

## E X C A M B I O N.

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1622. July 6.

HOME *against* KER.

**J**AMES Earl of Home, as heir to his father, raises summons against Sir John Ker, to bear it found, that he has, and ought to have, full regress to the Lord of Jedburgh's lands, and teinds thereof, whilk was given in excambion be the Earl's father to Sir John, for Hirsell, with the teinds thereof, be contract of excambion, dated the 23d June 1611, and in and to the rents, profits, and duties, of the said lands and teinds of Jedburgh, in so far as they may extend to the avail, worth, and rental of the teinds of the lands, and others libelled, contained in a decreet of spulzie obtained by John Hamilton, commendator of Coldstream, against the Earl, extending to the avails, quantities, and prices libelled of the said teinds, in the decreet, dated the 27th June 1621, and that during the hail years and spaces libelled, as well bygone as to come; or else in the Earl his option to hear and see them decerned to pay the Earl the avails and prices libelled in the decreet, of the particular crops therein mentioned, and crops 20 and 21 that has run sinesyne, and sicklike, to pay to him L. 1000 for ilk chaldar of 30 chalders, and for ilk 100 of 715 merks, whilk is the year's rental of the teinds contained in the said decreet, and evicted conform to condition of the contract of excambion. The defender absent, the pursuer referred the relevance of the summons to the LORDS, who found the summons relevant, and admitted them to probation.

Clerk, *Durie*.

*Fol. Dic. v. 1. p. 258. Nicolson, MS. No 90. p. 60.*

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1623. November 25.

E. MELROSS *against* KER.

WHERE parties excamb lands, either of these lands, *hinc inde* excambed, remains really affected to return to the party from whom the lands, received in

**No 1.**

In an excambion of lands, the party, from whom the eviction is made, has his option either to seek regress or damages.

**No 2.**

Contracts of excambion are real bur-

No 2.  
dens, and  
preferable to  
any real  
rights acquir-  
ed to the  
lands preced-  
ing the evic-  
tion.

permutation are evicted, conform to the proportion of the eviction, in which the party distrest hath recourse to his own lands given in excambion for the other *pro tanto*; in which recourse he is preferred to all other persons who have either comprised the lands, and thereupon are infest therein, or who have acquired any other real right thereof from him, who received the same in excambion, albeit these rights precede the eviction from the other party who exchanged; and this follows of its own nature in contracts of excambion, which of themselves are real, albeit that no other real security provided such recourse to the parties, but the first contract bearing the excambion, which, to produce that effect, are not respected as personal securities, but are real, as said is, and give the right of the prelation to the excambers, before all other parties thereafter acquiring right to these lands from any of the parties. This was so found in this process, albeit the charter and sasine which followed in that matter, upon the contract of excambion, be an express clause provided to either party, their recourse in case of eviction; yet the LORDS were all of that mind, that albeit there had been no more but the contract, it would have produced the same effect without the said clause.

*Fol. Dic. v. 1. p. 258. Durie, p. 83.*

1629. July 14.

L. WARDS *against* L. BALCOMIE.

No 3.  
In an excam-  
bion of lands,  
though regress upon e-  
viction was  
stipulated to  
the granter  
only, and his  
heirs, yet the  
lands being  
evicted from  
a singular  
successor, he  
was found to  
have regress  
against the  
excambed  
lands.

THE Laird of Wards's predecessor having received a charter, under the Great Seal, from King James the Fifth, of the lands of Wards, which charter reported, that the same were granted in excambion of the lands of Balcomie, pertaining heritably of before, and then to the Laird of Wards, and which were then resigned by Wards in his Majesty's hands for the saids other lands therein designed, in the which charter the King had granted expressly to the Laird of Wards a regress, and his heirs (not mentioning to his assignees and successors) in and to the lands of Balcomie, in case of eviction of the lands of Wards, disposed by the King to him, and that notwithstanding of any disposition to be made to any person thereafter of the lands of Balcomie; and the lands of Wards being evicted from the Laird of Wards by the Earl of Marr, upon that eviction, Wards seeking again decret against the Laird of Balcomie upon the said charter of excambion, who was heritable proprietor of the saids lands by disposition made to his predecessors thereof by Erskine of Pittodrie, who, after the excambion, had obtained the right of the saids lands from the King. It was found, that the pursuer had good right to pursue this action, and to claim the benefit of the excambion and regress, albeit he was only a singular successor in the lands of Wards to him who excambed, and albeit he was not heir to him, although the provision of the regress, contained in the charter of excambion, was introduced only in favours of the Laird of Wards and his heirs, and which