bygones, and in time coming, until there be a constant modified stipend allocated to the pursuer, by the Commission for Valuation of Teinds; found the defence against the pursuer's admission and possession not competent in this process; and found the defence, upon his not taking the oaths, not competent, he not being legally convicted thereof. No 69.

Fol. Dic. v. 1. *p.* 522. *Forbes, MS. p.* 63.

1759. *January* 8.

THOMAS FRASER of Glenvacky, claimant on the estate of Lovat, *against* His MAJESTY'S ADVOCATE.

No 71.
A person claimed a wadset right affecting an estate which had been forfeited. Pleaded for the crown, that no right had been produced. Answered, this *jus tertii* to the crown; the rights had been lost, but there had been long possession. The claim was sustained, but the rights to be produced.

UPON the 14th June 1694, Hugh Lord Fraser of Lovat granted an heritable bond or wadset-right, containing a precept of sasine, to Thomas Fraser brother of Belladram, for L. 1000 Scots; for security of which sum Lord Lovat became bound to infeft him in the lands of Glenvacky, under reversion, and for payment of a surplus-duty therein mentioned.—Thomas Fraser was infeft 27th October 1696, and his sasine duly recorded 2d December 1696.

Thomas Fraser entered on possession of the lands, and paid regularly the surplus-duty. About the year 1702, he made a transaction with William Fraser of Teanakyle; by which, for a valuable consideration, he disponed to Teanakyle his wadset of Glenvacky. But neither this conveyance, nor infeftment upon it, were produced.—It was proved, however, that Teanakyle entered on the possession of the lands, and continued to possess them from the year 1702 to the year 1745, when he died, and made payment regularly of the surplus-duty.

Teanakyle, some time before his death, conveyed this wadset-right to Thomas Fraser his son, who was infeft 19th August 1745.

The estate of Lovat having been forfeited and surveyed, an abstract of the survey was recorded in the Exchequer, which, with respect to the lands of Glenvacky, contained these words: 'Thomas Fraser of Glenvacky of surplus-'rent for his lands of Glenvacky wadset to him for 1000 merks, L. 20, one 'custom-cow, one wedder, one lamb, and 60 loads of peats.'

Thomas Fraser entered his claim, in order to have the mistake in the abstract of the survey rectified, by which the wadset-sum was stated as 1000 merks in place of L. 1000.

It was *objected* for his Majesty's Advocate, That the claimant had not produced the conveyance from the original wadsetter to Teanakyle, the claimant's father, nor the infeftment upon that conveyance; and therefore the claim must be dismissed; for that a proof, if brought, of his and his father's possession, could not constitute an heritable right; and nothing could supply the want of the intermediate conveyance to his father, but a proving of the tenor; that

No 71. the crown had an obvious title and interest to plead this objection; because, if the claimant could not show a good title to this wadset-right, it would be cut off by prescription, and likewise by the vesting act, as not claimed on.

A diligence was granted for recovering the writings which were wanted, and a proof was allowed of the claimant and his predecessors possession of the lands. The possession was clearly proved; but the writings were not recovered It was, however, proved, that the claimant, seven years before, had received a blow on the head, which had deprived him of his judgment, so that he could give no information where his papers had been lodged.

It was *answered* to the objection, That it was not the intention of the vesting act, to oblige those who upon legal titles were in possession of lands forfeited, to enter claims; that accordingly, neither feuers, wadsetters, nor tenants, whose rights have been constantly set forth in the several surveys, have ever been advised to enter claims: That, in this case, the claimant's lands of Glenvacky were only surveyed to the extent of the surplus-duty, and to the extent of the right of reversion: That the purpose of entering a claim, was only to rectify a mistake with respect to the extent of the wadset-sum; and that therefore the Court had only to take cognizance of that mistake; and if any objections lay against the claimant's titles, they would be judged of afterwards, when the lands came to be redeemed by the crown.

