

to receive vassals: and therefore the common acts which they do under that reduplication as such, can never prejudice them of any rights that are competent to them as creditors or otherwise. And thus, lately, in the case betwixt my Lord Torphichen and Ja. Maison, younger, the Lords found Torphichen, as a creditor, had interest to reduce Maison's right and infestment, though granted by himself as superior. And really the same is most just and consonant to law, by which *actus agentium non operantur ultra eorum intentionem*. And where a superior granted charter of an irredeemable right, without mentioning the right of reversion he then had, it was found not to prejudice his right of reversion; as *Dury* marks, 20th March, 1635, *Bishop of Glasgow against Mauld*.

I heard not if this was decided; but I think it ought not to hinder my Lord Forbes from quarrelling the eke, that he had confirmed the wadset.

Advocates' MS. No. 416, folio 224.

1673. July. The LORD LYON *against* ALEXANDER FORBES, of Auchintoull.

MY Lord Lyon pursuing declarator upon a gift of recognition of the lands of Auchintoull; ALLEGED, the right made by Alexander Forbes to Ja., his son, of these lands, can infer no recognition; because it is to his apparent heir, and who is *alioqui successurus*. 2do, For the base infestments granted by Ja. to sundry persons, far beyond the worth of the lands, neither can they infer recognition; because only granted by Ja., who was never the king's vassal, but was infest base holden of his father.

ANSWERED,—Though the infestment given by the father to the son can be no ground of recognition, yet those made by the son must be as good a ground for it as if they had been made by the father, who is the King's immediate vassal, to strangers; because the fee goes, by this, *extra familiam vassalli*, and the vassal becomes unable, in construction of law, to serve the superior: else a compendious way shall be laid for frustrating all recognitions; the father shall infest his son base, and he shall alienate without acknowledging the superior: which were most absurd; for the superior's interest shall be evacuated, himself contemned, and the vassal disabled to perform the services prestable by him to the superior: and it should be all one to the superior whether the fee be transmitted immediately to strangers by the vassal, or first to his son, and then by him to strangers; contrary to the solid and just maxims of law, *Quod directo non licet, nec per ambages fieri potest*. This is a pretty question.*

Advocates' MS. No. 417, folio 224.

1673. July.

A CAPER having rescued a Scots merchant ship which had been seized on by some Dutch caper, it fell to be questioned, whether or no, *jure postliminii quod obtinet*

* In July 1674, the Lords found the alienations made by the son, though he was only infest base, were a ground of recognition.

in rebus bello captis, the former private owners and merchants of the said ship, so brought up and rescued, could lay any claim to the same. Wherein it was ALLEGED for the caper, that the said vessel having been in the custody and power of the enemy by the space of twenty-four hours before they recovered her out of their hands, the same was *jure gentium* absolutely and irrevocably become the victor's and enemy's: and the owners, (whose right was *in pendent*i during the said space,) had utterly fallen from their right; and they having supervened and retaken her, she was become fully theirs: and the old owners had no claim or interest in her, unless they could say she was retaken before she was twenty-four hours in the enemy's possession, and which is a kind of prescription.

ANSWERED,—That Grotius, *lib. 3, de Jure Belli et Pacis, cap. 6, No. 3, et cap. 9, No. 14*, who sees as far into these affairs as any, (and many other lawyers are of his opinion,) is positive that the enemy does not acquire the dominion and property of things taken, till the other has lost all probable hopes of recovering them; and which is not till they be brought within their castles, forts, harbours, and other stations for ships, or where their whole fleet is; *nisi intra præsidia navalia, portus, fines imperii, aut eum locum ubi tota classis se tenet, perductæ sint*; but so it is, this ship was not brought to their own country or *præsidia*, and therefore it still remained theirs, the recovery of it not being desperate till then.—See Joannes Voet, *de Jure militari, cap. 5, pag. 286*.

REPLIED,—The same Grotius, in the place cited, as also Loccenius, *de jure maritimo, lib. 2, cap. 4, de jure postliminii*, affirms, By the universal consent of nations, *spatium 24 horarum* is determined for the time after which they become irrecoverably the taker's, and so must appertain to them who have retaken them from them.

Advocates' MS. No. 418, folio 224.

1673. July.

ONE having charged upon a bond, there was a suspension thereof raised upon this reason, that the said charge was most malicious; and given only because the suspender debtor in the bond offered in the payment of the annualrent, to retain one of six, conform to the benefit introduced in his favours by the 4th act of Parliament, in 1672. Whereupon sundry of the Lords, especially the Chancellor, President, Strathuird, &c. greedily drew in the debate, Whether the exacting of the whole six during the retention, or the taking the said full annualrent, when offered by the debtor voluntarily, and refusing to use that privilege, be lawful, yea or no; or if it can in any construction of law be reputed usury, to the effect they might get the same decided to be unlawful.

It was ALLEGED,—That though the creditor could not seek it, yet where his debtor was content to give it, he might take it, because there could be no usury, and we had no such thing unless where a statute decided or declared it; but so it is, the said act, 1672, allenarly ordains, that every debtor, for the space of one year, have retention of a sixth part of their annualrents; and which act being conceived in their favours, they might renounce the same. That it was against the ingenuity of lawgivers, and the interest of the lieges, to forge and invent crimes, where there was none; or to make acts of Parliament snares and gins wherein to catch innocent