

No 18.  
was not law-  
ful.

The long  
prescription  
excludes all  
enquiry as to  
the entry to  
possess.

defender's father, to whom he succeeds, was tenant, and paid mail and duty for this meadow to the pursuer, his predecessors or authors, and therefore could not intervert his possession, and pretend the meadow to be part and pertinent of his own lands, at least the defender's tutor paid mail and duty therefor.

THE LORDS repelled the defence of a possessory judgment, in respect of the reply of interverting the pursuer's possession, by the defender's father having paid mail and duty to the pursuer, his predecessors or authors, but would not sustain it upon the tutor's payment, for though the long prescription excludes all question, as to the entry of the possession, yet the possession requisite for a possessory judgment must be lawful.

*Fol. Dic. v. 2. p. 89. Stair, v. 2. p. 679.*

1696. January 17.

MR GEORGE ANDERSON, Minister at Tarves *against* SIR ALEXANDER FORBES of Tolquhoun.

No 19.  
Where there  
was a reduc-  
tion of  
a party's  
right, though  
in absence,  
which behov-  
ed to put him  
*in mala fide*,  
so that he  
could not  
have the bene-  
fit of a posses-  
sory judg-  
ment, by pos-  
sessing *de*  
*novis*, after the  
decree, he was  
accordingly  
not found  
entitled to  
the benefit of  
a new posses-  
sory judg-  
ment.

His defence was, Absolvitor from bygonies of the vicarage teinds, because I stand infest, and am seven years in possession, and so must have the benefit of a possessory judgment; *2do*, I have been *bona fide* possessor, by virtue of a right from Panmuir, Lord of the erection of Arbroath, and so *fructus perceptos et consumptos fecit suos*. *Answered*, His infestment can found no possessory judgment, being on a comprising led by a creditor of his father's against himself, as lawfully charged to enter heir, and who at random comprised teinds and all; so this gives no right, unless he instruct a right standing in his father's person to these teinds, antecedent to the comprising; *2do*, The seven years were interrupted by a decret of reduction of Tolquhoun's right to these tithes, obtained by Mr John Strachan, the minister's predecessor in that kirk; *3tio*, There were yearly inhibitions served at the kirk-door, which was sustained 23d January 1678, Duke of Lauderdale against The Earl of Tweeddale, No 31. p. 6427.—THE LORDS found Tolquhoun liable for the bygonies since the minister's admission in 1683, as being sufficiently put *in mala fide* by Dr Strachan's decret of reduction, though it was in absence; and that being so interrupted, he could not prescribe judgment by seven years new possession again, as was found by the Lords, 22d July 1664, Montgomery *contra* Home, No 14. p. 10627.; but did not think the inhibition of teinds (though sufficient to stop tacit relocation) was enough *inducere malam fidem*, being general against all and sundry, and neither executed personally nor at one's dwelling-house.

*Fol. Dic. v. 2. p. 88. Fountainhall, v. 1. p. 701.*

No 20.  
To acquire  
the benefit of  
a possessory  
judgement

1698. December 15. COUNTESS OF DUNFERMLINE *against* LORD PITMEDDEN.

IN the debate betwixt the Countess of Dunfermline and the Lord Pitmedden, my Lady craved to be preferred to bygonies, because she had the benefit

of a possessory judgment, in so far as her husband, Earl James, was, *in anno* 1684, infeft on my Lord Callender's apprising: and, after his forfeiture, the King and government possessing his right, these two being conjoined, made up seven years possession. *Answered*, In all these short prescriptions, *bona fides* is necessarily required in the beginning, whereas in the grand prescription it is presumed; but here Earl James could have none, for he bruiked by no other right save the back-tack of Auchinmoutie's wadset, which is the very right the Lady seeks now to exclude. Likeas, in her contract of marriage, the husband was obliged to purge the wadsets, and clear her jointure lands of all incumbrances, which was an homologation of their knowledge of the right; likeas there were sundry interruptions, and Earl James had defended against the declarator of the irritancy of the back-bond, &c. *Replied*, The back-tack being out of doors and annulled, it could be no title for the Earl's possession to be ascribed to, and the interruptions are null, not being at the ground and parish churches, as the act 1669 requires. Sundry questions arose here, which were not determined, viz. if the public's possession, during the forfeiture, may be connected with her husband's, so as to make up the seven years possessory judgment in her favours. Next, if she, being only a personal creditor by the obligation in her contract, and never infeft till 1695, can claim the benefit of her husband and the estate's their anterior possession before she had a real right? But the LORDS found in a possessory judgment there behoved to be a *bona fides*, at least in the beginning of their possession; and that Earl James, before his acquiring Callender's right in 1684, had no title to possess, but either as back-tacksman, or apparent heir to him, and that he could not invert his possession in prejudice of Auchinmoutie's wadset; and therefore repelled my Lady's defence founded on a possessory judgment, not only in respect of the interruptions, but that there was a defect in her husband's *bona fides in initio possessionis*, and seeing she *utebatur jure auctoris*, it passed with that vice and defect; and she could not be in a better case than if her husband had been founding on a possessory judgment.

No 20.  
there must  
have been a  
*bona fides* in  
the beginning  
of the posses-  
sion.

*Fountainhall, v. 2. p. 25.*

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### S E C T. III.

#### Interruption of Possession.

1626, July 18. LADY GLENGARNOCK against L. KILBIRNIE.

In a removing from a lake, the defender *excepted* upon his special infeftment, with forty years possession by deeds of property; and the pursuer *replying* upon her author's elder infeftment, and continual possession, and also

No 21.