2*dly*, The objection is founded upon the want of intermediate conveyances, which might be an objection competent to the heirs of the original wadsetter, but cannot be competent to the crown, which derives no right from these heirs. The objection would have been *jus tertii* to the forfeited person, and must be so to the crown, as in his right. It is proved by evidence on record, that the forfeited person was denuded of this right in the year 1696; and, therefore, if the wadset-right is not in the claimant, it must be in the heirs of the original wadsetter. This is a general point of law, which has been often decided; 3d December 1701, Forbes *contra* Udny, No 40. p. 7812. The same general point was established in a late remarkable case: Jacobina Clark brought a process against the Earl of Home and his tenants, founded upon an apprising led against the estate of Home by Helen Trotter in 1655, to which David Clark her father had made up a title by adjudication led against Helen Trotter's heirs in 1724. The Earl made various objections to Clark's adjudication; as, that the debts upon which it was led were prescribed; that proper titles had not been made up by the adjudger to these debts, by service and confirmation, &c.; and if he had prevailed in these objections, the effect would have been, that Helen Trotter's apprising would have been prescribed. But the COURT unanimously found, 27th January 1747, 'that it was not competent to the Earl of Home to object to the titles of the pursuer Jacobina Clark.' This interlocutor was affirmed upon an appeal; and the reason of appeal pleaded in that case was as follows: 'Because the scope of this action being to dispossess the 'the Earl of Home of his estate, and to have his tenants decreed to pay their 'rents to Jacobina Clark, the Earl has an undoubted interest to move every

'objection to her title, that he be not dispossessed of his estate at the suit of 'one who has no legal title or right.' No 71.

And therefore, in the present case, it will not support the objection in favour of the crown, to say, that if the claimant's right is set aside, the right of the original wadsetter will be prescribed, or that it will be cut off by the vesting act, for default of entering a claim. This argument will no more entitle the crown to plead in the right of a third party, than the prescription which would have been run against Helen Trotter's right, was found to support the Earl of Home's plea against Jacobina Clark.

'THE LORDS sustained the claim upon the claimant's producing a disposition in his favour from the heirs of the original wadsetter.'

For the Claimant, *Johnston.* Alt. Crown-lawyers. Clerk, *Justice.*

W. J. *Fac. Col. No 157. p. 279.*

1759. *March* 8.

SCHAW MACINTOSH of Borlum *against* WILLIAM and ANGUS MACINTOSHES.

No 72.
A condition in a bond of reversion, requiring the redemption to be made with the proper money and means of the reverser, found not effectual to bar redemption.

IN the year 1734, Schaw Macintosh of Borlum, for the sum of 44,000 merks, executed a disposition of his lands of Borlum, in favour of William and Angus Macintoshes; who, of the same date, granted him a bond of reversion, declaring, that the lands should be redeemable at the end of 25 years, but under certain restrictions. The clause of reversion was expressed in these words: 'In 'case the said Schaw Macintosh, or any heir-male to be lawfully procreated of 'his body, (secluding hereby expressly all other heirs, whether male, of line, 'tailzie, or provision, whether legal or conventional, and debarring them from 'any right or title hereto, being an express condition of granting hereof), can 'and shall (with the proper money and means of him the said Schaw Macin-'tosh, or of an heir-male lawfully to be procreated of his body, to be made up 'and acquired by them, or either of them, without contracting of debt, and 'without raising the same on any rights or securities on the other lands herit-'ably belonging to him the said Schaw Macintosh), consent and pay to us, or 'our foresaids, the sum of 44,000 merks, as the price and purchase-money paid 'by us, and that at the term of Whitsunday 1759; then, and in that case, 'we, or our foresaids, shall accept and receive the said hail sum, and shall fully 'and amply denude ourselves of, and convey and redispone to the said Schaw 'Macintosh, and the said heirs male of his body, the foresaid lands.'

Shaw Macintosh, some months preceding the term of Whitsunday 1759, brought a declarator of redemption against William and Angus Macintoshes, in order that it might be found, that he was entitled to redeem the lands, and that his process of declarator might be held as a sufficient premonition for that purpose.