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 infeftments," can never be extended to an heritor or reverser possessing lands contained in his own infeftments.

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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 allegeance, 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.

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Possession of lands upon infeftments 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.

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*, 1*mo*, 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 infeftment 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 infeftment was erroneous, and he must be considered

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as dying in a state of apparency *quoad* these lands, and consequently his disposition in favours of Mary Dickson his wife could carry nothing; wherefore, the pursuers, as heirs of line to John Muirhead, the person last regularly infeft, were entitled to take these lands; and 2*do*, It was *contended* for the pursuers, that, if the titles made up by George Muirhead were erroneous and void, neither he, nor his disponee Mary Dickson, could pretend any right by the positive prescription, their possession being founded on these erroneous titles. And George Muirhead dying within the 40 years, the possession of his disponee Mary Dickson could not be joined to his possession so as to make up the 40 years.

In *answer*, it was, upon the part of Mary Dickson the defender, endeavoured to be shown, 1*mo*, That the Earl of Wigton was undoubted superior of the parson-lands, in consequence of the statutes 1567 and 1592, whereby lay-patrons were authorised to dispose of their provostries, &c. And that, by the statute 1661, the patrons of these provostries, &c. were constituted superiors to the vassals of these subjects, whereby the Earl of Wigton, as patron of the church of Biggar, became superior of these lands which held of the parson, and, consequently, was entitled, *proprio jure*, to grant a precept and infeftment in favours of George Muirhead, who thereby established in his person a proper title to the lands; and, 2*do*, That, supposing the precept and infeftment to have been originally erroneous, as it had stood unquarrelled for more than 40 years, and had been the title of possession all that time, the right was established by the positive prescription; as George Muirhead possessed upon it for 39 years and 9 months, and the defender, his disponee, completed the possession for 40 years, before any challenge was brought.

"August 6. 1765, The Lords found, that the lands in question held of the parson of Biggar *qua* parson, and that the precept taken, and the title made up by George Muirhead, was erroneous and void; repelled the defence of prescription, and decerned."

The first part of this interlocutor the defender Mary Dickson acquiesced in; but the last part of it, which repelled the defence of prescription founded on 40 years possession, upon the precept of *clare constat* from the Earl of Wigton, and infeftments thereon, she brought under review by petition; and *argued*,

Prescription is defined to be an *adjectio dominii per continuationem possessionis*. George Muirhead was not, nor could not, be proprietor of the lands till he was infeft as heir to his predecessor, and, if that infeftment was void, he could not otherwise acquire the property than by prescription, as an heir unentered is not proprietor by the law of Scotland; according to which *mortuus non sasit vivum*. The question then is, What could prevent George Muirhead from acquiring that property he wanted by possession, upon what must be acknowledged to be a just title of prescription?

It has been said, he could not prescribe against his own heirs of line the pursuers, which is so far true, that prescription against a man's heirs at law cannot

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well be understood, no more than prescription against a man's self; for, *cui bono*, such a prescription? What right could he acquire? By it his heir of line would be obliged to make effectual his deeds, whether onerous or gratuitous; but the mistake lies here, that the prescription does not run against the heirs of George Muirhead, but against the heirs of his grandfather; for, upon supposition of his dying in a state of apparency, the heirs of the grandfather John can only take up these lands by service to him, and so the pursuers, in this case, have made up their titles. And, though the heirs of George Muirhead be the same persons with the heirs of John, that does not vary the principle of law; they do not claim the subject *qua* heirs of George, if so, they could not challenge his disposition to the defender; but they claim *qua* heirs of the remote predecessor, to whom they have served. And, although a man cannot prescribe against his own heir, he certainly may against the heir of his grandfather or any other predecessor, and thereby acquire a liberty of disposing of the subject, even gratuitously, in the same manner as a man, by prescribing against his heir of entail, acquires to himself the free disposal of the subject.

