

1774. July 20. GEORGE MIDDLETON of Lethendolles *against* EARL of
DUNMORE.

PRESCRIPTION.

Possession for 40 years, founded on a disposition from the superior, who had attained possession in virtue of the Clan Act, found sufficient to establish a Prescriptive Right.

[*Faculty Collection, VI. 386 ; Dictionary, 10,944.*]

PITFOUR. I am clear as to prescription,—no matter what was the original title.

PRESIDENT. I would not purchase on this title. The Crown is called, but does not appear ; therefore, nothing that we can do will preclude the Crown. Mr Grahame had no more than a right of superiority in 1720. He disposed to the Rollos : their right remained personal till 1750. No prescription has run. It is plain that, after 1720, the Rollos applied to the Crown, and that, upon that application, they were suffered to possess. *Here* is a clear *initium possessionis* by the Crown's grant : How is it possible to invert the possession ? I desire that I may be understood as speaking of the Crown's right, not as to a competition with any third party.

KAIMES. If a man possesses 40 years upon a title of property, *that* is good against all the world : but *that* is not the case here ; the possession began from the Crown.

AUCHINLECK. The time was, when the Crown would have interfered in a case like this : but, blessed be God, that is not the genius of our times. It is incumbent on Lord Dunmore to prove that the possession commenced on the Crown's grant.

PRESIDENT. That cannot be required of Lord Dunmore : He objects to the progress from the tenor of the proceedings before the Commissioners. It is the business of the other party to remove the objections.

MONBODDO. I went on the supposition, that the family of Hamilton granted a disposition of the *lands*. *That*, with 40 years' possession, is incontrovertibly good. It matters not that the disponees did, moreover, procure a right from the Crown : they might ascribe their possession to whichever title they chose : and so it was decided by the House of Peers in the case of *Otter*.

COALSTON. The right in the lands was completely vested in the Crown before 1720. Yet I think that the right of Middleton is established by positive prescription. Without prescription, the charter to Grahame was no more than a right to the superiority. Every word in Mr M'Queen's paper is sterling law : when a purchaser, upon charter and infestment, enters into possession, a purchaser from him, without infestment, will complete his title by positive prescription. A new right acquired from the Crown will not hurt this ; for no-

thing was paid in consequence of the right from the Crown. All that our law requires, is a habile title and possession *qua* proprietor.

KAIMES. It is a rule in our law, that no man can invert the title of his possession.

ALEMORE. I have heard so good opinions on both sides, that I am doubtful how to form mine. The person put into possession had a precarious right, for which nothing was to be paid: how does it appear that the Rollos did not continue to possess on the Crown's right? *Here*, in effect, there were two precarious rights; how can the Rollos plead the one against the other? I admit that they might have pleaded on either title against a third party. According to Middleton's argument, a person getting right from a liferenter may immediately take a charter from John a Nokes, and infest himself on it: and if he live for 40 years, he will have the property secured to him.

JUSTICE-CLERK. The right on the Clan Act is out of the question. The only thing material is the plea of positive prescription. Grahame's charter was a charter of the lands, burdened with the *dominium utile*. Rollo forfeited. The king was declared, by statute, to be vested in the lands: this is as good as if a title had been made up to the lands. They were surveyed,—a factor was appointed,—possession taken: the Crown allowed the rents to be possessed by the heir of the forfeited person: Will the heir then plead on the right of superiority as being a right of property? Our difference in opinion arises from our not attending to this,—that Graham's right and the Crown's right are perfectly compatible. I cannot desire Lord Dunmore to pay a full price for what I would not pay a full price.

On the 20th July 1774, "The Lords found the progress not sufficient;" altering Lord Monboddo's interlocutor: but, on a new production, 22d December 1774, "Found progress sufficient."

Act. R. M'Queen. *Alt.* A. Lockhart.

Diss. Alva, Coalston, Monboddo. *Non liquet*, Pitfour.

1774. July 23. JAMES HUTTON and OTHERS *against* JAMES KNOX and OTHERS.

BURGH ROYAL.

Non-residents, Minors, Members of the Guildry, Town-officers, and Pensioners of a Burgh, cannot vote in the election of a Deacon.

In a process of reduction and declarator, for setting aside the election of the deacons and treasurers of certain of the incorporations of the town of Brechin, the votes of several of the electors were objected to. The objections were reduced to the following heads:—*1st*, Non-residence; *2dly*, Such as were members of the guildry; *3dly*, Such as were minors; *4thly*, Town servants and pensioners.

The following opinions were delivered:—