBERT CAMPBELL of Monzie, and OTHERS, *against* MAJOR ALLAN MACLEAN, late Commandant of the 114th Regiment.

JURISDICTION.

The Court of Session competent to try a question among the officers of a disbanded Regiment, involving pecuniary interests, although arising out of military transactions.

IN 1761, Captain Allan Maclean was appointed major commandant of a corps then to be raised. His instructions from the secretary of war, bore, "That "the proposed major and captains should sell their present commissions: That "the captain-lieutenancy should be sold: That the money arising from such "sales should be thrown into a fund: and that no other levy money was to be