

1759. December 20.

JOHN MACKENZIE of Ardross against JOHN ROSS of Auchnacloch, and JAMES CUTHBERT of Millcraig.

No 12.
Found that it was necessary to produce the grounds of an apprising led an hundred years before, in a competition with a posterior apprising, with regard to the reversion of wadset-lands contained in both apprisings, but possessed by neither of the parties.

In the year 1641, Hugh Ross of Tollie granted a wadset of his lands of Cullkennie, mill of Milcraig, and others, to William and Gilbert Robertsons, elder and younger of Kindeace, redeemable upon payment of 20,000 merks. In 1721, this wadset came into the person of their successor William Robertson; who was infeft in the wadset-lands, in virtue of a precept of *clare constat* from the superior.

Hugh Ross of Tollie died in the year 1643.

In 1644, Mackenzie of Coul obtained an apprising of the property-lands of Tollie, and of the wadset-lands above mentioned, for payment of a considerable sum, against John Ross, as lawfully charged to enter heir to the said Hugh Ross his father; and in 1647, he obtained another apprising of the same lands for a different debt.

These two apprisings, upon the first of which a charter and infeftment had passed in 1644, were purchased from Coul, in 1656, by Alexander Mackenzie of Pitglassie, and came by progress into the person of John Mackenzie of Ardross.

In the year 1650, Thomas Manson led an apprising against the said John Ross of the whole lands above mentioned; and, in 1652, another apprising of the same lands was led by Mackenzie of Inverlaal.

These two last apprisings, upon both of which charters and infeftments passed, were purchased in 1653 and 1658, by John Ross of Tollie, against whom they had been led; and having passed to his successive heirs, stood, in 1721, in the person of Hugh Ross of Auchnacloch.

Upon the 23d of May 1721, William Robertson, in whose person the wadset then stood, disposed the wadset-lands to Hugh Ross of Auchnacloch, redeemable always, and with and under the reversion and right of redemption contained in the contract of wadset. And, of the same date, Hugh executed a disposition of these lands, under the title of heritable proprietor, in favour of his son John, and other heirs therein mentioned.

John died without issue; and was succeeded by Robert Ross late of Auchnacloch, his uncle; who sold the wadset lands, heritably and irredeemably, to James Cuthbert of Millcraig.

In 1756, Mackenzie of Ardross, whose predecessors had been in the constant possession of the property-lands of Tollie, in virtue of the two apprisings led by Mackenzie of Coul, brought a process for declaring his right to the reversion of the wadset-lands, which were likewise contained in the said apprisings, but which had remained constantly in the possession of Robertsons the wadsetters, untill their right was disposed to Hugh Ross.

In this process, John Ross of Auchnaloich, the son of Robert, and James Cuthbert of Millcraig, appeared as defenders; and founding upon the posterior apprisings, obtained by Manson and Inverlaal, they *pleaded*, That Ardross had no title to challenge their rights, or to redeem the lands, untill he should produce the grounds of his author's apprisings; seeing neither he, nor any of his predecessors or authors, had ever been in the possession of these lands, so as to acquire a right by prescription.

Answered for the pursuer, The charter of apprising of the wadset-lands, and infestment which followed thereon in the year 1644, regularly transmitted by progress to the person of the pursuer, afforded a complete title to the right of reversion, without production either of the apprising itself, or of the grounds of debt upon which it proceeded; for that the said charter and infestment completely denuded Hugh Ross of Tollie, and vested in Mackenzie of Coul the reversion of the wadset-lands; and as the possession of the wadsetter is, in the eye of law, the possession of the reverser, it being the only possession of which a right of reversion can admit, therefore the pursuer has acquired a good title by prescription to the reversion of the wadset lands, as well as to the property of the other lands, which were all along possessed by him and his predecessors.

Replied for the defenders, Neither apprising nor infestment could denude Tollie of the reversion, unless the apprising were supported by its grounds, or the infestment confirmed by prescription. And the pursuer argues altogether *in circulo*. He allows, that without prescription, an apprising, wanting grounds, could not convey the reversion; but he attempts to build prescription upon the wadsetter's possession; and in order to prove the title he has to found on that possession, he supposes, that he came in right of the reversion by the apprising 1644, which is just taking for granted the point that it was incumbent upon him to have proved. The apprising 1644, supported by no grounds, gives him no title to the reversion, more than a disposition without witnesses. The infestment can add no further title, unless confirmed by prescription. Prescription cannot be without possession; and he has no title to claim the benefit of the wadsetter's possession, unless he prove his antecedent title to the reversion, which he has not done.

Further, though it should be admitted, that this pursuer, if he were in a question with the wadsetter, might be entitled to redeem the wadset, without producing the grounds; yet the case is extremely different in a competition betwixt two apprisings, each of which, *ex facie*, gives an equal right to the reversion. In such case, the right of reversion stands suspended, until the competition be determined; and the wadsetter's possession will operate *retro* in favour of the party who shall be found to have the preferable right; but until that point be determined, neither of them can plead upon such possession.

Observed from the Bench; The wadsetter's possession is the reverser's, when it appears who is the reverser; but where that is the question, his possession

No 12. will apply to neither party against the other, though to both, if joined to any third party, or to him who prevails, and is found to have the true right.

'THE LORDS found, that the pursuer is obliged to produce the grounds of his apprising.'

Act. *David Dalrymple, jun. Frq. Garden, Tho. Miller, John Craigie.* Alt. *Lockhart, Ferguson.*
G. C. *Fol. Dic. v. 3. p. 254. Fac. Col. No 204. p. 365.*

1766. March 5. JOHN CHALMERS *against* MARGARET OLIPHANT.

No 13.
Necessary to produce the grounds of debt, though there had been possession upon an adjudication for more than forty years.

ALEXANDER BLACK, having bought a quantity of grain from Durham of Largo, Largo, in 1701, adjudged for the price a tenement in the Potter-row, belonging to Black. No charter or infeftment followed; but possession was taken in 1713, and continued till the commencement of this action beyond 40 years.

Jean Black, grand-child of Alexander, having granted a trust-bond to John Chalmers, he raised a summons of adjudication. Compearance was made for Margaret Oliphant, who had acquired right to Largo's adjudication, and, with the decret, was produced the contract for the corn, but no receipts to prove the delivery.

The pursuer *objected*, That the adjudication was null, as there was no evidence of the debt.

Answered, Had no possession followed, the objection would have been good; for then the adjudication could be considered as a step of diligence only; but, when possession has followed upon it for more than 40 years, it falls to be regarded as a title-deed, and all challenge is cut off by the negative prescription.

Replied, A right to heritage cannot be lost by the negative; it must be acquired by the positive prescription; and there is no place for that without charter and infeftment. A decret of adjudication is no more than a legal conveyance in security of the debt; and therefore must be supported by production of the grounds of debt, though possession has been had upon it for ever so long a time.

'THE LORDS found it was incumbent on Oliphant to produce the grounds of her adjudication.'

Act. *Wight.* Alt. *Swinton, jun.* Clerk, *Home.*
A. R. *Fol. Dic. v. 3. p. 254. Fac. Col. No 34. p. 58.*

* * * Lord Kames reports the same case :

AN adjudication was led *anno* 1701, of a tenement in Edinburgh for the sum of L. 2529, upon which possession following, was continued above 40 years. The possessor considering himself to be proprietor by the expired legal of his