

1636. *March 19.* LADY BORTHWICK *against* SIR MARK KER.

THE Lady Borthwick, being infeft, in conjunct-fee, in certain lands of the living of Borthwick, pursued her brother, Sir Mark Ker, for payment to her of the mails and duties of the same lands for divers years following the decease of her husband. The defender having alleged absolvitor, because he was infeft in the same lands publicly, holding of the king, and, by virtue thereof, in possession seventeen or eighteen years, upon a comprising led against her husband and herself too; the bond whereupon the comprising was led being granted by her as well as her husband;—this allegiance was repelled; whereupon the defender alleged again absolvitor from the years 1625 and 1626, because he brooked by virtue of his said infeftment, which he was *in bona fide* to do till he had been interrupted by a warning or citation; and so, *cum perceperit fructus illorum annorum, bona fide, et consumpserit*, he cannot be accountable for them to the pursuer. Replied, He cannot say *quod perceperit bona fide*, because he knew of the pursuer's right, and of the law—*Scientia rei alienæ inducit malam fidem, quantum ad fructuum acquisitionem attinet; atque ideo fructus quidem quos perceperit, vel consumpsit, postquam cognovit rem esse alienam, absolutè vel pleno jure suos non facit; sed interim duntaxat quamdiu res non evincitur: Nam, re evicta, restituendi sunt, aut existimatio eorum.* And, for this cause, the law makes this difference *inter dominii acquisitionem et fructuum acquisitionem: Ut usucapiam, sufficit ab initio bonam fidem habuisse; et, quamvis supervenerit mala fides, non interrumpitur: sed, ut fructus meos faciam et sim bonæ fidei possessor, continua bona fides esse debet; nec satis est initium cepisse a bona fide, sed in eo spectanda sunt singula momenta ut habetur; L. 23 § 1, l. 40; and l. 48, § 1, ff. de Acquir. Rer. Dom.* The Lords repelled the allegiance, in respect of the reply. Next alleged, It was not enough to say, that the defender knew of the pursuer's right, unless the pursuer would say, more, That the defender not only knew that the pursuer had a right, but that he knew it was a good valid right, that wanted neither confirmation nor any other solemnity of law: And sicklike, That he knew it was a better right than his-own, and would prevail against his right. The Lords found no necessity of this, but only to prove that the defender knew the pursuer to be infeft in conjunct-fee or liferent.

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1636. *March 19.* MARGARET SCOTT *against* WILLIAM ELLIOT of STOBBS.

MARGARET Scott, having comprised certain lands from Gavin Elliot of Burgh, charged William Elliot of Stobbs, superior thereof, to enter her. He suspended, and craved a year's duty. Answered, He can have no year's duty; because, the relict of umquhile Gavin Elliot, from whom the charger has comprised, being infeft in liferent in the same lands, has disponed her liferent to the suspender, by virtue whereof he is in possession thereof; and so, since the charger could have no benefit during the lifetime of the liferenter, albeit he were entered, the superior, who is in possession by virtue of the said liferent, can have no year's