

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.

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.

No 21. debarring all others, and particularly the defender, by breaking his boats, &c. The defender's exception was not found relevant in this possessory judgment, and the pursuer's reply was admitted to probation, although it was *alleged*, that breaking of boats which of itself is an unlawful act, could not be looked upon as a lawful interruption.

Fol. Dic. v. 2. p. 89.

*** The case is reported by Durie, p. 220, as follows :

1626. July 18.—IN a removing pursued at the instance of the Lady Glogarnock *contra* Laird Kilbirnie, for removing from a loch; the defender comparing, and proponing an exception upon his particular infestment of the same loch, clad with 40 years possession, by all deeds of property, as fishing by net, wands and cobil, and all other lawful manner; this exception was not found relevant in this possessory judgment, to defend the excipient, but the same was *repelled*, in respect that the pursuer *replied*, upon her author's elder infestment of the loch libelled, long anterior to the excipient's right, and continual possession, not only by themselves, conform to their right thereof, but also that they were in use to debar all others from any fishing therein, and specially this same excipient, and also his father before him, in so far as the said pursuer's authors brake the boats which were put upon the said loch, by the excipient's father, and by himself since his father's decease; which reply was admitted to probation, albeit the excipient *alleged*, that the breaking of boats, which of itself was an act unlawful, could not be respected as a lawful interruption, for which the doer might be convened for a wrong and insolent riot, which reply nevertheless was sustained, as said is.

Act. ———.

Alt. *Belsbes.*

Clerk, *Scot.*

No 22.

A possessory judgment by tacks, or infestment of teinds, found to be interrupted by inhibition at the kirk door, within the first seven years.
See No 31.
p. 6427.

1673. December 11. HOME *against* The EARL of MARR.

THE Laird of Polwart having a tack of the teinds of Logie from the Prioress of North-Berwick, pursues for the profits of the teinds. It was *alleged* for the Earl of Marr, That, for his lands of Atray, his predecessors had tack from Queen Anne, as being a part of the abbacy of Dunfermline, and that he was infest in his lands of Grange, *cum decimis inclusis* by the King, *in anno* 1615; and that he bruiked, by virtue of these rights, for many years, and so had the benefit of a possessory judgment, and could not be quarrelled without a reduction or declarator for bygones, or in time coming. It was *answered*, That a possessory judgment can only be attained by peaceable possession, without interruption, and the pursuer and his predecessors had constantly interrupted, by using inhibitions. It was *replied*, That inhibitions were no legal interruption, unless citation had been used thereon, seeing they were only used at the kirk door against all and sundry; and albeit they might interrupt any posses-