

S E C T. VIII.

Mala Fides induced by Process, whether it will take place from Citation, Litis-contestation, or Decree.

1619. June 2. HUNTER against L. SANQUHAR.

A TACK of teinds quarrelled by reduction, as set by a person after he was deprived, the decret was declared by the LORDS to be (to take effect) *a tempore litiscontestation*.

No 33.

Fol. Dic. v. 1. p. 111. Haddington, MS. No 1878.

1617. March 4. SEATON against SEATON.

No 34.

IN a reduction of a tack of teinds, the Lords did not give it effect, from the time of the failzie, *sed a tempore lites motæ* only.

Fol. Dic. v. 1. p. 111. Hope, MS.

* * * See This case, *voce* TEINDS.

1666. January.

LORD JUSTICE CLERK against The FEUERS of COLDINGHAME.

THE Lord Justice Clerk and his predecessors being infeft in certain lands, together with the office of forrestery within the abbacy and lordship of Coldinghame, and in certain duties yearly, namely a threave of oats out of every husband land for the office, pursues a declarator of his right against his vassals and tenants, and for payment of the duties bygone, and in time coming. It was *alleged* by some of the vassals, That they ought to be assoilzied; because they and their predecessors were infeft by the Abbots of Coldinghame, lawfully confirmed, conform to the law, in their lands, free from any such burdens; whereas any infeftments granted to the pursuer or his predecessors, were either posterior to theirs, or if prior, they were not confirmed before the defenders predecessors their infeftments were confirmed. To which the pursuer *answered*, and opposed his predecessors infeftments clad with possession, at least whereupon he and his predecessors had, from time to time, used citations, and done diligence, against the vassals, so that his right was not prescribed: And there was no necessity to say, that his predecessors were confirmed, *imo*, Because the lands and office held, of old, ward of the Abbot, and there was no necessity of confirmation in

No 35.

The Lords refused to sustain process for bygone duties payable out of the defender's lands, where the pursuer had not been in possession, but kept his process in agitation for a great number of years. It was sustained only from the last wakening.

No 35.

ward holdings. *2do*, Though that they held feu, yet this being an office, no act appoints confirmation of offices, which, even without sasines, may be granted and transmitted; but only of feu lands.

THE LORDS found no necessity of confirmation upon both the grounds fore-saids, or either of them. *See WARD.—SASINE.*

In the same process, though there had been many summonses raised, as in *anno* 1600, 1621, 1627, &c. yet the Lords would not sustain process for any by-runs, but only since the wakening now insisted upon was last raised, which was only within these three or four years; in regard he nor his predecessors had never been in possession, at least since the intending of the said processes, and had never obtained any decret.

Fol. Dic. v. 1. p. 111. Gilmour, No 178. p. 128.

1672. February 23.

GRAY against WATSON.

No 36.

In a reduction of land rights, it appearing by the pursuer's reduction, that he was clearly preferable, the defender was found liable to account from the citation.

GRAY having an ancient infeftment of Barbanoch from the Lord Gray, but his father having died when he was young, his tutor possess; and his tutor also dying in his pupillarity, the tutor's wife continued in possession. In the meantime Watson, who had married her sister, takes a new original right from the master of Gray, and comes to possession by the consent of his wife's sister without process. Gray, who was minor, having entered heir to his grandsire, and being infeft, Watson compeared and excepted upon his infeftment, and alleged the benefit of a possessory judgment, being seven years in possession, which the Lords sustained; whereupon Gray raised a reduction, and did reduce Watson's right, as being long posterior to his right; and the question arising, whether Watson should be liable for the mails and duties from citation, *litis-contestation*, or sentence in the reduction: It was *alleged* for Gray, that the only ground that could free Watson from mails and duties, was, that he was *bona fide possessor cum titulo, & fecit fructus perceptos suos*: And whensoever that ground ceaseth, the duties are due to the reducer who hath right, which is sometimes found to be from the citation, *litis-contestation*, or sentence; but here it must be from the citation, because the pursuer's right was produced and shown to the defender in the former pursuit of mails and duties, whereunto he had nothing to object, but the benefit of a possessory judgment; so that he cannot be said only to doubt or hesitate of his right, but to know clearly that he had no right, although he was secure, till reduction was intended, by the privilege of a possessory judgment: And as his possession was not *bona fide*, so it was vitious and clandestine, neither attained by authority nor consent, but by the collusion of his good-sister the tutor's wife; and Watson having lived within two miles, could not be ignorant, that Gray's predecessors were reputed heritable possessors. It was *answered* for Watson, That Gray being but infeft as heir to his grandsire, and of a long