

and Beatrix Johnsons' possession, albeit it was *alleged*, that Stephenlaw Porteous, from whom Young's right flowed, was a stranger, living in Salvonia; albeit he was *origine scotus*, and that he was not obliged to know the municipal statute of Scotland, whereby right of lands did prescribe to the prejudice of the blood.

Newbyth, MS. p. 42.

No 164.

1679. *January 21.* FRASER *against* HOG.

A WIFE'S infertment, granted by her husband, who was not himself infert, has not the benefit of the positive prescription by the husband's possession, it being necessary to validate her infertment, that she herself possess 40 years after his death.

No 165.

Fol. Dic. v. 2. p. 112. Stair.

*** This case is No 79. p. 10784.

1682. *December.* M'PHERSON *against* M'INTOSH of Stream.

A SUPERIOR having feued some lands to one who continued thereafter to come to the superior's mill for eight or ten years, and having after these years feued the mill to another, *cum multuris solitis, &c.*—the first feuar continued to go to the mill, and to pay insucken multures for the space of 34 years; whereupon the heritor of the mill raised a declarator of thirlage against the heritor of the lands.

No 166.

Alleged for the defender; That he had his lands free, and the pursuer could only lay claim to 34 years possession of astricted multures, which is the age of his title to the mill, and could not make up prescription.

Answered for the pursuer; That the years of his author the superior's possession must be reckoned to make up the prescription, and accresce to the pursuer.

THE LORDS found, That the right and possession of the superior, the common author, was to be conjoined to the pursuer's right, to make up the prescription of 40 years; and declared the defender's lands to be astricted to the pursuer's mill.

Fol. Dic. v. 2. p. 112. Harcarse, (PRESCRIPTION.) No 763. p. 216.

1701. *December 3.* FORBES *against* UDNEY.

No 167.

IN a proof of 40 years possession of a salmon-fishing, a party proved his possession as to fishing by angle, speer, and wand, and that it was accounted

No 167.

a part of his tenant's livelihood, and that the river fronting his ground was ever reputed his, &c. This was not found a sufficient possession for salmon-fishing.

Fol. Dic. v. 2. p. 112. Fonttainhall.

* * * This case is No 40. p. 7812., *voce* JUS TERTII.

1711. December 26.

The EARL of LEVEN *against* BALFOUR and the LAIRD and LADY BALLO.

No 168.

After the major part of lands holding ward, were alienated, the vassal's heir continued to possess for forty years. This found to exclude recognition, and the last heir having granted some infestments of annualrent, their possession, after his death, was conjoined with his former possession, to make out the years of prescription.

The minority of a trustee found not to interrupt prescription.

THE lands of Ballo holding ward of her Majesty, and the heritors having granted infestments of annualrent above the half, base and unconfirmed, the Lord Leven takes a gift of recognition in Moncrieff of Mornipaw's name, and pursues a declarator. Against which it was *alleged*, That one of the deeds, inferring the recognition, was a base infestment for 10,000 merks, granted to my Lord Melvill in 1653, to whom the Earl was heir; and though in the Usurper's time these casualties ceased, yet after restoration of the Monarchy in 1660 they revived, and you ought to have confirmed it; by which the recognition was through your fault and negligence incurred, and probable kept base of purpose, and so *non debes lucrari ex tua culpa*, and was so found by the Lords, Buchan *contra* Forbes, marked by P. Falconer, *voce* PERSONAL OBJECTION, that his own base infestment neglected to be confirmed by him, could not come *in computo* to make up the recognition of the major part, though it might have been a ground of recognition if a third party had had been donatar. *Answered*, I Leven had not the right in my person, but only succeeded to it as heir, and so nothing can be imputed to me: Likeas, confirmation might have saved the right, but not stopt the incurring the recognoscing of the land; and so the decision does not meet. Then, *2do*, *Alleged*, Your grounds of recognition are prescribed both *positive* and *negative*; for they being dated in 1653, and your gift not till 1693, and your declarator many years after, the casualty of recognition was prescribed *non utendo*, not being claimed within the 40 years; I having possessed the lands, either by myself, or creditors deriving right from me, all that time, and never interpellated by your citation in the declarator till the 40 years were expired. *Answered*, These lands holding of the Crown, its casualties cannot prescribe; because by 14th act, 1600, the negligence of the Queen's officers cannot prejudice her: Likeas annualrenters, though they may point the ground, yet they do not properly possess, and so these paying the annualrents can never stop the recognition. THE LORDS read the act of Parliament 1617, anent prescription, and found it ran against the Crown as well as against the subjects; and therefore found it relevant to exclude the recognition, that 40 years had run from the date of the base infestments, inferring the recognition, to the raising of the declarator; and that he, and others deriving right from