1761. *August* 4.

DAVID WILLIAMSON, Maltman in Newburgh, *against* JOHN DAW, Brewer there.

No 34.
Personal objection, which strikes against the granter of a deed, strikes against all pleading in his right.

ELIZABETH WILLIAMSON being infeft in two roods of land, and some houses built thereon, in the burgh of barony of Newburgh, she disponed them to her eldest son, Stephen Brown, who was infeft *more burgi* upon the 6th February 1722.

Stephen Brown dying without issue, John Brown, his younger brother, was infeft in these subjects, as heir to him, upon the 19th of May 1731.

John Brown having likewise died without issue, the succession devolved upon William Petrie, who was cognosced and served heir to him, and infeft *more burgi* in January 1748.

From William Petrie this small subject was purchased by William Anderson, who built some new houses upon it; and by his son it was disponed to John Daw, who rebuilt the houses, they having been burnt down by accidental fire.

During the greatest part of this possession, Elizabeth Williamson lived in the neighbourhood, without challenging any of the transmissions of these subjects, either to the several heirs or to the onerous purchasers; and seems to have understood herself entirely divested, as she procured a disposition from her son, John Brown, on his death-bed, which was afterwards reduced before the Court of Session: But, soon after her death, David Williamson, maltman in Newburgh, got himself cognosced heir to her, and infeft; and thereupon brought a reduction and improbation of Stephen Brown's right, and of all the subsequent titles.

In this process, John Daw produced Stephen Brown's sasine, but not the disposition to him; and the pursuer having obtained certification *contra non producta*, he next insisted in the reduction of this sasine, as proceeding either without a warrant, or upon a warrant declared to have been forged.

Pleaded for the defender, 1*mo*, Elizabeth Williamson, were she now alive, after so long possession had under titles derived from herself and her children, and after having witnessed the successive transmissions and repairs of the tenement, would not be allowed to challenge the rights she herself had acknowledged, but would be barred *exceptione doli*, and the pursuer, as heir to her, cannot be in a better condition.

2*do*, The long possession, and other circumstances attending this case, are sufficient to adminiculate the sasine, according to the doctrine laid down by Lord Stair, B. 2. T. 3. § 19. and the decisions there quoted. See PROOF.—Instrument of Sasine.

3*tio*, The rule there laid down by Lord Stair applies *a fortiori* as to tenements within burghs. In those the maxim, 'That a sasine being *assertio notarii* only, is not good without its warrant,' does not take place, there being hardly such a thing as a separate warrant for such sasine.

No 34.

4*to*, The defender's plea is strongly supported by the solemn decision pronounced in the case between Lord Hope, the Countess of Hopeton, and the Marquis of Annandale. Lord Hope claimed the estate of Annandale, under a gratuitous settlement by Marquis James, and produced a charter of resignation and instrument of sasine; but, as he could not make up the tenor of the warrant of the charter, certification passed against it, and his claim was dismissed. The Countess of Hopeton, however, as creditor to Marquis James, under the same title, was found entitled to claim out of the estate; because, *quoad* her, it was presumed there had been a disposition, the warrant for the charter, but that it had been abstracted by the apparent heir or his predecessor; and it was found that Marquis George, the heir of Marquis James, could not plead the want of it in prejudice of an onerous creditor. There, the question was as to a great land estate; here, as to a small tenement within burgh, which is in favour of the present case: There, with a creditor; here, with an onerous purchaser, and those deriving right from him, who, in the law, are regarded in the same light with creditors.—See APPENDIX.

Answered for the pursuer to the *first*; Supposing it true, that Elizabeth Williamson had lived 30 years, without challenging the right granted to her son, she could not be thereby barred from insisting in an action of reduction and improbation, in order to force production of that right, that it might appear whether it was valid, or under what conditions it was granted; and if in such process the right called for had not been produced, there appears no reason why the usual certification should not have been pronounced.