The pursuers say, the heirs of John Muirhead were *non valentes agere*, to interrupt this prescription, because they could have brought no effectual action for evicting this subject from George Muirhead. But though such *valentia agere* is sometimes found necessary in the negative prescription, as in the case of a bond liferented by a wife, the prescription of which is not found to run against her, *stante matrimonio*, because she is not, during that period, *valens agere;* yet it is not required by any statute or decision, in the case of the positive prescription, which is founded on different principles, and introduced by different statutes. The foundation of the negative prescription is the negligence of the creditor in not making a demand during 40 years; and it, therefore, has been held a good excuse, if, during part of that time, he was not *valens agere* for recovering of the debt. But the positive prescription stands upon a quite different footing, viz. possession upon a proper title for 40 years; and the statute 1617, which introduces it, expressly declares, that such a possessor shall not be troubled or inquieted by any person pretending a prior infeftment, "nor upon no other ground, reason, or argument competent in law, except for falsehood," without making any distinction, whether the true proprietor was negligent or not in prosecution of his right, or whether, during any part of the 40 years, he was *non valens agere*. No stop to prescription is mentioned in the act, except minority, and even that exception has been disputed, as relating only to the negative prescription; because the positive is founded on a presumption *juris et de jure*, that the possessor had prior evidence, which had been lost by fatality against which minority could not be pleaded. The distinction between the positive and negative prescription was clearly established by the decision, Innes *contra* Innes, 31st December 1695, Div. 13. *h. t.*, observed by Fountainhall.

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But the pursuers, in this case, were *valentes agere*. If the precept of *clare constat* was erroneous, there was an action competent to them, viz. an action of declarator, that George Muirhead, upon the title of the infeftment 1711, had no right to dispose of his estate gratuitously, in prejudice of the pursuers, the heirs of his grandfather. It is true, they could not have evicted the estate from George Muirhead; but such a *valentia agere* is not required, otherwise prescription could never run against a tailzie, while the person who possessed in fee simple was also heir of entail, which might be the case for hundreds of years; but it has been found sufficient that an heir of entail was *valens agere* to get the entail recorded, or to oblige the possessor to make up his titles, in terms of the entail, though not to evict the estate; Douglas of Kirkness *contra* Aiton of Kinnady, No 173. p. 10955.; and Innes *contra* Innes of Auchluncart, 31st December 1695, *Infra, h. t.* Neither does the case of Smith *contra* Gray, 30th June 1752, No 89. p. 10803, quoted for the pursuers, apply to this question; it differed from the present case in sundry particulars; there the settlement was upon the heir-male, who made up his titles upon investiture, in favours of the heirs at law, by which he had in his person two rights, both unlimited, the one, a personal right upon the deed of settlement, the other, a real right, made up by service and infeftment upon the old investiture. And the argument that moved the Court there, was, that there could be no *adjectio dominii* by possession on the infeftment, as he had an absolute right to the estate in fee-simple, by the deed of settlement, which will not apply to this case, as George Muirhead, if the precept was erroneous, had no right to the estate, real or personal, but what he acquired by the positive prescription.

Answered for Janet Miller and the other pursuers; The positive prescription is a creature of t' . law, introduced and established by the statute 1617, which distinguishes between singular successors and heirs; as to the first it requires a charter of the lands, with infeftment, cloathed with 40 years uninterrupted possession; and, as to heirs, it requires connected sasines, proceeding upon precepts of *clare* or retours. And although the statute, in the case of heirs, rests satisfied with sasines, or precepts, or retours, it will by no means follow, that the production of a precept of *clare* or retour is equal to a charter; and if so, the defender is not well founded in her defence of prescription. George Muirhead was no singular successor; he succeeded *qua* heir; the defender produces no charter, or original right in her person equivalent thereto, as required in the case of singular successors; and, considering him as an heir, the defender does not produce connected infeftments for the space of 40 years. A precept of *clare* contains no grant of the lands; it imports no more but an authority from the superior to introduce the heir into the possession of his predecessor. The 40 years were not elapsed during the lifetime of George Muirhead; there was no renewal of the infeftment in the person of any other heir. The defender's possession, after her husband's death, must be ascribed to the disposition in her favours, and cannot be conjoined with her husband's possession, so as to give

her the benefit of the positive prescription. The statute in the case of heirs requires connected sasines; and singular titles, not completed by infeftment, cannot be conjoined with sasines proceeding on precepts or retours, in order to found the positive prescription.

