

No 29.
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 properly
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December 20.—THE LORDS re-advise the debate between Helen Keith, Lady Baldincoth, and Sir Alexander Falconer and Scot of Logie.—THE LORDS having found the base infestment sufficiently clad with possession by Sir John Falconer's paying *two* years annualrent, and taking assignation thereto, which they found equivalent to a discharge, he being heritor and possessor of the *fundus*, which was properly debtor in the said annualrent; many things were subtly urged against this interlocutor, that *actus agentium non operantur ultra eorum intentionem*; and it could never be Sir John's meaning to prefer this annualrent to the apprisings and other rights then standing in his person, and which, if they had belonged to a third party, in a competition, would clearly have excluded this annualrent, and much more when they came to divide; and the apprisings are conveyed to Glenfarquhar and Logie, his singular successors. But the LORDS adhered to their former interlocutor, and found the assignation was all one with a discharge, and the annualrents coming in his person, were incompatible with his rights of property, *cum res sua nemini serviat*; and though he might defend on more rights as titles of possession, yet this servitude was no such title. See Stair, v. I. p. 402. Earl of Southesk against the Marquis of Huntly, *voce* PERSONAL and REAL. And they thought any thing was sufficient to clothe a base right with possession, seeing the 105th act of Parliament 1540, introductory of that distinction, was levelled only against fraudulent alienations made among near friends, and where there was ground to suspect simulation; and the distinction became unnecessary after the act 16th of Parliament 1617, for registration of fines, and is now wholly abrogated by the act 1693, c. 13: And found Sir John's taking the assignation, made his other rights then in his person accresce, inferring a *non repugnantia*; so that neither he, nor any coming in his right, can object against the same; and so preferred the Lady; though some thought it only a personal objection excluding Sir John himself from quarrelling it, in respect of his tacit acknowledgment, but not his singular successors.

Fol. Dic v. I. p. 89. Fountainball, v. I. p. 670. 690.

No 30.
 The Lords
 found a base
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 sufficiently
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 out any rela-
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1696. February 21. CREDITORS OF CUNNOCHIE against MALCOLM.

MERSINGTON reported Mr William Arnot, and other Creditors of Cunnochie, against Malcolm of Balbedy. The question was, Whether a base infestment was sufficiently clothed with possession, so as to make it public, by a discharge bearing the receipt of the annualrent of the personal bond, but having no relation to the heritable right on which the fine followed, and being paid out of other lands, and not those out of which it was upliftable.—*Answered*, By the 105th act, 1540, base infestments were annulable, because of the suspicion of simulation, which could not take place here; for *perinde est* to what ye ascribe the payment, if it was posterior to the fine, whether to the personal obligation, or real right; and *esto* the debtor paid the money out of his pocket, without relation to the

lands and rents, it is all one; and was so found, 23d July 1667, Hume *contra* Hume of Kello, No 26. p. 1295.—THE LORDS found Balbedy's right sufficiently clad with possession by the discharge produced.

Fol. Dic. v. 1. p. 89. Fountainball, v. 1. p. 713.

No 30.

S E C T. VI.

A Wife's right of Liferent, held Base of her Husband, is supported by the Possession of the Husband.

1622. March 8. LA. CORSINDAY *against* TENANTS.

THE goodwife of Corsinday being infest by her husband in liferent of some lands to be holden of her husband after his decease, pursues the tenants for mails and duties thereof; wherein appeared for his interest, James Garioch of Kin-stair, who was infest in the same lands upon a comprising, deduced at his instance against the Laird of Corsinday, her husband, for a debt owing by him, and who, by virtue of the said comprising and infestment, was in possession of the said lands seven years before Corsinday's decease; and in respect thereof *alleged*, That the Lady could not be found to have right to claim the said duties, especially seeing that the excipient's infestment was public, granted to be holden of the superior, and clad with the possession, and the pursuer's sasine was but base, given by the husband *stante matrimonio*. Which allegiance the Lords repelled, and preferred the pursuer upon her sasine, because she same was given in recompence of some other lands wherein she was infest, by virtue of her contract of marriage; which lands, so provided to her, she had renounced to her husband, so that the lands libelled being given to her in place of other lands, whereof she had renounced her right, they behoved to be in that same case as if she had been provided thereto, and infest therein by virtue of her contract of marriage; and therefore sustained her right thereof, albeit base, and preferred the same to the public right and possession of the compriser; albeit the compriser duplied, that he ought to have been preferred in that possessory judgment, by reason foresaid, of his public infestment, holden of the superior, clad with possession, and of the baseness of the pursuer's sasine, which he alleged could not be found to depend upon a contract of marriage, as coming in place of the lands therein contained, which she had renounced; seeing that renunciation was her own voluntary deed, and that none of the leiges could have been prejudged by that base sasine, or put in *mala fide* to have bought the lands from her husband, far less could it hurt a compriser *ex causa necessaria*; which allegiance was repelled,

No 31.

A lady was infest by her husband, to be holden of himself for her liferent after his decease. Seven years before his death, a compriser, infest to be holden of the superior, obtained possession. The lady had renounced other lands, to which she had right by her contract of marriage, and had obtained the above infestment in lieu of them. She was preferred to the compriser.