To the *second*, 1*mo*, 40 years have not yet elapsed from the date of the instrument of sasine, and no shorter possession is sufficient to support a sasine without its warrant; 2*do*, While the decreet of certification stands, the possession must be attributed to a forged deed; and, therefore, though it had been for more than 40 years, it could not have availed the defender, there being no prescription in cases of forgery; 13th February 1615, Lord Drumlanrig *contra* Wemyss, *voce* PRESCRIPTION.

To the *third*; It is true, that transmissions of rights within burghs are attended with certain peculiarities. Thus, an instrument of sasine, upon a resignation, is equal to a charter and sasine in other cases, so as to be a good title of prescription; and an instrument of sasine, in favour of an heir, is in the same respect equal to an instrument of sasine in other cases, following upon a precept from the Chancery, or upon a precept of *clare constat* from a subject superior: But that such instrument should, by itself, establish a right of property within the years of prescription, has never been understood. And Lord Stair has expressly declared, that instruments of sasine, taken upon singular titles, will not be sustained without a proper warrant; B. 2. T. 3. § 19. where two decisions are quoted perfectly apposite to the present case. (The cases alluded to are, 11th February 1681, Irvine *voce* PROOF; and 21st June 1672, Mitchell.—IBIDEM.)

To the *fourth*; The case of the Marquis of Annandale will not apply; for, 1*mo*, The question here is with a purchaser, whose business it is to examine his author's rights; there, it was with a creditor trusting to a charter and sasine, where it is not usual to examine the warrants of the debtor's investiture; 2*do*, The Marquis of Annandale having long possessed his father's estate, considering him only as apparent heir, his debts became effectual against succeeding heirs. No 34.

"THE LORDS found the pursuer barred *personali objectione*, as heir of Elizabeth Williamson."

Act. *David Gréme.* Alt. *John Craigie.*

A. W. *Fol. Dic. v. 4. p. 79. Fac. Col. No 58. p. 140.*

1763. *November* 17.

ROBERT WIGHT, Tenant in Murrays, *against* JOHN EARL of HOPETON.

No 35.
A tack for two 19 years, containing an obligation to renew from 19 to 19 years, sustained against a singular successor, who was found barred *personali exceptione*, from refusing to fulfil the obligation undertaken by the person from whom he had purchased.

UPON the 19th of June 1718, John Cockburn, then younger of Ormiston, granted a lease of the farm of Murrays, part of that estate, to Robert Wight, and his heirs, (secluding assignees, except such as the said John Cockburn, and his heirs, should be content with and accept of,) for the space of two 19 years from Whitsunday 1718.

This lease contained a clause in the following terms: 'And the said John 'Cockburn binds and obliges him, his heirs and successors, to iterate and re- 'new thir presents, from nineteen years to nineteen years, after the said two 'nineteen years are first completely out-run and expired, upon the said Robert 'Wight, his heirs and successors, paying, upon each renewal, the sum of 'L. 100 Sterling, as a grassum or entry of the foresaid lands, to the said John 'Cockburn, his heirs or assignees, at the said Robert Wight, or his foresaids, 'their entering to the foresaid lands, after the expiration of the said two nine- 'teen years, as said is. Which tack and assedation the said John Cockburn 'binds and obliges him, and his foresaids, to warrant, acquit, and defend to 'the said Robert Wight, and his foresaids, at all hands, and against all dead- 'ly, as law will.'

In 1745, the said John Cockburn disponed the estate of Ormiston to his only son, George. The disposition bore, that George had paid L. 21,745 Sterling of price; and it contained a clause of absolute warrandice, with the following exception: 'Excepting from my said warrandice the feu-rights of certain parts 'of the said lands, granted by me in favour of sundry persons; as also the 'standing tacks of the said lands, barony, and others, set by me, my prede- 'cessors and authors, to the present tenants and possessors thereof; without 'prejudice, nevertheless, to the said George Cockburn, and his foresaids, to