

1676. February 8. SCRIMZEOUR against The EARL of NORTHESK.

GUTHRIE of Achmethie granted disposition to the Earl of Northesk of his lands of Achmethie, which by a back-bond was qualified to be for payment and relief of sums due to the Earl: But before infestment, umquhile Major Scrimzeour apprised the lands from Guthrie, and was thereupon infest, and obtained decret of mails and duties against the tenants; and being killed at Dunbar, the Earl of Northesk entered to possession, and obtained payment of the mails and duties from the tenants, without process of law. Margaret Scrimzeour being infest as heir to her father, did obtain reduction of the Earl's right, as being posterior to her father's right, and pursued the Earl for compt and reckoning of his intromissions, who *alleged* absolvitor for all years preceding the decret of reduction; because he enjoyed the rents as *bona fide* possessor, by virtue of his infestment of relief.—The pursuer *answered*, *imo*, That a *bona fide* possessor is only secure when he possesses as *dominus*, who may freely spend what he hath; but this infestment being for relief, and comptable, was in place of a stock, and cannot be presumed to be spent as rent. *2do*, *Bona fides* cannot be pretended, where the possession is vitious, *vi, clam, aut precario*; but the Earl's possession was vitious, interverting Scrimzeour's possession, who had obtained decreets against the tenants; and so was clandestine.—The defender *replied*, That he was not obliged to know Scrimzeour's right or possession; but being infest by the common author, he might warrantably demand the duties from the tenants; and if they voluntarily paid him, he might lawfully take up the same, and continue his possession till his *bona fides* should be interrupted, or his right reduced.

Which the LORDS sustained; and found that he might employ the rents uplifted before the decret of reduction; being comptable for the superplus.

*Stair, v. 2. p. 412.*

1676. December 14. The EARL of ARGYLE against The LORD MACDONALD.

THE Earl of Argyle having pursued the Lord Macdonald, for reduction of a feu holden of the pursuer *ob non solutum canonem*; it was *alleged*, That the defender had a disposition of the superiority from Locheal, before my Lord Argyle's right, by a disposition likewise from him: And though my Lord Argyle having completed his right before the pursuer, by an infestment upon the same, will have right to the feu-duties after his infestment; yet the defender had right to the bygonies by the foresaid disposition made to him; which, being of the lands, and superiority, and made to the vassal himself, was, upon the matter, an assignation to the feu-duties, and a discharge. And farther, That, as to the feu-duties after my Lord Argyle's right, he was *in bona fide* not to pay the same, having the foresaid disposition as said is: And my Lord Argyle having

No 30.

An infestment of relief was reduced, on account of a prior apprising; but the defender's possession was held to be *bona fide* until the decree of reduction.

No 31.

In the reduction of a feu *ob non solutum canonem*; found the defender was *in bona fide* not to pay; having the first disposition of the superiority from the common author, though the pursuer was first infest; the

No 31.  
pursuer ha-  
ving done  
nothing on  
his right to  
make inter-  
ruption.

done nothing upon his right to make interruption ; and therefore the summons ought not to be sustained upon cessation and not-payment, before intimation of the pursuer's right to the defender.—Both which allegiances the Lords found relevant.

In the same case, the Lord Macdonald having proponed an allegiance, viz. That my Lord Argyle was obliged, by bond, to warrant Lochal at the hands of the defender ; and of any pursuit competent upon the said disposition, made to the defender, *et quem de evictione tenet actio, agentem repellit exceptio* : And the same being found relevant, the defender giving his oath of calumny thereupon, the LORDS, in respect the defender being in town, had refused, at least had not come to give his oath of calumny, had decerned : But the Lord Macdonald having inteded reduction of that decret, upon offer to give his oath of calumny, upon pretence, that it was towards the end of the Session, when his oath of calumny was craved ; and that upon some occasions he had been forced to go home : It was *alleged* for the Earl of Argyle, That upon Macdonald's refusal to give his oath of calumny, it was, in construction of law, a calumnious allegiance, and could not now be received ; and the greatest favour could be shown to him, was, that he should be heard to verify the same *instante*. —THE LORDS did decern, superfeeding extracting until a day in January ; that, in the mean time, the defender might verify the said allegiance, having taken his path of calumny, that the writ was not in his own hand. See OATH, of Calumny.

A&. Lockhart & Bernie.

Alt. Cuninghame & Thoirs.

Fol. Dic. v. 1. p. 109. Dirleton, No 401. p. 197.

1712. November 26.

WILLIAM DOUGLAS, Chamberlain to the Duke of Roxburgh, *against*  
THOMAS CHATTO of Mainhouse.

No 32.  
An adjudica-  
tion, with a  
decreet of  
mails and  
duties, against  
a person, year  
and day at  
the horn, but  
before his life-  
rent escheat  
was gifted,  
sustained as a  
title of *bona*  
*fide* possession,  
till inter-  
pelled by  
a decreet of  
declarator.

In a process of special declarator, at the instance of William Douglas, as donatar of the life-rent escheat of Henry Main, by virtue of a gift from the Duke of Roxburgh superior, against Thomas Chatto, as possessor of some lands belonging to the rebel :—THE LORDS sustained an adjudication, with a decreet of mails and duties, obtained by the defender against the rebel, after the rebellion, but before the pursuer's gift, for a debt anterior to the rebellion, as a sufficient title of the defender's *bona fide* possession, till the same ceased by pronouncing of the decreet of general declarator of the life-rent escheat ; albeit the adjudger was neither infest, nor had charged the superior ; in respect a simple adjudication, with a decreet of mails and duties, is a sufficient title to possess and intro-mit with the rents.

Fol. Dic. v. 1. p. 109. Forbes, p. 635.

\* \* \* The remaining Sections of this Title are in Volume V.