

objections to the adjudication, since he did not insist on them within 40 years of its date, or, at least, of possession's being obtained thereon. The clause in the foresaid statute 1617 bears, That all actions, competent upon heritable bonds, reversions, contracts, or others whatsoever, shall be pursued within the space of 40 years: From which it was *contended*, That the general words, OTHERS WHATSOEVER, must comprehend all claims for which an action was competent, and, consequently, claims of property; and upon this ground it was that the LORDS found an action of reduction, *ex capite lecti*, prescribed *non utendo* within 40 years; March 18th 1707, Murray against Irvine, No 32. p. 10721.

No 19.

3tio, The foresaid clause mentions reversions expressly, which do prescribe, with an exception of those incorporated *in gremio juris*, which cannot relate to legal reversions; and, therefore, when the pursuer pretends to object nullities to the adjudication, so as to open it, and render the same still redeemable, he is, by the act, expressly debarred *non utendo* for upwards of 40 years, and it must remain an absolute and irredeemable right.

THE LORDS found, that the adjudger, though 40 years in possession, yet, not being infest, he could not object the negative prescription against the pursuer, as heir.

Reporter, Lord Newball. Act. And. Macdowal. Alt. Jo. Forbes. Clerk, Gibson.

Fol. Dic. v. 4. p. 91. Edgar, p. 199.

1768. August 5.

DUKE OF BUCCLEUCH *against* The OFFICERS OF STATE.

WALTER, Earl of Buccleuch, purchased the barony of Ewisdale from Sir John Ker, who became bound to infest him, either *de me*, for a feu-duty of 160 merks, or *a me*. The Earl was infest base, and got a perpetual discharge of the feu-duty.

No 20.  
Original tenure of lands lost by the negative prescription.

Anne, Countess of Buccleuch, in her contract of marriage with the Duke of Monmouth, granted procuratory for resigning her lands, in terms of the contract; and a charter was thereon expedite, under the Great Seal, comprehending the barony of Ewisdale, as if holding feu of the Crown, for payment of 160 merks, though the Countess was not crown-vassal in that barony.

The feu-duty never had been exacted, nor entered in the property-rolls in Exchequer. At length, in 1760, the Barons made an order that the Duke should be charged with the feu-duties for 40 years back, and in time coming.

The Duke brought an action in the Court of Session, to have it found and declared, that, as the barony of Ewisdale was formerly held ward of the Crown, so he was now entitled to hold it blanch, and to have all subsequent charters and retours expedite in those terms.

No 20.

*Pleaded* for the pursuer; As the barony of Ewisdale was held ward of the Crown by Sir John Ker, and feu of him by the Earl of Buccleuch, so there was no change of the holding from ward to feu in any of the charters; and it must have been by mistake that the charter in favour of the Countess was conceived, as if the barony had been held feu of the Crown; especially as, in that same charter, there is an express clause, changing the holding of other parts of the estate from ward to blanch.

Nor is there room for prescription in this case. No feu-duties have ever been received by the Crown; and the Duke cannot be said to have acquired, by prescription, the mode of holding which the Officers of the Crown contend for, or be obliged to plead prescription against his will. Indeed, there are not *termini habiles* for prescription in favour of the Crown; since, when the mistake first happened, and for many years after, the Crown had no interest to plead it, ward being a more beneficial tenure than feu.

*Answered*; There is no sufficient evidence that the Countess did not establish a right to the procuratory in Sir John Ker's disposition, whereby her resignation of the barony of Ewisdale would have been effectual at the time; and there is the stronger reason to believe, that her titles were properly adjusted, that, as appears from the Preface of Forbes's Journal, p. 32. Sir John Gilmour, President of the Session, was called up to London, upon occasion of the Duke of Monmouth's contract of marriage.

Be that as it will, upon the supposition that the statute for abolishing ward-holdings had never passed, so that it would have been for the advantage of the pursuer to hold feu, rather than ward, the renewals of the investiture, granted by the Crown, would have defended him against any action which might have been brought to compel him to hold ward. And these renewals, which are so many repeated acts of possession on the part of the Crown, must be equally sufficient to establish that mode of holding which is most beneficial to the Crown, in virtue of the statute introducing the positive prescription, which is no less available to the superior than to the vassal. Indeed, the Duke is barred by the negative prescription, since he or his ancestors might have brought an action for correcting the mistake, supposed to have been committed in the investitures.

“THE LORDS found, that the pursuer is not entitled to demand a charter from the Crown of the barony of Ewisdale, holding blanch.”

Reporter, *Auchinleck*.Act. *Lockhart, Ilay Campbell*.Alt. *Montgomery Advocatus*.

G. F.

*Fol. Dic. v. 4. p. 91. Fac. Col. No 76. p. 321.*