interfering and clashing, one of them behoved to be unjust, and so condemn his Majesty's letter of protection to the Lords, in May, 1674, discharging the quarrelling of any of the sentences of the Session upon iniquity. He takes it to the Lords' answer, which of the two contrary decreets they would acknowledge and legitimate. They adhere to the first decreet, and prefer the donatar of the liferent escheat not only to Savage, (who was infeft in an annualrent after denunciation, but the heritable bond was prior,) but even to Clerkson, or any who were basely infeft before the denunciation. The reason of which decision lies in this,—that it were unreasonable to defraud and exclude the King, or respective superiors, of the liferent and escheat of their vassals, falling and incurred through their contumacy, and lying year and day unrelaxed at the horn; the creditors might have relaxed him within the year, and that had saved them, by private clandestine deeds, which they, as superiors, had never owned nor acknowledged, by adhibiting their consent, either in accepting a resignation, or granting a charter of confirmation; without which deeds and consent of his own, the *jus quæsitum* to him by the rebellion could not be stopped. And yet thir casualties of superiority, being odious and unfavourable in law, are not to be extended beyond their due limits, and lawful and honest creditors are not to be wronged thereby; only they should know the condition and capacity of him with whom they contract: l. 19. D. *de Regulis Juris. Vide supra, numerum* 446, [Earl of Aboyne, 28th February, 1674;] *item, numerum* 445, anent quarrelling sentences of the Lords as unjust, in Almond and Dumfermling's case. *Item, numeros* 122, [Earl of Argile *against* Cambell, 2d February, 1671,] and 156, [Hamilton *against* Bell, 25th February, 1671.] And upon thir grounds the Lords found the donatar preferable; unless we would either say, the superior had consented, acknowledged, and confirmed Savage's infeftment before the gift, or that we had made it public by possession any time before the expiring of year and day. And when I offered to prove possession of that term's annualrent preceding the elapsing of year and day, Craigie forced us to allege, it was either legal possession, by obtaining a decreet of poinding of the ground against the tenants within the year; or by natural possession, receiving it from the tenants, labourers of the ground, before the year expired: and that it was not sufficient to say, made public by civil possession, of receiving the annualrent from the heritor, since that respected not *jus fundi*, and such payment might be ascribed to the personal obligation. *Vide supra, numero* 297, [16th January, 1672;] *item*, the case of Hew Sinclar's Creditors, at the foresaid 413th Number.

On the 8th of June, 1677, the Lords having advised the probation led by witnesses and discharges, to prove the possession within the year *currente rebellione*, they found the same not proven; and so preferred the donatar to Savage, the annualrenter: only, since the maills and duties were not proven against the tenants, they could not decern against them till they were proven.

*Advocates' MS. No.* 479, *folio* 247.

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1676. *June.* ROBERT MACMORRAN *against* THOMAS ROBERTSONE.

ROBERT MACMORRAN, as assignee constituted by Mungo Wood, college-treasurer of Edinburgh, who, *eo nomine*, was confirmed executor *qua* creditor to Isobel

Barron, first relict of Nicol Udwart, and then of Mr Robert Balcanquall, (and which Isobel was infeft by the said Nicol, in 1624, in the liferent of that tenement and dwelling-house, now acquired and possessed by Thomas Robertson, brewer,) pursues the said Thomas for the maills and duties thereof, by the space of four or five years before she died, which was in anno 1667; her last husband, Balcanquall, (to whom the same belonged *jure mariti*, and who had disponed it to Thomas his authors,) having deceased in 1662, and so her own right reconvalesced.

1*mo*, ALLEGED for the defender,—It was prescribed.

ANSWERED,—Though forty years was run, yet, *contra non valentem agere nulla currit præscriptio;* she was clothed much of that time with a husband. This was sustained to interrupt.—*Vide supra*, the case of Mason and Rind, [January, 1672,] *numero* 333.

2*do*, ALLEGED,—He was seven years in possession, by virtue of a real right and infeftment, before the intenting of the pursuit, and so had the benefit of a possessory judgment, and behoved *lucrari fructus perceptos.*

ANSWERED,—That he could not acclaim the benefit of a possessory judgment, unless he could say seven years in possession, by virtue of a right, since Balcanquall, the liferentrix, her last husband's death, in whose lifetime she could not pursue or interrupt; likeas the defender's possession was her possession.

