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SYME, *v.* ERSKINE, &c.

[M. App. Superior and Vassal, No. 3.]

JOHN SYME, W.S., for himself, and as Trustee for the Creditors of JOHN RANALDSON of Blairhall, ... } *Appellant;*

SIR WILLIAM ERSKINE of Tory, Bart., eldest son of the late Sir WILLIAM ERSKINE of Tory, Bart., and Sir WM. FORBES, Bart., and ALEX. FORBES, Esq., second son of the late DAVID FORBES, W.S., and others, his Trustees, ... } *Respondents.*

House of Lords, 22d July 1803.

SUPERIOR AND VASSAL—WARRANDICE—DAMAGES—PENAL ACTION.—A superior and his agent gave a vassal an entry, after the superior had divested himself, by a sale of the superiority, to another superior. The consequence of this was, that a title made up as of fee to an entailed estate, was disappointed and rendered invalid. In an action of relief and damages raised, after the death both of the superior and his agent, brought against their heirs and representatives, Held that an action, penal in its nature, did not transmit against heirs, and that, besides, here the entry so taken, was devised to defeat the entail, and therefore *versans in illicito.*

John Ranaldson inherited certain estates descending to him by entail, namely, Blairhall, and the lands of Longleys and Westerbroom, purchased by his father from Doctor Erskine, who retained the superiority.

He had made up titles to Blairhall under the entail, but not to those of Longleys and Westerbroom, having in view to claim the fee of these lands, although the entail included them.

In consequence of his father's debts, and his own, he was
1786 and 1789. obliged to execute a trust deed in favour of the appellant, for behoof of his creditors, conveying the rents of the estate of Blairhall, and the fee of the lands of Longleys and Westerbroom. This deed was acceded to by most of his creditors, and in particular, by the appellant and by John Ranaldson's mother, and Mrs. Ann Ranaldson Dickson, and his other sisters, who were next heir substitutes of entail.

The appellant, as trustee, then proceeded to complete his title under the trust-deed. In doing so, it was necessary to apply to the superior for a precept of clare in favour of John Ranaldson as to these lands. This was done by applying to the late David Forbes, agent to the late Sir William Erskine, the superior, in the following manner.

"J. Syme presents compliments to Mr. Forbes, he will "be so good as make out a precept of *clare constat* in favour "of Mr. Ranaldson as soon as possible.—Windmill Street, "Friday."

Mr. Forbes, without stating that his client had, some time ago, sold the superiority of these lands to Mr. Mutter, and, consequently, could not grant such, immediately prepared a scroll of a precept, which was marked by him on the 28th of Sept. The precept itself was signed by Sir William Erskine, as superior, on 22d October 1789, and this having been notified by Mr. Forbes to the appellant, Mr. Syme wrote in the following terms: "Mr. Syme presents compliments to Mr. Forbes, and "begs he will give the bearer the precept of *clare constat* in "favour of Mr. Ranaldson, with the disposition and infeftment "in favour of his father. J. S. begs leave to send by the "bearer the fees. Mr. Forbes will please send a receipt for "the feu duty.—27th October 1789."

Mr. Forbes answered: "Mr. Forbes returns compliments "to Mr. Syme, whose card he has just now received. Giv- "ing up the precept infers discharge of the feu duty, but Mr. "Syme should have shown that preceding 1787 it has been "paid, and therefore he will please send for the discharges "of them; or write to Mr. William Gulland, Sir William "Erskine's factor at Tory, to know if the feu-duties preced- "ing the 1787 have been paid.—28th October."

After further correspondence, and upon payment of the years' feu-duty, from 1788 to 1789, and the fees for the precept of clare; the precept was delivered over, and an infeftment was taken upon it in favour of Mr. Ranaldson. He died in 1796, having the year before granted a disposition of his whole heritable and moveable property, including the lands in question, to the appellant, in trust for his creditors. On this trust, he proceeded to sell these lands, at the sale of which the blunder was discovered, that they had taken a title from the wrong superior; whereupon the next heir of entail, Miss Ann Ranaldson interfered, and raised an action of reduction, and succeeded in reducing the title, which, but for the blunder, she could not have done, because John Ranaldson, as disponee in the entail, was entitled to take up the estate as in fee.

