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that Lurgiecraig was a part of Newthorn. It was *duplicated*, That this was competent the time of litisecontestation; and the defender has fully proved, that Lurgiecraig has been possessed past memory by the heritors and tenants of Purdie's-Mill, as a part and pertinent thereof.

THE LORDS having considered the depositions, and having found that they fully proved the possession as a part and pertinent past forty years, they assoilzied the defender *ab hoc judicio possessorio*; and yet, in respect of the reply, omitted *bona fide*, which the Lords thought not fit now to discuss *post conclusionem in causa*, they reserved action of declarator of property to the pursuer, and the defender's defences against the same, as accords; and if the pursuer pleased, gave him liberty to turn his removing into a declarator.

*Gilmour, No 23. p. 18.*

1664. December 7.

No 6.

Lady CRAIG, and GREENHEAD Her Husband, *against* Lord LUIRE.

A possessory judgment not competent to a wife by her husband's possession against another deriving right from him.

THE Lady Craig being infest in liferent, pursues her tenants. Compearance is made for the Lord Luire, who apprised the lands of her husband, and *alleges* that he ought to be preferred, because he stands publicly infest, and any right the Lady has is but base, holden of her husband; and before she attained possession he was publicly infest. It was *answered* for the Lady, That her husband's possession is her possession, and so her infestment was clad with possession from the date thereof. It was *answered*, That that holds only in the case of an infestment to a wife upon her contract of marriage; but this was but an additional gratuitous infestment *stante matrimonio*, she being competently provided before by her contract.

In which case, such provisions cannot prejudice lawful creditors, neither can the husband's possession give the benefit of a possessory judgment to the wife, unless she had possessed seven years after his death.

THE LORDS found, That such infestments as these, being gratuitous and voluntary, could not be prejudicial to the husband's creditors, nor give the wife a possessory judgment; and the case here being with a creditor of the husband, they did not proceed further to consider, and determine if the husband's possession in such a case would not validate the base right as to any acquired right thereafter.

*Stair, v. 1. p. 235.*

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Forfeiture and five years possession were not found relevant to give the benefit of a possessory judgment, by exception or reply, without a retour by an inquest.

1666. June 13.

Sir HENRY HOME *against* TENANTS of KELLO and Sir ALEXANDER HOME.

JOHN HOME younger of Kello being forfeited in the Parliament 1661, for being with the English army against the King's army at Worcester 1651, Sir Alexander Home obtained gift of the forfeitry and thereupon came in possession. Sir Henry Home having apprised the lands of Kello from the said John Home and his father Alexander Home upon their bond, and having charged the superior in

1653 to infeft him, obtained decret of mails and duties against the tenants; which being suspended upon double pointing, and Sir Henry and Sir Alexander competing, it was *answered* for Sir Alexander, the donatar, That he had possessed three years, and offered him to prove, that the rebel had possessed five years before, therefore craved the benefit of a possessory judgment; *2dly*, That he was preferable in point of right, in so far as he offered him to prove that the rebel was five years in possession before the forfeiture, which gives the King and his donatar complete right by the act of Parliament. It was *answered* for the Creditor, That he ought to be preferred, because there being no retour upon the act of Parliament, finding by the inquest that the rebel was five years in possession as heritable possessor, he can neither have the benefit of a possessory judgment nor stop the creditor's diligence, who found themselves upon the apprising against the father who stood publicly infeft, and there is no sufficient right in the rebel's person alleged nor produced. It was *answered*, That the five years possession might be proved by witnesses by way of exception; *2dly*, It was offered to be proved by an inquest conform to the act of Parliament.

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THE LORDS found no benefit of a possessory judgment competent; neither would they sustain the five years possession by way of defence; but decerned, superseding extract until the 15th of July, within which time, if the donatar obtained the retour of an inquest, he should be heard thereupon.

The donatar further *alleged separatim* that the rebel was infeft by the father, which was sufficient to prefer him without an inquest. It was *answered*, *Non relevat*, unless he had been either publicly infeft, or by base infeftment clad with possession, before the superior was charged upon the creditor's apprising, which being equivalent to a public infeftment, is preferable to the rebel's base infeftment. It was *answered*, That the King or his donatar needed no possession, nor can be prejudged for want of diligence.

THE LORDS found the creditor's allegiance relevant.

*Stair, v. 1. p. 375.*

1668. February 6. Mr GEORGE JOHNSTON *against* Sir CHARLES ERSKINE.

THE lands of Knockhill being a part of the lands of Hoddam, did belong to Richard Irvine, and were comprised from Robert Irvine great grand child to the said Richard as charged to enter heir to the said Richard, at the instance of Mr John Alexander minister at Hoddam; but no infeftment nor diligence against the superior having followed upon the said comprising during the said Robert's life; the Lord Lyon Sir Charles Erskine comprised from Mr James Alexander, son to the said Mr John, the right of his comprising, and obtained infeftment upon the said comprising in August 1666. The said Robert's two sisters and his sisters children, obtained themselves infeft as heirs to the said

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Where neither infeftment had passed on an apprising, nor a charge against the superior, there was found not sufficient title for a possessory judgment.