

4to, The benefit of a possessory judgment, is sometimes a good defence against maills and duties, but not against an infeftment of annualrent ; though it will hinder and stop the tenants from being decerned in maills and duties, yet it will not stay the ground from being pointed. See the information of this cause beside me. See thir parties, 8th November, 1679, [Dictionary, page 9069 ;] *item*, [Boog against Muir, 30th July, 1679.] *Vide infra*, [No. 579,] *Sir John Scot's* case, [June, 1677.]

*Advocates' MS. No. 568, folio 284.*

1677. June 13.

BAILIE against GORDON.

ONE gets a wadset in 1643, from the Marquis of Huntly, of three chalder of feu-duties, payable to the said Marquis, (which is *feudifirma feudifirmarum*, discharged in the King's property, act in 1597,) redeemable on 4000 merks, and holden base of himself. (See this in the other MS. 15th November, 1677, page 4.) The wadset is granted to the mother in life-rent, and to her son in fee. The mother having married a second husband, and so, *jure mariti*, he having right to the life-rent, he buys also the right of the fee from her son the fiar, and gets a disposition thereof. Within two months after this, the son who was fiar, (notwithstanding the alienation he had made of it,) does fraudulently infeft his own wife in the right of that wadset, she not being *fraudis particeps*. Within a month after her right, he who had acquired the right of fee from the son, confirms it, and so makes it public, and cleds it with possession. After this, a competition arising betwixt him and the relict of the son,

She ALLEGED her right though posterior was preferable, because her husband's possession was her possession, and she could not *per rerum naturam*, possess otherwise, *vivo marito*, but *jure constituti, et fictione unitatis*, and in his right ; and her right was a month anterior to his confirmation, and so she was first clad with possession. ANSWERED, her right could not be reputed clad by her husband's possession, since he had none, being merely fiar, and his mother (whose right the husband had) being liferenter. REPLIED, her husband's right of fee was clad with possession, by his mother's possession, through the reservation of the liferent to her, and consequently the wife's right (which was derived from her husband,) must be reputed as clad with her mother-in-law's possession.

Though this seemed very metaphysical, and made a *progressus in ficta possessione*, and was *fictio fictionis* ; (which some reprobate ; yet see Hotoman, in *Quæstionibus Illustribus*, and my summary of him ;) yet the Lords inclined to have sustained it, to prefer the relict before the other anterior right.

*Advocates' MS. No. 569, folio 284.*

1677. June 13.

ANENT INFERIOR JUDGES.

I THINK no inferior judge competent to actions of declarators, of commission, of