

1665. July 15. JAMES BORTHWICK *against* JANET SKEEN.

IN the action betwixt James Borthwick and Janet Skeen, of 8th July last,— it was now alleged, That Janet Skeen, the liferentrix, could not remove, because she bruiks the lands by a tolerance of the heir, or apparent heir of her husband; and their possession being the pursuer's possession, and the right of liferent being reduced, the feu stands now in the person of the minor, without the burden of the said liferent, and so [he] has good interest to defend the relict and tenants, who are in possession, why they should not remove, and whose fee cannot be drawn in question, in respect she is minor, *et minor non tenetur placitare*. 2do. Any liferent right in the person of the relict, being only a liferent of an annualrent out of the said lands; and that in warrandice, in case of inlacking of either lands out of which the annualrent [is] partly disposed, the relict had no title in her person, whereby she could have possessed the said lands: and so albeit her right be reduced, yet the pursuer cannot attain possession, or remove the defender; because the fiar's right and possession stand unprejudged by the said reduction.

To which it was REPLIED, That the pursuer having raised reduction, both of the fiar's right and of the relict's right as liferentrix, and being only debarred from the reduction of the fiar's right by the privilege of minority; and yet, notwithstanding, having reduced the liferentrix her right; the said reduction cannot operate in favour of the fiar, but only in favour of the pursuer; whereby, during the liferenter's lifetime, the pursuer may enter to the possession of the said lands. And whereas it is alleged, That the liferentrix had no title in her person whereby to have possessed the said lands,—[it] is answered, 1mo. The liferentrix's right is opposed: which is a sufficient right whereby she might have possessed; and, *de facto*, for several years, did possess the said lands of Kirk-snype, prior to the reduction. 2do. The defunct having disposed the same lands in favours of Robert Home of Diringtoun, and whereupon, the said Robert was infeft; in the said disposition there is a reservation of a liferent in favours of the relict: so that albeit it could be made appear that the right of liferent, depending upon the contract of marriage, had been only of an annualrent, and had been no sufficient title to possess; yet, by the reservation of liferent in the foresaid disposition, the relict had no sufficient right thereby to possess: and, conform thereto, the relict and her husband were in the peaceable and natural possession of these said lands, and did set tacks of the same for the space of five or six years, before the pursuer's reduction. So that now the pursuer having reduced all liferent rights standing in the person of the relict, he has good interest thereupon to enter to the possession of the said lands, and to crave removing against the relict and her husband, and their tenants; against which the fiar cannot compear; and upon her fee being affected with her mother's liferent, which, *quoad* her, does subsist as a valid right of liferent, and would debar the fiar from the possession during her lifetime.

To which it was DUPLIED, That the liferentrix's right, depending upon her contract of marriage, is only but an annualrent *ut supra*; and the reservation of the liferent in favours of the relict, in the disposition made to Diringtoun, in favours of Janet Home, the fiar: which if the pursuer will so declare, then the

liferentrix, of her own consent, will be content to remove and enter the pursuer to the possession.

To which it was TRIPLIED, That the liferent right made to the relict, in implement of her contract of marriage, is opposed: which was a sufficient title whereby she might possess; and, conform thereto, was in possession. And there is no necessity that the pursuer should derive a right from the liferentrix; having a better right in his own person; and whereupon he hath reduced the liferentrix's right. And, as to any condition contained in Diringtoun's right, in favours of Janet Home, fiar, the pursuer cannot be burdened therewith; because it is evident that the said condition does not affect the reservation of liferent in favours of the relict, of fee in favours of Home of Diringtoun. And the pursuer makes no farther use of the disposition in favours of Diringtoun, but only to evince, that, by the reservation of liferent therein contained, the relict had a sufficient right, thereby, to possess his said lands; and which being now reduced at the instance of the said pursuer, upon a right standing in his own person, he has thereby sufficient interest to enter to the possession of the said lauds during the liferentrix her lifetime, and to insist in the removing against her and her tenants. And so the liferentrix, having a right in her person, which would have excluded the apparent heir from possession, and the said right of liferent being now reduced at the pursuer's instance, she cannot recover to clothe her possession with a tolerance from the apparent heir, in prejudice of this pursuer; for *vinco vincentem, te ergo vinco*.

It was farther alleged by the liferentrix, That her possession is the apparent heir's possession; and so the apparent heir, having possessed the land by her by the space of seven years, she must have the benefit of a possessory judgment; and the mother cannot be removed till the apparent heir's right be reduced.

The Lords repelled the whole defences proponed for the liferentrix and the minor, and decerned in the removing.—*Partibus ut supra*.

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1665. July 15. The LAIRD of AYTOUN against The EARL of DUNDEE.

THE Laird of Aytoun, as having right, by assignation from the donatar, to the escheat of the Laird of Craig, pursues a special declarator against the Earl of Dundee; for the duties of the lands pertaining to the deceased Laird of Craig, for crop 1663; and for corn, cattle, goods, and gear, which were upon the mains of Craig, that was in the Laird's own labouring; all which was intromitted with by the Earl of Dundee.

The Earl having EXCEPTED, upon a disposition of the moveables, by virtue whereof he had intromitted, and so were *fructus bona fide percepti et consumpti*;—

And it being REPLIED by Aytoun, That the disposition was for the Laird of Craig's own behoof; and so being simulate, the allegiance ought to be repelled; the simulation being evident by the rebel's own possession: likeas, by Act 145, P. 12, King James VI, all such rights and dispositions made by rebels to their nearest friends, *retenta possessione*, are null, and cannot be obtruded against the donatar.

The Lords repelled the allegiance, in respect of the libel and reply; and assigned a day to prove.

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