

done voluntarily, *et sine causa*, in prejudice of the excipient, a true creditor, at the time of the purchasing of the pursuer's right, who he could not prejudice by any voluntary deed, done gratuitously to his own oye, for love and favour.—THE LORDS repelled the allegiance, and sustained the pursuer's infeftment, albeit base; and albeit the defender's was a public right, and albeit it was done *inter personas conjunctas*, and without a cause onerous, (for none of the parties were in possession of the lands, but now were disputing their rights,) seeing the same was done for implement of a bond before the defender's infeftment granted to him by the Lo. Jedburgh, and whereupon he had served inhibition before the defender's infeftment; so that this bond and inhibition preceding, was a sufficient warrant to prefer that infeftment depending thereon to the excipient's right, acquired after that inhibition, albeit the same was public, and the pursuer's base, and albeit the same was done without an onerous cause; yet it was sustained, and preferred to the other infeftment excepted on, given to the creditor *ex causa onerosa*, seeing, at the time of the granting thereof to the pursuer, the granter was not then, nor yet is bankrupt, neither was then unanswerable to pay any debt owing by him; so albeit that then, and at the time of the pursuer's bond foresaid, the defender was his creditor, yet the donation voluntarily made by the Lord Jedburgh the debtor, might validly and lawfully have been made; and cannot be quarrelled upon that ground by the creditor, he having done no deed by inhibition, to prohibit the said infeftment, and donation, and bond, albeit done for love and favour.

A. & Neilson.

Alt. Sandilands.

Clerk, Gibson.

Durie, p. 575.

1633. January 22.

GORDON against M'QUEEN.

ONE being infeft in lands by a base infeftment redeemable, to be holden of the granter; and having set a back-tack to his author of the said lands, for payment of a silver tack-duty, answerable to the annualrent of the money, whereupon the land was wadset; of the which silver duty he had received payment diverse years since the date of this wadset; and thereafter, the defender having acquired the heritable irredeemable alienation of these lands, from the same author to the pursuer, by a public infeftment, holden of the superior; and by virtue thereof, being ten or twelve years last bypast in actual possession of the land, the pursuer never claiming right thereto all this time, neither by virtue of the heritable wadset, nor by the sub-tack, but being still silent, and these rights being obscure and unknown to the defender, who acquired the lands from the heiritor, being then possessor: It was found in an action pursued by the pursuer, upon his foresaid heritable base right, for payment of the mails and duties of the lands, of all the bygone years preceding this year 1632, viz. by the space of 12 or 14 years bypast, and sicklike in time coming; and which pursuit he retrenched to

No 7.

A person was infeft in lands by base infeftment redeemable. He let the lands to his author by back-tack, for a money-rent, of which he received payment some years. His author sold the lands to another irredeemably. The creditor in the base right demanded no rent from the purchaser of

No 7.  
several years.  
His right, not-  
withstanding,  
found good  
and entire.

the said back tack-duty ; that the said pursuer ought to be paid of the same by the defender, who was possessor and heritor all these years, not only in time to come yearly, but also of all these said bygone years ; albeit the pursuer's right was but base, and that the defender's right was public, and clad with so long possession ; and albeit, the pursuer had been so long out of possession, and had never done diligence all that time, to recover payment of his back tack-duty ; seeing his right was once clothed with possession : Which the LORDS found, gave him preference to the posterior public right for bygones, as well although they had been owing these 20 or 30 years bygone, as for the time to come ; and found, That the defender's uplifting of the duties of the lands, of the said years bypast, by virtue of the said title, which was *titulus verus et non putativus, et ubi fructus erant bona fide precepti et consumpti*, did not liberate him from the said bygones ; and found, That the pursuer ought not to be put to reduce the defender's right, as he alleged he ought, in this judgment, which he alleged to be of that same nature, as if he were in a removing, which was repelled. See BONA FIDE CONSUMPTION.

Aft. *Cunninghame.*

Alt. *Mowat & Gilmor.*

Clerk, *Scot.*

*Durie, p. 665.*

1633. February 14. CHARTERS against L. BALMAGHIE.

No 8.

A person holding a base right, attained possession for some years. A liferenter was preferred to him in the possession for 36 years. A person, in virtue of a public right, then held possession for five or six years. The original base right being once good by possession, remained so even after 40 years, and was preferred accordingly.

ONE Charters pursuing removing against the Laird of Balmaghie, the pursuer being infest in the lands libelled, as heir to his father, who was infest by Alexander Livingston of Airds, above 45 years since, by an infestment to be holden of the granter, and by virtue thereof was divers years in possession of the land, ay and while the relict of the said Alexander Livingston, being liferenter of the lands, after her husband's decease, by virtue of that her liferent right, became in possession thereof, wherein she continued by the space of 36 years, or thereby, ay and while the time of her decease ; after whose decease, immediately, the L. Balmaghie defender, apprehended the possession, and hath continued therein now by the space of five or six years bypast, he being infest by progress from his predecessors and authors, by five several heritable infestments, in five several his author's persons, flowing from that same Alexander Livingston, common author to both the parties, and all by public infestments, to be holden of the superior ; whereby it was *alleged*, That in this judgment possessory, the public infestment ought to defend against the base right, which was now extinct, being out of possession these 40 years bypast, and so prescribed.—THE LORDS nevertheless repelled this allegiance, in respect that the pursuer's base right was alleged once to be clothed with possession, whereby it was once a good right, and ought to be preferred to the posterior right, albeit public ; and found, That this possession, albeit after so long time, (and albeit tending to destroy the public infestment with so long progress,) was probable by witnesses, and receivable *hoc ordine*, without reduction ; and found, That the prescription had no place in this case,