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tions of the prescription, interruption being always the deed of the person for whom, not against whom, it is used.

In respect it was *answered* for the pursuer; It was in the superior's option when to claim the benefit of recognition; and, albeit prosecution of the feudal forfeiture, upon the first alienation of the major part, was out of lenity forborne, yet when, by recent repeated deeds of alienation, the vassal had rendered himself incapable to serve his superior, these deeds should be conjoined with the former alienations to make up the major part; for the supposed prescription could put the vassal in no better case than if he had obtained a declaration or obligation from his superior, that if he transgressed no more by making further alienations, the superior would not quarrel his right upon the former deeds. It is a mistake to think, that such a prescription would have the same effect *quoad* the old infeftments, as if they had been consented to by the superior; for at most, it doth import only a confirmation. Now the superior's confirmation doth not hinder the right confirmed to be brought *in computo* to make the rest of the lands recognosce, if the major part was alienated before confirmation, March 23. 1683, Recognition of the Lands of Cromarty, *vocæ* RECOGNITION. *2do*, If the recent deeds of alienation could not be conjoined with the prior alienations of the major part that might happen to be secured by prescription, the vassal could never afterward incur recognition by subsequent deeds, since he had not another major part to alienate; and so the nature of the fee would in effect be changed. See RECOGNITION.

*Forbes, p. 626.*

1713. June 19.

ALEXANDER MURRAY of Broughton *against* ROBERT M'LELLAN of Barclay.

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A reverser's possession by a back tack, was found the wadsetter's possession, in a case where the wadsetter pleaded the positive prescription against a party who had a right to the lands prior and preferable to both wadsetter and reverser.

IN a reduction and improbation at the instance of Alexander Murray of Broughton, whose predecessor was heritor of the lands of Barclay, against Robert M'LeLLan, for reducing a wadset of these lands with infeftment thereon in the defender's person, flowing by progress from the Lord Kirkcudbright, there being a certification granted against the Lord Kirkcudbright, the defender's author; the pursuer would have the defender's right to fall in consequence. The defender, for supporting his wadset, founded on prescription; in so far as the Lord Kirkcudbright, the reverser, possessed by a back-tack from the wadsetter as his tenant from the year 1651 till the 1668, when the wadsetter obtained a declarator of irritancy of the back-tack; after which time, the wadsetter himself possessed, and in the 1680 adjudged for the back-tack duties unpaid; which adjudication was equivalent to a discharge of Kirkcudbright's right of reversion.

*Alleged* for the pursuer; *imo*, The defender's right being only a wadset, a limited right of security can produce but a limited effect; for, though forty years possession, conform to a wadset right, might exclude action upon personal back-bonds, or questions concerning payment of the money, or exceptions or reasons for reducing the wadset infestment itself; yet possession, by virtue of such a title, could never make an absolute right of property to cut off the proprietor from the right of reversion, or make the wadset right become any thing else than a wadset right. No right can be acquired by prescription but what is possessed; therefore a wadsetter possessing only *jus pignoris* (which differs from a right of reversion) can never acquire by prescription a title to the reversion. This agrees with the principles of the civil law, *Pignori rem acceptam usu non capimus, quia pro alieno possidemus*, L. 13. D. De Usurp. et Usucap. and the right by *Usucapio* or prescription of pledges or hypothecs accrue to the debtor, L. 33. § 4. D. eod. Now, an improper wadset with a back-tack to the granter (such as this in question) is in the same case with a *pignus* or *hypotheca* in the civil law; seeing in both the creditor *possidet pro alieno*, in so far as his possession exceeds the sum for which the right was granted. The case of wadsets containing reversions incorporated are excepted from the act of prescription 1617; therefore no prescription can give the wadsetter a right to the reversion, or an irredeemable property, though it might render the wadset itself unquarrellable as such. So that, *2do*, If prescription were competent in this case, it behoved to accrue to the Lord Kirkcudbright's Representatives, whose right is reduced by the certification, and the wadset right falls in consequence; according to the rule, *Resoluto jure dantis, resolvitur jus accipientis*. It can no more subsist after the principal original right is removed, than *accidens sine subjecto*, or a relative without a correlative. *3tio*, There can be no prescription in this case for want of a continued possession by the wadsetter. *4to*, The adjudication against the Lord Kirkcudbright can afford no defence, because it carries only the Lord Kirkcudbright's right which the pursuer hath reduced; besides, the back-tack duties adjudged for were satisfied by intromissions within the legal.

*Answered* for the defender; *imo*, A wadset right is certainly a right of property and a good title for prescription, except against the reverser; the reason of the exception is the *pactum de retro-vendendo* which hinders the wadsetter's *bona fides* with respect to the reverser, and all deriving right from him; but as to all other persons who have no interest in that *pactum* or reversion, the wadsetter's right of property is absolute and unlimited; and when the reversion comes to be dissolved by discharge and renunciation, or transmission in favours of the wadsetter, his right turns as full and absolute as can be, and is understood to be so even *retro* from the date of the wadset infestment. So that here the reversion being personal to the Lord Kirkcudbright, and those deriving right from him, the pursuer, who has no right from him, cannot question the defender's title, in whose person any right of reversion belonging to the Lord

