

No 26.

seeing, where no right is shown, the possession is presumed to be merely precarious and by tolerance. *Replied*, The Duke had right, not only by the gift of forfeiture, but also as come in Bailie Robert Fowles's place, who had apprised the estate of Huntly, the right whereof the Duke had acquired. *Duplied*, As to the voluntary right from Robert Fowles, offered to prove it paid by intromission after his acquisition, conform to the act of Parliament 1661, declaring it so redeemable; and as to the forfeiture, by the laws then standing in 1655, when the wadset was granted, it was expressly declared, that no forfeitures should prejudice either creditors or vassals; and though these acts of Parliament, from the year 1640 till 1660, are rescinded, by the great rescissory act in 1661, yet there is an express *salvo* and reservation in the end of that act of the rights of private parties, and so cannot be extended to cut off Innes's wadset; likeas the same is renewed again by the act of Parliament in 1690.— Yet that act has no retrospect to by-gones. *3tio*, The Marquis of Argyle's forfeiture is plainly null, the minutes not being signed by the Chancellor or President of the Parliament; and though the reductions of dooms of forfeitures past in Parliament can be no where tabled but there, yet when the Duke subjects his gift of forfeiture to the Lords, by founding on it, they may cognosce on its nullities, as they did on a decret of the commission of Parliament in favours of a minister, 16th January 1663, Earl of Roxburgh, No 62. p. 7328.; at least, it was *urged* that the reduction of the forfeiture might be summarily remitted to the Parliament. But the Lords resolved first to hear how far the *salvo*, in the rescissory act 1661, extended, ere they would enter on the consideration, whether they would remit the reduction of the Marquis of Argyle's forfeiture to the Parliament, yea or no.

The time of the reasoning of this cause, the Duke being at the bar, he claimed the privilege of entering within the bar of the Inner-house while his cause was under debate, and instanced that it had been so granted to the Duke of Hamilton. All being removed till the Lords might advise and deliberate on the Duke's desire, they found, that, by a printed act of sederunt, 16th December 1686, all were secluded from coming within the bar while the Lords were in judgment; and the Lords having sent one of their number to acquaint the Duke with their resolution, his Grace acquiesced therein; and any who had entered before, it was by connivance, or their contingency to the Blood Royal,

Fol. Dic. v. 2. p. 89. Fountainball, v. 2. p. 93.

S E C T. V.

In what Subjects Possessory Judgment takes place.

1627. *March 15.* EARL OF GALLOWAY *against* TAILFER.

No 27.

IN a removing pursued by the Earl of Galloway against Tailfer; *excepted*, That he had a rental for him and his heirs of the same lands. *Replied*, He offer-

ed him to prove that another was rentalled therein before him, who had transferred his right in the pursuer's person. *Duplied*, That ought to be repelled, in respect of his rental, by virtue whereof he had been in possession for twenty or thirty years. THE LORDS sustained the exception upon a rental cloathed with possession, as if it had been an infeftment.

Fol. Dic. v. 2. p. 90. Spottiswood, (REMOVING.) p. 280.

No 27.

1628. July 26. L. WARDIS against L. DINKINTIE.

THE L. of Wardis pursues the L. Dinkintie for the astricted multures of his lands, in the which multures Wardis was infest, and the defender proponing a nullity against the pursuer's infeftment, the same being of lands of the abbacy Lindores, since the annexation whereof to the crown there was no dissolution made before the pursuer's infeftment, without which had preceded, the pursuer's infeftment could not be found valid, the same being granted since the annexation; this nullity of not dissolution, was not received against this infeftment *hoc ordine*, because it was offered to be proved, that the same was clad with real possession these 15 years bygone, and because there were three infeftments standing in the persons of three of the pursuers authors, which the LORDS found could not be taken away so summarily by exception in this judgment, tending to continue a possession, and not to acquire a new possession, but they reserved action upon that nullity to the excipient, as accords.

No 28.

Act. ——— *St Davidson.*

Alt. *Advocatus.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 90. Durie, p. 394.

1628, November 19. LOCH against LOCKIE.

SOME tenants of a tenement under the castle wall of Edinburgh, raised a double poinding against Robert Loch and Laurence Lockie, by whom they were doubly distressed for payment of their mails and duties. Loch *alleged*, That he was infest in an annualrent of L. 4 out of the tenement, and by virtue thereof ten years in possession, by obtaining of a decret of poinding of the ground against the heritor and tenants, and by poinding for the same annualrent, and uplifting thereof. Lockie *alleged*, That he was heritably infest in the property of the said tenement, by a precept of *clare constat*, given by my Lord Haddington to him, who is superior of the same, as being temple lands; and as to the infeftment of annualrent and the possession foresaid, no respect should be had thereto, because it was null of the law, being an infeftment of annualrent out of a temple-tenement, to be holden in burgage of the King, by resignation in the provost's and bailies' hands, which could not be, the Lord Torphichin being superior thereof. THE LORDS sustained the allegiance for Loch, cloathed with ten years possession.

Fol. Dic. v. 2. p. 90. Spottiswood, (MAILS and DUTIES.) p. 201.

No 29.
An infeftment of annualrent, cloathed with 7 years possession, has the benefit of a possessory judgment.