1791. *January* 22. JOHN CAITCHEON *against* PETER RAMSAY.

No 91.
Possession by an apparent heir unentered, whether reckoned in the period of prescription.

THE grandfather of John Caitcheon having been in embarassed circumstances, a creditor of his, in the year 1713, led an adjudication against some landed property belonging to him. Having obtained a charter of adjudication, the creditor was infeft, and immediately entered into possession.

In 1732, the adjudger, without obtaining a decree of expiration of the legal, sold the subjects, as being his undoubted property, to the father of Peter Ramsay; who was immediately infeft, and took possession.

After his father's death in 1751, Peter Ramsay entered into possession; but he never made up titles as heir to his father.

In 1764, John Caitcheon, as heir to his grandfather, brought an action for setting aside the rights under which Mr Ramsay held the subjects, on this ground, that, before the expiration of the legal, the debt due to the adjudging creditor had been fully paid out of the rents.

If Mr Ramsay, after his father's death in 1751, had made up a feudal title in his person, by service and infeftment, it was admitted, that, by the long prescription of 40 years, he would have been secure; but as he had possessed in the character of apparent heir only, Mr Caitcheon

Pleaded; The benefit of the statute of 1617, c. 12. introducing the positive prescription, belongs only to those 'who, along with their predecessors and 'authors, have bruiked heretofore, or shall happen to bruik in time coming, 'by themselves, their tenants, and others having their rights, their lands, ba-'ronies, annualrents, and other heritages, by virtue of their heritable infeft-'ments, made to them by his Majesty, or others, their superiors or authors, 'for the space of 40 years, continually and together, following and ensuing 'the date of their said infeftments, and that peaceably and without lawful in-'terruption,' &c.

In a subsequent part of the statute, a distinction is made between the case of heirs and singular successors, as to the nature of the documents necessary for acquiring landed property by prescription, the law requiring in the latter a formal investiture by charter and infeftment preceding the 40 years; whereas, in the former, it is sufficient that the party pleading prescription shall produce, as the warrant of his possession, 'instruments of sasine, one or more, continued 'and standing together for the space of 40 years, either proceeding upon re-'tours or precepts of *clare constat*.' Still, however, it is required in all cases, that the possession shall be founded on infeftment. With regard to feudal rights, this is no less essential, than possession is in those which do not admit of sasine.

This is the opinion of Mr Erskine, who lays it down, that 'possession must, 'by the statute, be continued throughout the whole course of prescription up-'on the title of sasines;' and that 'the possession of an heir, before he has

'completed his titles, is not reckoned;' b. 3. tit. 7. § 5. And so the point was decided, in a case reported by Lord Stair, 15th February 1671, Argyle, No 85. p. 10791.; where it was found, 'That a sasine not having 40 years 'possession by the life and bruiking of the person seised, and never being re-'newed in his successors, is not a sufficient title of prescription;' Stair, b. 2. tit. 12. § 15. Lord Bankton, it should seem, thought that the possession of an apparent heir, "upon his completing his titles," would be available to him in a question of this sort. But although that opinion were better founded than it appears to be, it is inapplicable to the present case; Bankton, b. 4. tit. 45. § 163. No 91.

Answered; In the first part of the statute of 1617, the Legislature defines the nature of the possession which is required for establishing a right by the positive prescription. And if it had gone no farther, there might have been some reason to doubt, whether possession, unaccompanied with sasines, could be reckoned in filling up the statutory period. But in the following part of the statute, where the nature of the title necessary for prescription is described, the meaning of the Legislature is quite clear; nothing more being required than that the party pleading prescription shall produce a charter of the lands, with an instrument of sasine preceding the commencement of the 40 years possession; or, 'where there is no charter extant, instruments of sasine, one or 'more, continued and standing together.'

The distinction here made between those whose possession is warranted by a habile title of property, such as a charter and infeftment, and those who, having taken the lands by descent, are not required to produce the warrants of the infeftment on which they found, appears extremely just, when the danger is considered to which these writings are exposed in the transmission of property from the dead to the living. And it may be a question, whether, even in the latter case, it was intended that the possession should, during its whole course, be accompanied with infeftment. But in the former case, unless by Mr Erskine, it does not seem to have been doubted, that possession for 40 years, preceded by a complete feudal investiture, is sufficient, whether the infeftment has been regularly renewed in those who are heirs to the person infeft or not.

The passage in Lord Stair does not relate to the case of an heir, but to that of a singular successor. In the decision reported by the same author, the question was, whether or not one sasine, proceeding on a precept of *clare constat*, was a sufficient title of prescription. In a subsequent decision, collected by Edgar, it was found, that 'prescription runs by an apparent heir's possession, 'though not infeft, if the predecessors were infeft in virtue of a charter;' 20th July 1724, Earl of Marchmont *contra* Earl of Home, No 88. p. 10797.; and a similar judgment was given, 22d December 1774, Middleton *contra* Earl of Dunmore, *infra, h. t.*

No 91. It is true, that, in those cases, the apparent heir had, before the competition, completed his own right by service and infeftment. But that circumstance, of which no notice is taken in the statute, does not seem to make any difference. An infeftment was, with propriety, required at the commencement of the prescription, it being necessary to show clearly that the party intended to hold the subject as his own; but after he had, in that manner, published what his purpose was, no reason can be given why the possession of his heir, which can only be ascribed to the same title, should not have the same effect as if he himself had survived the whole space of 40 years. The right of possessing the land estate held by the ancestor, which is one of the privileges of apparency, would otherwise be a snare to those in whose favour it was introduced.

Indeed, it does not appear why the apparent heir may not, at any time, by service, remove such an objection as the present; the rule, *Quod pendente lite nil innovandum*, being applicable only to rights acquired during the litigation from third parties, and not to any thing which one of the litigants may do, by exercising powers that are solely vested in himself; 12th July 1785, Massey *contra* Smith, No 73. p. 8377.

The question was reported on memorials, when

The Lords unanimously "sustained the defences."

Reporter, *Lord Stonefield.* Act. *Dalzel.* Alt. *Sir William Miller.* Clerk, *Sinclair.*

C. *Fol. Dic. v. 4. p. 94. Fac. Col. No 162. p. 325.*

SECT. III.

Title by Sasine upon Hasp and Staple.

1697. *June* 10.

Administrators of Heriot's Hospital *against* Hepburn.

No 92. Sasine upon hasp and staple having no other warrant but the clerk of the burgh's assertion, is not a sufficient title for prescription, as not contained in the act of Parliament 1617, which mentions sasines upon retours, charters, and precepts of *clare constat*, but no word of hasp and staple; so that acts of Parliament being *strictissimi juris*, are not to be extended, and these being omitted, it must be presumed to be *casus de industria omissus*, and not *per incuriam*.

Fol. Dic. v. 2. p. 104. Fountainhall.

*** This case, (which is in opposition to the case which follows,) is No 82. p. 10786.