

* * * D. Falconer mentions the following particulars relative to the same case:

No 34

BLACKWOOD of Pitreavie being reponed against the decret of ranking, as mentioned in the decision of the 3d instant, (*voce* PROCESS.) infisted for preference on the heritable bond, upon the estate of Dudhope, granted to Miln of Barnton, disposed by him to Sir George Hamilton, and by him disposed first to certain creditors, with whom the pursuer was now competing; and after to Fleming of Farm, who was first infest, and whose interests the pursuer had adjudged, upon a bond for 9500l. Scots, granted in 1705 to Pitreavie, by Sir George Hamilton and Sir Archibald Fleming of Farm.

Objected, The disposition to Farm, in relief of certain supposed debts, wherein he was bound for Sir George Hamilton, does not instruct its onerosity, being from a father to his son-in-law, and therefore cannot be effectual against the disponent's prior onerous creditors; especially as by the tenor of some of the bonds, in relief of which it is granted, Farm is bound as principal, and Sir George as cautioner: At least, Farm having bound himself, without being induced by the disposition, which is dated at a distance of time from the bonds, supposing it founded on a true, it had no necessary cause, and is therefore reducible.

THE LORDS, in regard that there was no evidence that any part of Mr Blackwood's debt was paid, found that the objection was not competent.

N. B. They further found the onerous cause of the disposition to Farm sufficiently instructed; but that case being involved in facts, is not observed.

D. Falconer, No 45. v. 2. p. 43.

1749. November 10.

ELLIOT against ELLIOT.

HENRY ELLIOT, in Flat, had right, by progress, to a bond granted by James Scot of Bristo in 1684, on which his author had, after James Scot's death, which happened in 1692, obtained decree of constitution against James and William Scots his sons, and thereon led an adjudication in 1745 against Bristo's heirs, of the lands of Chifholm and Wandburn, and lands of Ancrum.

In the action of mails and duties pursued on this adjudication, compearance was made for Sir James Stewart of Goodtrees, who produced a disposition from James Scot of Bristo, in 1692, of the lands of Chifholm and Wandburn, and lands of Ancrum, to William Scot his second son, with a conveyance from him to the late Sir James Stewart, of the lands of Chifholm and Wandburn, in 1697; and for William Elliot of Kirklands, who produced a conveyance, from the said William Scot, of the lands of Ancrum, to Thomas Porteous in 1695, from whose heirs he derived right.

Of these dispositions from Bristo, to William Scot his second son, the pursuer repeated a reduction on the act 1621; against which the defence for both was

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The singular successor of a conjunct person found not to be bound to prove the onerous cause of his disposition after forty years.

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prescription, but, with this difference, that Sir James Stewart could only plead the negative prescription, whereas William Elliot of Kirklands also pleaded the positive prescription, in virtue of an investment taken by Thomas Porteous his author, in the year 1696, upon a charter passed in 1695.

To these defences the pursuer replied upon his minority: And, so far as concerned the negative prescription pleaded for Sir James Stewart, the reply was admitted to be good; and condescendences were appointed by the Ordinary to be given in, of Bristo's debts and effects in 1692, when he granted the disposition of Chisholm and Wandburn to William Scot, his second son.

The Ordinary sustained the defence upon the positive prescription proponed for the said William Elliot, as to the lands of Ancrum possessed by him, his predecessors and authors, upwards of forty years, upon the charter and sasine in favour of Thomas Porteous *in anno* 1696, and found that the interruption of the negative prescription running against the bond of relief, does not interrupt the positive prescription as to the foresaid lands of Ancrum; and assilzied the said William Elliot of Kirklands from the reduction.

Against this interlocutor assilzieing Kirklands, the pursuer reclaimed; and the point deserved well to be considered. Where there is a competing heritable right belonging to a minor, that his minority will avail to save his right against the positive prescription by another possessor, was not doubted; but, if a personal action, being saved by minority from the negative prescription, *v. g.* a reduction on death-bed, or on the act 1621, as in this case, should interrupt the positive prescription, it would much impair the security from the records. On the other hand, as the records neither are, nor can be a security in all cases, whereof several instances may be given; so also, when an action upon any debt or obligation is kept alive from the negative prescription, why should not that preserve every action, of whatever nature, competent for the party to have raised upon that title?

This point appeared to the Lords to be so doubtful, that, on advising petition and answers, they appointed it to be heard in presence; and accordingly it was heard, but not determined.

For, upon the hearing, another point occurred, upon which the Lords took up the case, *viz.* That it was now upwards of forty years from the date of the disposition by Bristo to William Scot, his second son; and the Lords found, 'That, after so long time, parties could not be obliged to bring an assuction of the onerous cause of it,' agreeable to what had been frequently found in other cases. *Vide supra* January 18. 1749, Blackwood of Pittreavie against the Creditors of Sir George Hamilton, No 34. p. 904. And, upon this ground, Sir James Stewart became also safe as to the lands of Chisholm and Wandburn.

Fol. Dic. v. 3. p. 49. Kilkerran, (BANKRUPT.) No 13. p. 58.