

liferentrix, of her own consent, will be content to remove and enter the pursuer to the possession.

To which it was TRIPLIED, That the liferent right made to the relict, in implement of her contract of marriage, is opposed: which was a sufficient title whereby she might possess; and, conform thereto, was in possession. And there is no necessity that the pursuer should derive a right from the liferentrix; having a better right in his own person; and whereupon he hath reduced the liferentrix's right. And, as to any condition contained in Diringtoun's right, in favours of Janet Home, fiar, the pursuer cannot be burdened therewith; because it is evident that the said condition does not affect the reservation of liferent in favours of the relict, of fee in favours of Home of Diringtoun. And the pursuer makes no farther use of the disposition in favours of Diringtoun, but only to evince, that, by the reservation of liferent therein contained, the relict had a sufficient right, thereby, to possess his said lands; and which being now reduced at the instance of the said pursuer, upon a right standing in his own person, he has thereby sufficient interest to enter to the possession of the said lauds during the liferentrix her lifetime, and to insist in the removing against her and her tenants. And so the liferentrix, having a right in her person, which would have excluded the apparent heir from possession, and the said right of liferent being now reduced at the pursuer's instance, she cannot recover to clothe her possession with a tolerance from the apparent heir, in prejudice of this pursuer; for *vinco vincentem, te ergo vinco*.

It was farther alleged by the liferentrix, That her possession is the apparent heir's possession; and so the apparent heir, having possessed the land by her by the space of seven years, she must have the benefit of a possessory judgment; and the mother cannot be removed till the apparent heir's right be reduced.

The Lords repelled the whole defences proponed for the liferentrix and the minor, and decerned in the removing.—*Partibus ut supra*.

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1665. July 15. The LAIRD of AYTOUN against The EARL of DUNDEE.

THE Laird of Aytoun, as having right, by assignation from the donatar, to the escheat of the Laird of Craig, pursues a special declarator against the Earl of Dundee; for the duties of the lands pertaining to the deceased Laird of Craig, for crop 1663; and for corn, cattle, goods, and gear, which were upon the mains of Craig, that was in the Laird's own labouring; all which was intromitted with by the Earl of Dundee.

The Earl having EXCEPTED, upon a disposition of the moveables, by virtue whereof he had intromitted, and so were *fructus bona fide percepti et consumpti*;—

And it being REPLIED by Aytoun, That the disposition was for the Laird of Craig's own behoof; and so being simulate, the allegiance ought to be repelled; the simulation being evident by the rebel's own possession: likeas, by Act 145, P. 12, King James VI, all such rights and dispositions made by rebels to their nearest friends, *retenta possessione*, are null, and cannot be obtruded against the donatar.

The Lords repelled the allegiance, in respect of the libel and reply; and assigned a day to prove.

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