

1775. August 2.

ELIZABETH, SIBELLA, and BARBARA M'KENZIES, *against* JAMES FEA and
ROBERT LAING.

No 71.

The positive prescription, whereby the property of a subject hath been acquired, has no effect against a *jus crediti* over that subject, when it is saved from the negative prescription.

ARTHUR BUCHANAN of Sound died about the year 1676, leaving a son, William Buchanan, and a daughter, Marjory.

In the years 1680, 1681, and 1682, the lands of Sound were adjudged by three different creditors, viz. Arthur Murray, Thomas Buchanan of Sandside, and Margaret Græme, and the defenders are now in the right of these adjudications. The debts which were the ground of them had likewise been secured by inhibitions as far back as 1665, 1676, and 1677.

In 1687, William Buchanan of Sound granted an heritable bond for L. 1900 Scots, to William M'Kenzie Commissary of Orkney, and Margaret Stewart his spouse, and their heirs therein mentioned, containing a precept of sasine for infefting them in an annualrent, to be uplifted out of certain parts of Sound's lands lying in the island of Eda in Orkney, upon which infeftment was taken that same year.

William Buchanan above-mentioned, died unmarried. The succession to the estate of Sound then opened to Marjory, the sister of William, who had intermarried with Thomas Buchanan of Sandside, who was one of the adjudgers as above; and, in 1697, William M'Kenzie, creditor in the aforesaid heritable bond, brought a process before the Court of Session against Marjory Buchanan, as charged to enter heir to the deceased William Buchanan of Sound, her brother, in which she renounced to be heir to him.

Sandside afterwards acquired right to the two adjudications led by Murray and Græme, and entered into possession of the lands.

In 1704, Margaret Stewart, the widow of the said William M'Kenzie, and liferentrix in the heritable bond, brought a new action of pointing the ground against Thomas Buchanan, and also against the possessors of the lands of Eda. This action continued in dependence till 1710, when it was allowed to fall asleep, and some time afterwards she conveyed her claim for the bygone annualrents to her daughter, Lady Castleyards, who, in the year 1730, brought a new action of pointing the ground, and, it is said, containing also another conclusion for subjecting the defender on the passive titles against Janet Buchanan, the daughter of Thomas by his second marriage, who succeeded both to the estates of Sound and Sandside; and she and her husband, Fea of Clestrain, the predecessor of the present defender, entered into possession of both estates.

This action continued in dependence till the year 1752, and then, like the former, was allowed to fall asleep before any final decision was given therein.

Thomas M'Kenzie, father to the pursuers, having acquired right to the fee of the above bond, and principal sums therein, by an adjudication against Commissary M'Kenzie, the original creditor, in the year 1747, brought a process of pointing the ground, and mails and duties, against the aforesaid Janet Buchan-

an, and her husband, Fea of Clestrain; which having been sisted in respect of a process then depending for payment of the annualrents in this bond, was not further insisted in, only that it was kept from sleeping by enrolments every year till the year 1752, when it fell asleep.

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The pursuers, as having right to this bond, wakened the foresaid process of pointing the ground, and mails and duties, which was originally brought by their father; they also libelled and insisted in new conclusions for declaring any incumbrances on this estate in the defenders persons satisfied by their intrusions therewith, and for obliging them to account therefor as incumbrancers.

In defence it was *contended, 1mo*, That the adjudication, in consequence of which their predecessors and authors had got possession of these lands, were now become absolute titles of property, and secured from challenge by the positive prescription; *2do*, That the original heritable bond due to Commissary M'Kenzie, which was the foundation of the pursuer's title, was cut off by the negative prescription; and, *3tio*, Objections were made to the pursuer's title to that heritable bond, supposing it still to be a subsisting debt.

The question turned on this point, Whether this was a subsisting incumbrance on this estate, although the property thereof was vested in the defenders, by the positive prescription, which the Court thought were nowise inconsistent; and the following judgment was given:

' THE LORDS repel the defence of prescription, and find the debt is still a subsisting incumbrance on the lands.'

Act. M^cQueen,

Alt. Hay Campbell.

Clerk, Kirkpatrick.

Fol. Dic. v. 4. p. 94. Fac. Col. No 192. p. 124.

 SECT. II.

What Subjects may be carried by the Positive Prescription.

1671. February 1.

ALEXANDER FERGUSON *against* PARISHIONERS OF KINGARTH.

ALEXANDER FERGUSON being one of the prebends of the chapel-royal by his Majesty's presentation and collation, pursues the heritors of the parish of Kingarth for the teinds, as being annexed to the chapel-royal, as appears by the books of assumption, and three presentations from the King produced. Appearance is made for the minister of Rothsay, who *alleged* that he had presentation to the kirk of Kingarth from the King, and collation thereupon, and so

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The teinds of a parish found not acquirable by prescription, in opposition to the King's right.