No 167. a part of his tenant's liveliehood, 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. Fonntainhall.

*** 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 infeftments 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 infeftments of annualrent above the half, base and unconfirmed, the Lord Leven takes a gift of recognition in Moncriff of Mornipaw's name, and pursues a declarator. Against which it was *alleged*, That one of the deeds, inferring the recognition, was a base infeftment 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 infeftment 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, 2*do*, *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 interpelled 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 prejudge her: Likeas annualrenters, though they may poind 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 infeftments, inferring the recognition, to the raising of the declarator; and that he, and others deriving right from

him, had possessed the lands free of any such claim, and so the casualty was prescribed. No 168.

Before the Revolution, these rights of superiority were much extended; and Craig is blamed for favouring them too much, and yet he oft repeats that rule, *mitiores pœnæ nobis semper placuerunt;* but since 1690, the Lords have been more strict, and retrenched them much in Callendar of Craigforth's declarator of recognition against Mr Alexander Higgens, and other like cases as they occurred.

1712. *February* 12.—IN the action mentioned 26th December 1711, betwixt the Earl of Leven and Ballo's Creditors, the LORDS found the recognition prescribed, not being pursued for within the 40 years. On a new hearing, it was *alleged* no prescription, because Mornipaw, the donatar, was minor several years; which being deduced, the prescription is interrupted, and the process is far within the 40 years. *Answered*, No regard to his minority, because he was but a mere name borrowed for the behoof of Lord Leven, and in whose favour he is now denuded; and therefore my Lord can have no benefit thereby. *Replied*, I and my father am standing infeft in the right and title of the recognosced lands, and though under back-bond, we by the public records appeared to be proprietors; and our back-bond to the Earl of Leven was only the ground of a personal action to cause us denude of the trust in his favour; and till that was done, we being only *in titulo*, our minority must discount from the years of prescription: For put the case, we had so far broke our trust as to have disponed the land to a third party, and that purchaser been infeft, and prescription had been obtruded to him, if he had replied upon interruptions by my minority, would not that have been relevant and sustained? And if competent to my singular successors, then much more to me. Is there any thing more frequent, than in the case of many creditors on a bankrupt's estate, to entrust and employ one of them to adjudge for himself, and to the behoof of the rest, to whom he gives back-bonds declaring the trust, and obliging himself to denude and be accountable? Yet if prescription were objected against him, he might certainly reply on his minority, though trustee; even so can Mornipaw do here; and of this inumerable more instances can be given. *Duplied*, It is true, the act of prescription 1617 excepts minority; but that is not to be understood of the minority of the trustees, but only of those to whose behoof they are intrusted; so that if the Earl of Leven, the true party here concerned, had been minor, then it might have been alleged on to stop prescription, but Mornipaw, his trustee's minority can never have that effect; for the benefit of restitution *in integrum* upon the exception of minority takes no place, but where the minor is lesed. But here Mornipaw the minor had no manner of concern in the right trusted to his father, but merely to denude of it when required, and not bound to diligence; so his minority can never operate any advantage to a third party; but the Earl's own minority had been stronger to plead interruption, if it had

No 168. existed; and it is well known that some exceptions are merely personal, and not communicable to their cautioners; as to a *socius*, a *maritus*, a *minor*, and a wife; yet the benefit is denied to their cautioners, *l.* 2. *C. De fidejussor. minorum.* Neither is the case in hand favourable: My Lord Leven, in so far as he is a creditor, is secure; his debt is not quarrelled; and recognitions deserve no great encouragement, being introduced when feus were gratuitous donations, whereas ward-lands are bought at a full and adequate price: And no such gifts should pass without a back-bond not to prejudge the creditors; though this in a singular manner is by subreption impetrate without that just clog; and our lawyers and historians have always censured these gifts. Buchanan in the life of King James IV. b. 13. blames Bishop Elphingston, (though a very worthy prelate in other respects) for advising that King to renew that heavy casualty of recognition to fill his coffers, which he had emptied by his magnificence, greater than the Crown's revenue would speak to. And though in late times these casualties of superiority were screwed too high, yet since the Revolution in 1688, the Lords have proceeded with more regard to the interest of poor vassals. The Lords, by a plurality, found the trustee's minority did not interrupt the prescription. But on a reclaiming bill, representing the case as of a general import, and a leading preparative to more cases than this, they allowed it to be further heard in their own presence.

