

1707. March 18.

JAMES MURRAY of Conheath *against* JOHN IRVINE of Drumcoltran.

JAMES MURRAY of Conheath having right to an adjudication of a wadset granted by umquhile John Glendinning of Parton to Maxwell of Barwhillany and Grissel Maxwell his spouse, in liferent, and to the heirs to be procreated betwixt them in fee, pursued reduction *ex capite lecti* of a disposition granted by the said John Glendinning to his younger children, and transferred by them to Drumcoltran.

*Alleged* for the defender; It being 40 years since the disposition quarrelled was granted, any action of reduction thereof *ex capite lecti* is prescribed *non utendo* within the 40 years.

*Replied* for the pursuer; Albeit personal actions and obligations prescribe by the lapse of 40 years, 28th act, Parl. 5th James III. yet no man loses his heritable right merely *non utendo*, unless the other party possess the heritable subject for the space of 40 years by virtue of charter and sasine, or infeftment on retour, &c. act 12th, Parl. 22d, James VI. which the defenders cannot pretend to have done. And an apparent heir may enter, (if not debarred by intervening services) to his predecessors who died 100 years ago, and quarrel rights to their estate, that are not either granted by the true heritor, or fortified with 40 years possession.

*Duplied* for the defender; Under the word obligation in the act 28th of King James III. Parl. 5. all that can be ground of action is comprehended; and 28th November 1665, Younger *contra* Johnstons, *infra*, *h. t.* reduction of retours and all actions in favour of heirs were found to be comprehended in the said act. The delay of a reduction *ex capite lecti* is odious, seeing thereby the defender may suffer through the death of witnesses to prove the defunct's convalescence after granting the deed quarrelled. Again, though a defence on the positive prescription of heritable rights requires possession in the defender; the negative prescription, which is only a denying of the pursuer's title, reacheth both heritable and moveable rights without necessity of possession. As to the act 1617, that establisheth only a positive prescription of absolute and irredeemable rights; and mentions only the negative prescription of heritable bonds, wadsets, or rights of that nature, in which the positive prescription cannot take place, the defender's possession being always the granter's possession.

THE LORDS found the action of reduction *ex capite lecti* prescribed *non utendo* within the space of 40 years.

*Fol. Dic. v. 2. p. 98. Forbes, p. 154.*

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The heir's privilege of challenging his predecessor's death-bed deed, suffers the negative prescription.