

in no worse state, than if the translation to her had not been made ; whereas, had she paid money for it, her case had been that of one *certans de damno evitanda*.

No 47.

*Replied* to the objection, That Margaret Ferguson purchased only a personal right, without infesting her author. It can make no difference, that she took infestment directly herself without infesting her author ; for since the principle is, that backbonds do not qualify infestments, though she purchased what might truly be a qualified right, yet, so soon as she took infestment, no matter whether in her author's name, or her own, the right behaved to become thereby absolute. And, were this otherwise, there could be no conveyance of land-rights without every successor being infest, which yet are very frequent ; for, if it should happen in the longest series, that any one disponent was not infest, this would lay an embargo upon the subject, and effectually exempt it from commerce for the course of the long prescription ; no body being sure that the right was not extinguished in the person of him that was never infest, so as not to be capable thereafter of being conveyed. And in this view perhaps there would not be found many secure purchases in Scotland, which therefore would draw the registers to have a very limited effect.

“ THE LORDS found, That the backbond granted by William Baird to Knockdolian, was not effectual in prejudice of the said Margaret Ferguson her infestment, she being a *bona fide* purchaser for an equivalent onerous cause ; and therefore preferred the said Margaret Ferguson.”

*Fol. Dic. v. 2. p. 65. Dalrymple, No 151. p. 207.*

1743. December 13. GORDON against GRANT.

GORDON of Craig granted to — of Tillyfour a disposition of certain lands, containing absolute warrandice, and receipt of the price ; and Tillyfour executed an obligation, narrating, That he had detained 1000 merks, in satisfaction of a real incumbrance due to one Farquharson. Tillyfour disposed the lands to Grant of Rothmaise with absolute warrandice, and further assigned the warrandice in Craig's disposition. It appeared, that Rothmaise had retained the 1000 merks, though Tillyfour had some time after the sale granted a discharge of the price. As this incumbrance never was purged, Craig, whose separate lands were bound in warrandice, brought an action both against Tillyfour and Rothmaise for payment of the 1000 merks. THE LORDS found, That the action was not competent to Craig against Rothmaise, reserving to Craig his defences, if pursued for Farquharson's debt. See APPENDIX.

No 48.

*Fol. Dic. v. 4. p. 66.*