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But, Supposing that the precept of *clare* and infeftment 1711 should be considered as a good title of prescription, it would not avail the defender. George Muirhead had a double title to these lands; he was heir of line, and heir of investiture, which, independent of any grant, was a good title of prescription; and therefore, his possession can with no justice be ascribed to the erroneous and void precept from the Earl of Wigton: For though, in a question with third parties, possession under either of these titles might be sufficient to support the right, yet in a question with the heirs of the former proprietor, the possession must be ascribed to that title which gave the proper right. No man can prescribe against himself or his right heirs; it is implied in every idea of prescription, that something is to be acquired, and that there should be some person against whom prescription is to run, and who must be entitled to interrupt. Both parties agree, that this estate was the undoubted property of George Muirhead; he therefore could acquire no right by prescription which he had not before; his apparency *qua* heir of the former investitures was a legal title of possession, and though he made up his titles erroneously, that could make no alteration in the destination of heirs; and as he would not by that possession prescribe against himself, as little could he prescribe against his right heirs: While both titles centred in him, the one proper, the other improper, the law must consider the possession as held under the proper title; nor does the decision in the case Mackerston, No 172. p. 10947, and some later cases, where two rights centred in the same person, infringe this general rule; in all these cases, there was a manifest benefit and advantage to be acquired under the one title, in preference to the other. The fetters of an entail were to be knocked off; a fee simple was to be acquired, instead of a tailzied estate; and therefore, the law might justly ascribe the possession to the preferable right, though, even in these cases, the point was held doubtful. But with no reason can that principle be extended to the present case, where nothing was to be acquired under one title more than the other, and where there was no person against whom that prescription could be said to be running, or whose right could be cut off, and consequently no person to interrupt. And as both titles were equally beneficial, and the one a proper title, the other improper, it sounds oddly, that the improper title should be established by prescription, and the proper title cut off. And so this point was judged in two remarkable cases, the one respecting the estate of Dundonald, 26th January 1726, No 3. p. 1262, the other more recent, Smith *contra* Gray, No 89 p. 10803.

It is a rule in law, that contra non valentem agere non currit præscriptio: The pursuers had neither title nor interest to challenge the titles made up by George Muirhead; there must be a right to found an action: The pursuers had

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but a bare hope of succession, which gave no immediate right; and if they were not in condition to have interrupted the prescription, it cannot run against them. The defender says, the exception of *non valentes agere* applies only to the negative prescription; but no reason can be assigned why that exception ought not to protect against the positive as well as the negative prescription; the *ratio legis* is the same in both, and to forfeit a person of a right before he had it is absurd; and this was fully argued and determined in the case of Duke of Lauderdale *contra* Earl Tweedale, 25th January 1678, Div. 13. *h. t.*

"February 7th 1766. The Lords, on advising the petition and answers, found the precept of *clare constat*, with the infeftment thereon in favours of George Muirhead, is a habile title for prescription: Found it competent for the defender, in this case, to found upon her own and George Muirhead's possession, in order to make out her plea of prescription; and repel the pursuer's objections thereto, founded on the precept of *clare* being granted by a wrong superior, in respect prescription is sufficient to sopite that defect; and remit to the Lord Ordinary to hear parties on the fact, how long the peaceable possession continued, and to do therein as he shall see cause."

And to this interlocutor the Court adhered, March 6th 1766, upon advising a petition for Janet Miller, &c. with answers for Mary Dickson.

For Janet Miller, *Alexander Lockhart* and *George Wallace.*
For Mary Dundas, *James Burnet*, *James Montgomery*, and *Henry Dundas.*

A. E. *Fol. Dic. v. 4. p. 96. Fac. Col. No 107. p. 367.*

*** Lord Kames reports this case:

The lands called Parson's-lands were anciently part of the patrimony of the parson of Biggar, and were feued out by him. The parson of Biggar, *qua* superior of the said land, with consent of the Earl of Wigton as patron of the church of Biggar, did, *anno* 1655, grant a charter of that land to Mr John Muirhead advocate, his heirs and assignees, to be holden of him the parson, and his successors in office, for payment of a feu-duty specified, and the charter was completed by infeftment. George Muirhead, grandson to John, led by wrong advice, made up his titles to that subject *anno* 1711, by taking a precept of *clare constat* from the Earl of Wigton, said to be superior, instead of taking it from the parson; and upon this erroneous precept George Muirhead was forthwith infeft. Upon this title he possessed the subject down to the 1748, when, for love and favour, he disponed it to his wife Mary Dickson. He died in the 1751 without issue, and his wife's possession added the short time that was wanted to complete the positive prescription.

The heirs of line considering the said George as heir-apparent only, upon account of the nullity of his infeftment, made up their titles as heirs to John Muirhead regularly infeft, as is mentioned above; and upon that title brought a reduction of Mary Dickson's right, upon the following medium, That an

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heir-apparent has no power to alien the estate gratuitously. Her ultimate defence was the positive prescription; to which it was *answered*, That the pursuers had no right to the estate during the life of George a nearer heir, that their right commenced npon his death, and consequently, that the prescription could not begin to run till his death. And the pursuers urged in general, That as the positive prescription operates a transference of property from one person who loses his right by his neglect, to another who acquires it by his continued possession, it necessarily follows that there can be no positive prescription, unless there be at the same time a person against whom the prescription runs. And hence also the objection of *non valens agere*, which is always sustained against the positive prescription as well as against the negative; for though there be a person who has an interest to oppose the prescription, yet the prescription cannot run against him while his hands are tied up from challenging the right.

