

1636. *March 19.* LADY BORTHWICK *against* SIR MARK KER.

THE Lady Borthwick, being infeft, in conjunct-fee, in certain lands of the living of Borthwick, pursued her brother, Sir Mark Ker, for payment to her of the mails and duties of the same lands for divers years following the decease of her husband. The defender having alleged absolvitor, because he was infeft in the same lands publicly, holding of the king, and, by virtue thereof, in possession seventeen or eighteen years, upon a comprising led against her husband and herself too; the bond whereupon the comprising was led being granted by her as well as her husband;—this allegiance was repelled; whereupon the defender alleged again absolvitor from the years 1625 and 1626, because he brooked by virtue of his said infeftment, which he was *in bona fide* to do till he had been interrupted by a warning or citation; and so, *cum perceperit fructus illorum annorum, bona fide, et consumpserit*, he cannot be accountable for them to the pursuer. Replied, He cannot say *quod perceperit bona fide*, because he knew of the pursuer's right, and of the law—*Scientia rei alienæ inducit malam fidem, quantum ad fructuum acquisitionem attinet; atque ideo fructus quidem quos perceperit, vel consumpsit, postquam cognovit rem esse alienam, absolutè vel pleno jure suos non facit; sed interim duntaxat quamdiu res non evincitur: Nam, re evicta, restituendi sunt, aut existimatio eorum.* And, for this cause, the law makes this difference *inter dominii acquisitionem et fructuum acquisitionem: Ut usucapiam, sufficit ab initio bonam fidem habuisse; et, quamvis supervenerit mala fides, non interrumpitur: sed, ut fructus meos faciam et sim bonæ fidei possessor, continua bona fides esse debet; nec satis est initium cepisse a bona fide, sed in eo spectanda sunt singula momenta ut habetur; L. 23 § 1, l. 40; and l. 48, § 1, ff. de Acquir. Rer. Dom.* The Lords repelled the allegiance, in respect of the reply. Next alleged, It was not enough to say, that the defender knew of the pursuer's right, unless the pursuer would say, more, That the defender not only knew that the pursuer had a right, but that he knew it was a good valid right, that wanted neither confirmation nor any other solemnity of law: And sicklike, That he knew it was a better right than his-own, and would prevail against his right. The Lords found no necessity of this, but only to prove that the defender knew the pursuer to be infeft in conjunct-fee or liferent.

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1636. *March 19.* MARGARET SCOTT *against* WILLIAM ELLIOT of STOBBS.

MARGARET Scott, having comprised certain lands from Gavin Elliot of Burgh, charged William Elliot of Stobbs, superior thereof, to enter her. He suspended, and craved a year's duty. Answered, He can have no year's duty; because, the relict of umquhile Gavin Elliot, from whom the charger has comprised, being infeft in liferent in the same lands, has disponed her liferent to the suspender, by virtue whereof he is in possession thereof; and so, since the charger could have no benefit during the lifetime of the liferenter, albeit he were entered, the superior, who is in possession by virtue of the said liferent, can have no year's

duty in the mean time; but it must be superseded until the decease of the liferenter. Replied, The superior cannot be compelled to enter a stranger without a year's duty, as the Act of Parliament provides, which makes no exception; and it is not reasonable, because he has bought the liferent, that he should be defrauded of that which the law gives him, or have the payment of it suspended. The Lords found the answer to the reason of suspension relevant, and suspended the payment of the year's duty until the liferenter's decease.

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1636. *March 22.* The EARL of GALLOWAY *against* GORDONS of GRANGE and KILSTURE.

IN a double poinding, raised at the instance of some tenants, against the Earl of Galloway on the one part, and Gordons of Grange and Kilsture on the other; Alleged for the Earl, He should be answered and obeyed of the mails and duties, because he had comprised the lands *in anno* 1630, from the Laird of Sorbie, long before any right in the person of Grange and Kilsture. Replied for them, They should be answered, notwithstanding of the comprising, because they are infest in the same lands in April 1632, by disposition flowing from Sorbie for onerous causes; and, by virtue thereof, in possession for the space of two years and above; and the Earl's comprising cannot be respected, he neither being infest thereupon, nor having done any diligence against the superior to get himself infest; and so, the comprising being no real right, and they having obtained a real infestment for onerous causes, and possession conform thereto, ought to be preferred. The Earl duplied, His comprising, without infestment following thereupon, gave him right to the mails and duties; and that Sorbie, being denuded by the comprising, could not make any voluntary disposition in prejudice of the compriser. The Lords preferred them that were infest and in possession, in respect the compriser had done no diligence against the superior.

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1636. *July.* CAPTAIN PETER ROLLOCK *against* SIR WILLIAM STUART of GAIRNTILLY, &c.

THERE was a contract passed betwixt Sir Walter Rollock, and Sir William Ruthven of Banden, by which the said Sir William disposed certain lands to the said Sir Walter and his heirs. Captain Peter Rollock doth serve himself heir-general to the said Sir Walter, his father; and thereby, having right to the said contract, intented summons of improbation against Sir William Stuart of Gairntilly, and others, that pretended right to the said lands. Alleged against the pursuer's interest, He could not compel them to produce, as heir to his father; because they offered them to prove, that umquhile Andrew Rollock, elder brother to the pursuer, was served and retoured general heir to his said father, Sir Walter, whereby the right of the contract being established in his person, it behoved to pertain to his heirs, and not to his father's heirs; so that, unless the