

No 8.

1631. *March 15.*FLETCHER *against* KID.

THE donatar to one's escheat being pursued for the debt in the horning, *alleged*, That the horning, denunciation, escheat, and gift; were null, having proceeded upon general letters; and he offered to renounce the gift. This was repelled in respect of his intromission, after which he could not quarrel the horning, nor renounce the gift.

*Fol. Dic. v. 2. p. 82. Durie.*

\*\*\* This case is No 4. p. 3614. *voce* ESCHEAT.

1665. *November 9.*LADY KNAPEIRN *against* SIR ROBERT FARQUHAR.

No 9.

The benefit of a possessory judgment is never granted in prejudice of him to whom the possessor disposed, or of him to whose disposition he consented, it being against *bona fides* for any one to impugn his own deed.

SIR ROBERT FARQUHAR being infeft in certain lands by the Laird of Knap-eirn with his Lady's consent, pursues the tenants, and obtains decret for mails and duties. The Lady pursues reduction on these reasons, That she stood infeft and in possession eleven years after her husband's death, *bona fide*, without any pursuit; and so being *in judicio possessorio*, she was *tuta receptione*. It was *answered*, That the benefit of a possessory judgment was never granted to any party, in prejudice of those to whom that party had disposed, or consented to a disposition, which includes an obligation to possess them; nor can they be in *bona fide* contrary their own consent and deed, to possess.

THE LORDS repelled the defence, in respect of the reply. It was further *alleged*, That Sir Robert, by a declarator produced, had acknowledged nothing of that wadset due, but what was contained in a fitted account written by him, and subscribed by both parties, which did innovate the wadset, and Sir Robert could have no right thereby, but by this count, which only could touch the husband; *2dly*, Albeit the wadset did stand, in so far as the count extends, yet Sir Robert ought to have no benefit by the wadset, till he produce the account. It was *answered*, That the account was never in his custody, but given to Knap-eirn, in whose favours it was introduced; and seeing it was clear, that his wadset was not extinct, but restricted, the pursuer behoved to condescend *in quantum*, and to prove it; *alliganti incumbit probatio*.

THE LORDS ordained and appointed Sir Robert's oath to be taken, before answer, on his having the account; and yet they found, that he ought to produce it; but the interlocutor was stopt the next day.

*Fol. Dic. v. 2. p. 81. Stair, v. 1. p. 305.*