After both Sir William Erskine's and Mr. Forbes' death, the present action of relief was then raised against Sir William Erskine, as representing his father, and his agent's representatives, to indemnify for the loss thus occasioned.

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In defence, it was pleaded, 1st. That the precept of *clare constat* neither gave nor implied any warranty that the granter was truly the superior; 2d. That the appellant had himself to blame for the mistake, which his application to Mr. Forbes, and his conduct in the business occasioned; 3dly. That as it originated in a fraudulent scheme of the late Mr. Ranaldson, to defeat his father's entail, in which the appellant, as the agent of that gentleman, and to serve his own private views, participated, they could not be suffered to make the defeat of that scheme, whether from accident or negligence, a ground of an action of damages. 4th. That as Mr. Ranaldson could have qualified no damage, because, if he had succeeded obtaining a good title, which a purchaser might have relied on, and had sold the property, he must still have been answerable for the full amount, at least to the heirs of entail, in defraud of whom he acted. And, lastly, that actions penal in their nature do not transmit against heirs. The Court allowed a proof of the circumstances.

It was proved that David Forbes, as the superior's agent, had revised the disposition and sale of the superiority to Mutter, in his own hand writing, in June 1788; that it was engrossed in the chartulary, five pages distant from the *precept* of *clare constat*—that he had taken a bond for the price of the superiority lands, and that a settlement of accounts between David Forbes and his client had taken place, in

Mar. 11, 1800. which the transactions were set forth.

The Lord Ordinary pronounced this interlocutor, "Having "considered the mutual memorials for the parties, assoilzies "the defenders simpliciter, and decerns, supersedes extract

Jan. 21, and June 16, 1801. "till the third sederunt day in May next, and dispenses "with representation." On two reclaiming petitions the "Court adhered.*

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* Lord President Campbell said,—"This is a question arising from a wrong superior giving an entry, and the investiture being thereby null; and, consequently, whether he and his doer are liable in damages on that account? There appears to me to be strong reasons for sustaining such a claim, unless, in this case, the pursuer can be met by a personal exception, as *versans in illicito;* for he was acting wrongfully in making up such a title contrary to the entail, and thereby involving his constituent, Mr. John Ranaldson, in an irritancy. It, no doubt, was for the interest of the creditors that a title in fee simple should be made up, or at least that their debts should attach upon the estate. It is a question if this would have

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—If Sir William Erskine had been superior of the lands of Longleys and Westerbroom, at the time he granted the precept of *clare* by the advice of his agent, Mr. Forbes, it is quite clear that the appellant, and other creditors of Mr. Ranaldson, who had acceded to the trust deeds granted by him, on the faith of his making up a title to the lands in fee simple, might have sold these lands, and applied the price towards extinction of the debts, without possibility of challenge from the heirs of entail; because it is a settled point, that when the substitute of an entail makes up his titles, referring to the different restrictions of it, but without narrating them *verbatim*, the entail is ineffectual against creditors. Or if the superior even had refused to grant a precept of *clare constat*, the right of the appellant and other creditors might have been completed otherwise, by charging John Ranaldson to enter heir to his father; but the appellant was prevented from having re-

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happened if a feudal title had been made up under the entail, while the tailzie was unrecorded; or if adjudication had then been led against him upon a charge to enter. Case of Ross of Thurso. *Vide* case of Lady Glencairn *v.* Graham of Gartmore, 23d May 1800, M. App. No. 1, "Heir apparent." Andrew Ranaldson died 22nd October 1778. The tailzie was recorded 14th January 1779. John was the institute in the entail. He passed a charter upon the procuratory, 6th August 1781, and was infeft 19th June 1784. Besides, I doubt if a penal action can transmit against the heirs. *Vide* Tod *v.* Thomson, 21st Dec. 1793. (Unreported.) This latter case was an action of damages brought against the heir of a notary who had given an erroneous notarial intimation, thirty-nine years before, whereby the assignation was rendered useless, to the effect of giving a preference in competition with creditors. The Lord Ordinary found the heir liable in damages. But, on reclaiming petition to the Court, the Lords were much divided on the subject, and the case was finally compromised."

LORD MEADOWBANK.—"*Versans in illicito* is not a sufficient defence; but I have doubts on the merits. The maxim ought to apply here—Penal actions *Non transit contra hæredis.*"

LORD BANNATYNE.—"I think that Sir William Erskine and the heirs of Mr. Forbes are both liable."

LORD POLKEMMET.—"I think *versans in illicito* a good defence."

LORD GLENLEE.—"I think this action, which is penal, not good against the heirs."

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course to this mode, from relying on the precept of *clare* being granted by the right superior, he having every right to believe him such, from paying him the feu-duty, and not being told by Mr. Forbes, at the time, on application for the precept, that his client was not then superior, and therefore, in consequence of their gross negligence, the appellants are entitled to relief. The respondents' ancestors had no excuse. They could not plead ignorance, for the sale of the superiority had only taken place a year previously, when the whole affair must have been fresh in their recollection, yet not the remotest hint is given of the matter, and Sir William Erskine signs the precept of *clare constat*, for the usual gratuity and fees, on the representation that he was still superior.

Pleaded for the Respondents.—The granter of a precept of *clare constat* comes under no engagement to warrant its efficacy, express or implied. It generally bears to be granted *salvo jure cujuslibet*, and, at any rate, that is understood. The nature and course of the proceeding demonstrate that this must be the case. And it is always granted on application of the vassal, on such evidence as he may tender, and as a matter of favour, and to save him the circuitous mode and expense of a special service. It is also granted *periculo petentis*. Lord Stair says:—"Infeftment being passed on "such a precept, giveth the party the real right of the lands, "if done by the right superior. It will not be sufficient title "as to the real right of the ground against any other party "than those who acknowledge the giver thereof to be the "superior, and the receiver to be heir. For if, upon any "other colourable title, they question any of these, the in-"feftment and precept of *clare constat* will not be sufficient "alone, unless it have obtained the benefit of a possessory "judgment or prescription." From this doctrine, it follows, that the vassal or receiver of such a precept, was always bound at all times to show that the granter was the true superior. The appellant therefore was to blame in the matter, for not satisfying himself. Being employed to make up the title, he ought to have inquired into the right superior. He never put the question to Mr. Forbes. All that he seemed anxious for, was to get the precept of *clare* in a great hurry, in order to cut out the heirs of entail from claiming the lands in question. Looking, therefore, to this circumstance, and to this hurry, and to the fact that Mr. David Forbes was then eighty-two years of age, at which some want of recollection is allowable,

B. iii. tit. 5, § 26.

the blame rather lay with the appellant. At all events, he who seeks damages, ought to come into the Court with clean hands. The appellant and his employer were intending to resort to a scheme, by which the persons entitled to succeed under the entail, were to be defrauded of their rights. The appellant says he had the consent of the next heir, but there were many whose consent he had not. Besides, as the appellant can only plead in room, and in right of John Ranaldson, and could have no better right than he had, which was one under the entail,—as he could not have specified any damages, so neither can the appellant. Besides, penal actions cannot be maintained against the respondents, Sir William Erskine and Mr. Forbes' representatives, on account of alleged fault of those whom they represent. For the culpable act of an ancestor, the heir is not liable, and therefore, on this ground alone, the action must fall.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For Appellant, *John Clerk, David Douglas.*
For Respondents, *C. Hope, Wm. Adam.*

JAMES RUTHERFORD of Ashintully - - *Appellant;*
JAMES STORMONTH, Esq. - - *Respondent.*

House of Lords, 25th July 1803.

SERVITUDE OF COMMON PROPERTY, OR OF COMMON—PRESCRIPTIVE POSSESSION. — The appellant and the respondent's estates marched with each other. The former claimed a right of servitude of common, for pasturing his cattle, and casting fuel, feal, and divot, upon ground claimed exclusively by the respondent, who brought a declarator to have such right set aside. It appeared that the appellant founded on a decree arbitral, so far back as 1577; but, since that date, the marches had been changed by agreement of parties, and a new stone dike built to mark the division. The appellant, however, sometimes pastured his cattle on a patch of the lands. Held that he had no right of common, and that the respondent had exclusive right to all the lands on his side of the march, and that the parties had no