

No 2.
dens, and
preferable to
any real
rights acquir-
ed to the
lands preced-
ing the evic-
tion.

permutation are evicted, conform to the proportion of the eviction, in which the party distrest hath recourse to his own lands given in excambion for the other *pro tanto*; in which recourse he is preferred to all other persons who have either comprised the lands, and thereupon are infest therein, or who have acquired any other real right thereof from him, who received the same in excambion, albeit these rights precede the eviction from the other party who exchanged; and this follows of its own nature in contracts of excambion, which of themselves are real, albeit that no other real security provided such recourse to the parties, but the first contract bearing the excambion, which, to produce that effect, are not respected as personal securities, but are real, as said is, and give the right of the prelation to the excambers, before all other parties thereafter acquiring right to these lands from any of the parties. This was so found in this process, albeit the charter and sasine which followed in that matter, upon the contract of excambion, be an express clause provided to either party, their recourse in case of eviction; yet the LORDS were all of that mind, that albeit there had been no more but the contract, it would have produced the same effect without the said clause.

Fol. Dic. v. 1. p. 258. Durie, p. 83.

1629. July 14.

L. WARDS *against* L. BALCOMIE.

No 3.
In an excam-
bion of lands,
though regress
upon e-
viction was
stipulated to
the granter
only, and his
heirs, yet the
lands being
evicted from
a singular
successor, he
was found to
have regress
against the
excambied
lands.

THE Laird of Wards's predecessor having received a charter, under the Great Seal, from King James the Fifth, of the lands of Wards, which charter reported, that the same were granted in excambion of the lands of Balcomie, pertaining heritably of before, and then to the Laird of Wards, and which were then resigned by Wards in his Majesty's hands for the saids other lands therein designed, in the which charter the King had granted expressly to the Laird of Wards a regress, and his heirs (not mentioning to his assignees and successors) in and to the lands of Balcomie, in case of eviction of the lands of Wards, disposed by the King to him, and that notwithstanding of any disposition to be made to any person thereafter of the lands of Balcomie; and the lands of Wards being evicted from the Laird of Wards by the Earl of Marr, upon that eviction, Wards seeking again decret against the Laird of Balcomie upon the said charter of excambion, who was heritable proprietor of the saids lands by disposition made to his predecessors thereof by Erskine of Pittodrie, who, after the excambion, had obtained the right of the saids lands from the King. It was found, that the pursuer had good right to pursue this action, and to claim the benefit of the excambion and regress, albeit he was only a singular successor in the lands of Wards to him who excambied, and albeit he was not heir to him, although the provision of the regress, contained in the charter of excambion, was introduced only in favours of the Laird of Wards and his heirs, and which

clause was found to extend to his successors in that right ; also it was found, that the pursuer needed not to cite to this action the Laird of Balcomies' author of his right, who acquired the right from the King by the public infestment, the King's Majesty, and his Officers representing the King, with whom he excambed, and the Laird of Balcomie who was heritable proprietor by public infestment, and possessor of the lands, being summoned, which was found enough in a process of this nature ; also it was found, that the pursuer needed not to show where any of his predecessors to him, or himself, who is alleged to have excambed with the King, was infest in the land before the excambion, as the defender alleged, ought to be qualified before the pursuit could be sustained ; which was repelled, and the charter proverting the same was found sufficient to qualify the same, albeit the party alleged, that such narrations ought not to be respected as true, except the same could be made good otherways, specially against the excipient, who, or his author, was infest in the saids lands originally by the King's Majesty, in whose person the right to all the lands in the kingdom is presupponed to consist *plenarie*, without relation to any excambion ; notwithstanding whereof this charter so proverting was sustained, without necessity to show any other right preceding, seeing it might be presumed, that all the excamber's rights were delivered to the King's Officers, or, to such others, who thereafter acquired right from the King at the time of the excambion, especially after so long time since the excambion, *ubi præsumitur, omnia bona fide fuisse gesta*, and it was not probable that the King's Officers would have prevaricated, and walked so unfaithfully as to have ascribed the cause of the infestment to an excambion, if it had not been so, where there was no necessity so to do, seeing the King might have otherways disposed of the lands at his own pleasure.

Act. *Nicolson.*Act. *Stuart.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 258. Durie, p. 461.**See APPENDIX.*