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Kirkcudbright stands established by his adjudication, which is equivalent to a discharge of the reversion. *2do*, The brocard, *Resoluto jure dantis*, &c. takes no place against the long prescription; for, one who pleads prescription is supposed to derive his right *a non domino*, seeing otherwise he needed no prescription to support it. The L. 13. D. De Usurp. et Usucap. imports only that the possessor of a *pignus* cannot prescribe a right against the reverser, because he knows it to be reversible; but he can prescribe it as to all others. It is true, that conform to the L. 33. § 4. D. eod. possession of a wadsetter is also possession of the granter of the wadset; but that can never hinder the wadsetter to plead that same possession for himself against all others except the reverser. *3tio*, The reverser's possession by the back-tack was the wadsetter's possession; and, as a wadsetter's possession is imputed to make up prescription in favours of the reverser, so the the reverser's possession by a back-tack may be ascribed to make up prescription to the setter who hath the disposition under reversion; for possession by virtue of a subaltern right from another, is ascribed to the granter's title; and by the act of Parliament 1617, possession by persons themselves, or others having their right, sufficeth to found prescription. *4to*, Albeit the defender's adjudication were still open to the Lord Kirkcudbright (as it is shut by decreets and prescription) yet the pursuer hath no interest to propone payment of the sums therein by intromission with the legal; in regard he, the pursuer, doth not represent the Lord Kirkcudbright, nor hath any right from him to the reversion of the adjudication, and the defender, by entering to the possession, had right to the whole rents.

*Replied* for the pursuer; Granting that a wadset is a right of property restricted only by the clause of reversion, and that the clause is conceived in favours of the reverser and his assignees; *ergo quid?* A third party not having right to the reversion, cannot quarrel the wadset; but it doth not follow, that a wadsetter possessing as such, may acquire the irredeemable right by prescription. The distinction, that though a wadsetter cannot prescribe against the reverser, he may against other parties, is without the authority of law or decision. A wadsetter's right is, like *ager limitatus*, a limited title of *pignus* for security of a debt, incapable of addition by prescription; seeing the reversion in the bosom of his right doth perpetually hinder him to possess *bona fide pro suo*; and though prescription may render a weak title good, it can never alter the nature of a right, and make a redeemable *pignus* become irredeemable property. *2do*, As the wadsetter cannot acquire by prescription, so neither is the right of reversion personal to the reverser's heirs and assignees, but it is real, *inhærens solo*, being (as the word implies) a return to the ancient property. So that the pursuer, by discussing the right of the reverser and his heirs, may, as proprietor, quarrel the defender's wadset, as flowing *a non habente potestatem*, and remove that incumbrance affecting his property. *3tio*, Albeit in the matter of prescription, possession of the creditor completes the title in the person of the debtor, L. 13. L. 33. § 4. D. De Usucap., and a wadsetter's possession is the

reverser's, 18th July 1667, Lady Burgie *contra* Strachan, No 37. p. 1305; yet possession of the proprietor is not, in the construction of law, the wadsetter's possession; such a fictitious possession is not sufficient to found prescription, which requires a real and continued possession; for the words in the act 1617, "By themselves and others having their rights by virtue of their heritable infestments," can never be extended to an heritor or reverser possessing lands contained in his own infestments.

THE LORDS sustained the defence of prescription to support the wadset right, and found the reverser's possession by a back-tack, ought to be conjoined with the wadsetter's to make up the prescription; but repelled the allegiance, that the back-tack duties for which the adjudication was led were satisfied within the legal; the same not being proponed by the Representatives of the Lord Kirkcudbright, and in regard the wadsetter having entered to the possession, had thereby right to the whole rents.

*Fol. Dic. v. 2. p. 112. Forbes, p. 680.*

1766. February 7.

JANET MILLER and GEORGE BARCLAY, her Husband, for his Interest, and ISOBEL, &c. Children of Andrew Aikman and Margaret Miller, *against* MARY DICKSON, Relict of the Deceased George Muirhead of Whitecastle.

MARGARET and Katharine Muirheads, as heirs-portioners of line, served and retoured, to John Muirhead of Parson-lands, their grandfather, brought a process of reduction and declarator against Mary Dickson, relict of George Muirhead of Parson-lands, their brother, for asserting their right, as heirs to their grandfather, to those lands, and for annulling and setting aside a right to said lands, executed by George Muirhead, in favours of his spouse Mary Dickson.

The pursuers, Margaret and Katharine Muirheads, having died, the process was wakened at the instance of Janet Miller and Jean, &c. Aikmans, as heirs, served and retoured, to Margaret and Katharine Muirheads, who *contended*, 1mo, That George Muirhead, the husband of Mary Dickson; had made up no proper title to these lands, which, before the Reformation, held of one of the prebends of the collegiate church of Biggar, the parson of which, with consent of the Earl of Wigton, the patron, in 1655, granted a charter to John Muirhead of said lands, to be holden of the parson and his successors, for payment of a small feu-duty: That George Muirhead had taken a precept of *clare* from the Earl of Wigton the patron in 1711, as heir to John Muirhead, upon recital of the 54th act 1661, which directs the vassals holding of benefices of laick patronage, to take their infestment from the patron in place of the titular; whereas the superiority of these lands is declared to belong to the Crown by 23d act 1690, so that George Muirhead's infestment was erroneous, and he must be considered

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Possession of lands upon infestments proceeding on precepts from a wrong superior, sufficient to give right to the subjects by the positive prescription. The possession of a disponee joins to the possession of his author to complete prescription.