Fol. Dic. v. 2. *p.* 113. *Fountainhall, v.* 2. *p.* 694. & 721.

*** Forbes reports this case:

1712. *July* 25.—The major part of the lands of Ballo holding ward of the Crown, being alienated by the heritor for the time before the year 1661, Robert Balfour of Ballo, the last heritor, granted several base infeftments of annualrent since then, and died in the year 1692. The deceased John Moncrieff of Mornipaw being infeft in the year 1694, upon a charter of recognition of the said lands, under the Great Seal, granted by the Sovereign in the year 1693, Alexander Moncrieff his son and heir, commenced and insisted in a declarator of recognition against the Heirs and Creditors of Ballo.

The Lords sustained the defence of prescription by virtue of forty years possession without interruption after the year 1661, before which the major part of the lands had been alienated, to exclude recognition; and also found the possession by base infeftments granted by Robert the last vassal in favours of annualrenters after his decease, ought to be reckoned equal to Robert's own possession to make up the years of prescription for excluding the recognition.

Albeit it was *alleged* for the pursuer; That since the year 1692, when Robert Balfour died, and prescription was far from being completed: There was no standing infeftment of property renewed in the person of his heir, conform to the decision, February 5. 1671, E. Argyle *contra* L. M'Naughton, No 85. p. 10791., so that prescription of the property cannot be made up by the pos-

session of the annualrenters after Robert's decease; though an annualrenter's possession may be interpreted the heritor's possession during the heritor's lifetime; for the act of Parliament 1617, requires possession by virtue of sasines one or more continued and standing together for the space of forty years; and an infeftment of annualrent cannot be understood a continuation of an infeftment of property, whereupon the former is but a servitude, so as possession by virtue thereof could complete prescription of property after the decease of the person infeft in the property, when there is no new infeftment of property to which the possession can be ascribed. No 168.

In respect it was *answered* for the defenders; Albeit Robert the last vassal died in the 1692, *hæreditas jacens* was *vice domini*, and represented the defunct since his death, which interval must be computed to fill up the years of prescription; for, did the apparent heir just now serve, would not the *interim* possession from his predecessor's death be reckoned his the heir's possession, and his service be drawn back to the moment that his predecessor died? there being no interruption by any extraneous intruder into the possession *medio tempore* by an exclusive title, which is conform to the civil law, L. 31. § 5. D. De Usurp. et Usucap. And as an apparent heir not served may continue his predecessor's possession, so the years of such an apparent heir's possession will count in the course of prescription. Now, creditor's continuing the defunct's possession *hæreditatis jacentis* in his right, is the same upon the matter as if his apparent heir had possessed.

2*do*, THE LORDS found that there may be a conjunction of posterior deeds of alienation within the prescription, with deeds of alienation prior to the commencement thereof to infer recognition *quoad excessum*, with the burden of annualrents preceding the year 1661.

Albeit it was *alleged* for the defenders; That how soon the major part of the lands was alienated, they recognosced and became *ipso jure* the superior's, from which time the vassal and others deriving right from him, having possessed forty years by virtue of their rights, are secured therein by the positive prescription, which hath the same effect in law as an alienation, L. 28. D. De Verb. Signif. or a confirmation with a *novodamus* from the superior, which hinders antecedent base infeftments to enter *in computo* with subsequent base infeftments to make up the major part, in order to recognition, March 23. 1683, King's Advocate *contra* L. Cromarty, *voce* RECOGNITION. For the recognition once prescribed, as all other prescribed rights, vivendi ulterius non habet facultatem, L. 3. C. De Prescript. 30. vel 40. Ann. It is a non ens cujus nullæ sunt affectiones, nulli effectus. So that debts contracted after the recognition was incurred, and thereby *jus quæsitum* to the superior, did not make his right more valid; consequently can never be computed to establish what was already sufficiently established, though they might be reckoned upon to make up a new recognition, since the completing of prescription; nor can they be considered as interrup-

No 168. 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 obligement 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, *voce* Recognition. 2*do*, 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 Brughton *against* Robert M'Lellan of Barclay.

No 169.
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 Brughton, 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.