

ing the more ancient right; and it being in his option to ascribe his possession to any of the two rights he pleased.

The Lords did, notwithstanding, find, That he could only ascribe his possession to the decret *in anno* 1643; and that in respect that the first decret, *in anno* 1631, was never settled in his person by transferring, either at his own instance, or at the heirs of line, who were his authors: But, withal, the Lords declared, that the pursuer having forced the Earl to ascribe his possession to that decret, he should never be heard thereafter to quarrel the same by way of reduction or declarator.

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1670. July 14. GARDENER *against* The LADY LETHAM.

IN a spuilie, pursued at Gardener's instance against the lady,—It was ALLEGED Absolvitor; because the corns were lawfully poinded; and that, before any diligence done by the pursuer, the defender had arrested the corns upon the ground. It was REPLIED, That, before the defender did poind, the pursuer had poinded upon his letters, and was in possession of the corns.

The Lords did repel the defence, in respect of the reply; and found, That a naked arrestment could not hinder another creditor to poind; and that the corns, being poinded, were not affected with the prior arrestments, albeit it be a real diligence.

This interlocutor was indeed conform to prior decisions; yet there appears to be much reason against it, in respect that real diligences affect singular successors.

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1670. July 19. SCOTT, Bailie of Aberdeen, *against* THOMAS BOYES.

BAILIE Scott being heritor of a tenement in Aberdeen, whereof Margaret Forbes was liferenter; the said Margaret did assign her liferent to Robert Smith, bearing in satisfaction of 400 merks paid to her; as likewise upon a backbond to reponer her to the possession, how soon the said Robert should be satisfied of the said sum: Which assignation being transferred to Thomas Boyes, the said Thomas disposes his right in favours of Scott the heritor, who did pay him the said 400 merks, and 70 merks beside: Which translation Boyes did oblige himself to warrant from his own, and the facts and deeds of Smith the cedent; as likewise became obliged to refund the said 400 merks, at the first term after Scott should be distressed. Thereafter, Margaret Forbes, the liferenter, having distressed Scott, and recovered decret against him, for three years' possession, Scott did pursue Boyes for warrandice of his translation, upon these two grounds:—*First*, That, in the translation made by Boyes, he was obliged for Smith, his author's fact and deed: but so it is, that the ground of his distress was a backbond granted by Smith, which was not mentioned in the translation made by Boyes to Scott, but was concealed.

The Lords did assoilyie from that reason : because, albeit there had been no backbond, the assignation made by the liferenter, and transferred by the defender to the pursuer, bearing only in satisfaction of 400 merks, was *per se* sufficient, without a back-bond, to qualify Scott's right ; so that he ought to have looked upon it as that, upon satisfaction of 400 merks, by intromission or otherwise, it might be extinguished, whether there had been a back-bond granted or not. The second reason of the pursuit was,—That Scott was only obliged to refund the 470 merks at the first term after distress ; and therefore ought to refund to him his three years' possession, which he was forced to pay to the liferenter ; especially, he having advanced a greater sum than that which was paid to the liferenter, or was contained in Boyes's right.

The Lords did likewise assoilyie, notwithstanding of that ground ; in respect that Boyes had expressly transferred such a right only, as he himself had from Smith, which was only taxative, and not absolute : And found, That Scott being secured for repayment in case of distress, that the warrandice could not be interpreted to extend as to the preceding years of his possession, it being against reason and the meaning of parties that he might possess the whole years that the liferenter lived, and yet repeat the sums of money paid by him. But they found that Scott's possession, for the space of three years, should diminish yearly so much of the principal sum ; and for the superplus, they did decern the defender to refund the same, with the ordinary annualrents.

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1670. July 20. The LAIRD OF BLACKBARONY *against* JOHN BORROWMAN.

IN a reduction of the disposition of the lands of Nether Stewartoun, made to Borrowman, by Burnet of Carlops, whose author was Burnet of Cringlety, at the instance of the Laird of Blackbarony, who had right to an inhibition from Dennistoun, a creditor of Cringlety ; whereupon he craved the foresaid right to be reduced *ex capite inhibitionis* :

It was ANSWERED for the defender, That his disposition was in obedience of a decreet arbitral, following upon a submission prior to the inhibition ; at least to the publication thereof at the market cross.

It was REPLIED, That the submission being voluntary, and the inhibition executed personally against Cringlety, prior thereto ; and being executed publicly before the decreet-arbitral, which was the cause of the disposition, it was a just ground whereupon to reduce the right.

The Lords did ordain the defender to instruct the cause of the submission betwixt Cringlety and Carlops, that they might know if it depended upon any real right of trust, whereby Cringlety was obliged to denude himself of the right of these lands in favours of Carlops ; *quo casu* they declared that they would assoilyie from the reason of reduction : But if the submission was not in contemplation of any such right, but was merely personal and arbitrary, they would sustain this pursuit.

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