It occurs for the defender, that the argument urged for the pursuers has no better foundation than a misapprehension of our act 1617, concerning the positive prescription, as if it were copied from the Roman *usucapio*, which is far from being the case. The Roman *usucapio* is defined 'modus adquirendi dominii per continuationem temporis; whence it indeed follows, that if the possessor be in the course of acquiring the property, there must be another in the course of losing it. Our act 1617 rests upon a foundation more just and more expedient. It is no part of its intendment to transfer property from one to another, nor can it be defined *modus adquirendi dominii*. On the contrary, it supposes the possessor to be the proprietor, and to have been so from the date of his title downward. But as law justly entertains a jealousy of old latent claims, the only intendment of the statute is to secure the proprietors of land estates against old obsolete claims, that venture not into the light till the objections that lay against them originally are lost. And to bar such latent claims it is enacted, 'That continued possession upon an infeftment for 40 years without interruption shall give an unquarrelable right, good against all mortals and against all objections, falsehood only excepted.' Hence it clearly follows, that the positive prescription with us does not suppose two persons, one acquiring property, another losing it: If a man has possessed his estate for 40 years upon a title of property, he is secure against every sort of challenge except falsehood; which is precisely the case of the defender. She therefore, at this distance of time, is not bound to justify the infeftment of 1711: It is sufficient for her to say, that a precept of *clare constat* with infeftment upon it is a legal right of property, and that she and her husband have possessed 40 years by virtue of that title.

THE COURT at first repelled the defence of prescription, upon the following ground, that the pursuers were *non valentes agere* during the life of George Muirhead; and therefore that prescription could only begin to run upon his death. But upon a reclaiming petition and answers, they reversed this interlo-

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cutor, and with great unanimity sustained the defence of prescription, being of opinion that this defence was clearly founded upon the act 1617. The ruinous consequences of the first interlocutor made a deep impression upon the Judges. If a man cannot acquire by the positive prescription, unless there be a person existing who can object to it, the necessary consequence is, that 400 years instead of 40 may not be sufficient to secure a family in the possession of their estate. If an heir-apparent make up a wrong title, as is supposed in the present case, he and his successors can be no better than heirs-apparent, till the succession divide and produce a competitor to the successor in possession. At that rate, every debt contracted antecedent to the act 1695, every contract of marriage entered into, and every sale made, would be null and void. This could not be the meaning of the act 1617. It is true the act 1695 respecting the debts of an heir-apparent affords some remedy, but far from being sufficient. The most onerous deeds will not avail if the heir die before he has been three years in possession. Supposing infeftments upon the estate equal to the value, yet if the next heir, discovering the original defect in the title, shall obtain a regular infeftment, and contract heritable debts upon which infeftments follow, these latter debts will be preferable upon the estate; for the prior debts being granted by an heir-apparent, cannot affect the estate, but only the person of the heir passing by.

Sel. Dec. No 239. *p.* 312.

1774. *December* 22.

GEORGE MIDDLETON of Lethemdolles and DAVID PATERSON of Bannockburn *against* JOHN EARL of DUNMORE.

No 171.
Possession for forty years, founded on a disposition from the superior who had attained possession in virtue of the clan act, found sufficient to establish a prescriptive right.

THE lands of Lethem and Lethemdolles were vested by infeftment in the person of Robert Rollo of Powhouse, in the year 1699, holden by him of Hugh Wallace of Ingleston, the superior; and which he continued to possess by that tenure, till, having been concerned in the rebellion 1715, he and his son James were both tried and convicted of high treason, whereby his estate became forfeited.

Hugh Wallace the superior meaning to take the benefit of the clan act, upon the 30th May 1717, granted a precept for infefting himself in the lands of Lethem, and he was infeft accordingly 3d June said year.

Mr Wallace entered a claim to the lands of Lethem before the Commissioners of Enquiry; but no procedure thereupon appears, nor does it appear that he took any step as to the lands of Lethemdolles.

Mr Graham of Airth acquired the foresaid lands of Lethem and Lethemdolles from Mr Hugh Wallace the superior; and having been thereupon infeft in 1720, upon a charter from the Duchess of Hamilton, Hugh Wallace's immediate superior, he, with consent of Hugh Wallace, granted a feu-charter of the whole