REPLIED,—That the seven years for giving a possessory judgment must be accounted within these years in which she was married; as well as the Lords did, in , 1668, between the Earl of Winton and Coventon, find, that minority did not hinder the seven years for making up the possessory judgment to run; although *minor non tenetur placitare*, and is equiparat to a wife under the power of the husband. Craigie inclined to repel this, unless we would allege seven years in possession since she became *sui juris et valens agere* by her last husband's decease.—See Stair's System, tit. 12, Of Real Rights, No. 23. *pag. mihi* 180; *infra*, 30th July, 1677, No. 631, Lindsay *against* Frazer.—Then we urged, that after the death of her first husband she was three years a widow *sui juris*, and all that time was silent, and the defender's authors possessed; and, since the decease of her second husband, she was silent other three or four years: which two times and taciturnity being conjoined together, made up seven years' peaceable possession before her warning and action for maills and duties; and so behoved to put the defender in the case of a possessory judgment, that he was not liable to dispute his right but in a reduction. This subtilty seemed plausible to Craigie. *Vide* parag. 12 et 13, *Institutionum de Usucapionibus, ibique interpretes.*

But, 3*tio*, we ALLEGED, Absolvitor; because we offered to prove paid for the years acclaimed, except one; in so far as the liferentrix had granted a discharge to Margaret Balcanquall, daughter and heir to Mr Robert, her husband, and so liable to the defender to warrant her father's disposition to his authors, acknowledging her receipt of the maills and duties of her liferent lands in Edinburgh, which the said Margaret Balcanquall had intromitted with. Now the liferentrix being paid by her, she nor her executors can never recur; and if the said Margaret Balcanquall should lay claim to them, she is repellable in law, because she is the person liable in warrandice to the defender, *et quem de evictione tenet actio eundem agentem repellit exceptio.*

ANSWERED,—1*mo*, It behoved to be a specific discharge of the individual maills and duties now acclaimed, and of the same years, and for the same house. 2*do*, Offered to prove she liferented other tenements in Edinburgh; and so it may be a

discharge to the said Margaret of her intromissions with these. *3tio*, Offered to prove, by Thomas Robertsone's own oath, that he never paid or counted to the said Margaret, to Isobel, the liferentrix, or any other, for the maills and duties now acclaimed.

REPLIED to the first,—A general discharge was as valid and effectual to extinguish and take away a debt as a specific one. To the second, They behoved relevantly to say, that she liferented two different tenements beside this controverted; for if she liferented this and another, the discharge will extend to both, mentioning an acquittance of intromission with her liferent tenements *in plurali*. Find the third relevant, of consent.

This cause ended in an agreement; and Thomas Robertsone paid 600 merks for a discharge of it.

*Advocates' MS. No.* 483, *folio* 249.

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1673 and 1676. SIR ANDREW RAMSAY, LORD ABBOTSHALL, *against* FRANCIS KINLOCH.

1673. *June.* SIR ANDREW RAMSAY, Lord Abbotshall, as standing infeft in the barony of Waughton, pursues a reduction and improbation against F. Kinloch, of his right of the lands of Gilmerton. Wherein the terms being run, and the pursuer craving certification, *contra non producta;*

ALLEGED,—The same could not be granted, because he had produced sufficiently, in so far as he had produced a disposition and infeftment granted to Mr J. Cockburne of these lands prior to the pursuer's interest, either of comprisings or inhibitions. *2do*, He had also produced a public infeftment of the same, flowing on Waughton's resignation prior to any real right of comprising; and so needed produce no more, having produced a better and a more ancient right than the pursuer's title, and which excluded him. *Vide* Dury, *26th February*, 1622, *Earl of Kinghorne* against *Inchture*.

REPLIED,—The pursuer must have certification, notwithstanding of what is produced. 1*mo*, Because Cockburne's infeftment is but base. *2do*, It is but under reversion, and so can never stop the superior, and he who hath right to redeem, from having certification against all other latent rights of these lands; all that is produced being allenarly a base right, though prior, and not a perpetual, but only a temporary exclusion of the pursuer's interest, who is stated both in the right of suspension and reversion; and so can never stop certification sought at his instance. And as for the public infeftment, and which is both prior and irredeemable, no respect can be had thereto, because, 1*mo*, The instrument of resignation whereon it proceeds is not produced, though, by act of Parliament, necessary to be produced, and without which be seen we conclude in law no public infeftment ever was, but the same must fall in consequence. *2do*, The said infeftment is posterior to Smeiton's inhibition, which is a part of the pursuer's interest, and therefore can never defend against the certification.

DUPLIED,—The right, though base and affected with a reversion, is sufficient to defend the property, and stop certification against any other rights, aye and while it be redeemed. As for the want of the instrument of resignation, it is not material: