

No 31.  
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heir of Laurence Simpson for payment, it was *alleged*, that the contract was null, being only subscribed for the mother and her daughter by one notary, against the tenor of the act 80th, Parliament 1579. This allegiance was repelled, because it was a contract of marriage, whereupon marriage had followed, and that it was subscribed by Laurence Simpson's own hand, whose son is convened. And it being further *alleged*, that this assignation ought not to be sustained, being made only by the daughter, with consent of the father, to whom the right of the sum did only justly belong, and who cannot be denuded of his right so established in his person, except he had been formally denuded by an assignation thereof, principally made by himself; so that this assignation, which is only a naked consent, cannot be found *habilis modus* to transmit the full right to the assignee, specially where the father is now dead; this allegiance was repelled, seeing no party having interest to propone this allegiance did oppose the same, and it was not competent to the debtor to propone it; but the LORDS ordained the pursuer to find caution to warrant the defender at all hands who might pretend interest to the sum libelled.

*Fol. Dic. v. 1. p. 518. Durie, p. 832.*

1662. July 18. LORD FRAZER *against* LAIRD OF PHILLORTH.

No 32.  
In a declara-  
tor of proper-  
ty, the de-  
fender pre-  
tending no  
right in his  
person, was  
not allowed  
to object to  
the pursuer's  
title.

THE Lord Frazer pursues declarator of property of the barony of Cairn-builg, against the Laird of Phillorth, as being infeft as heir to his father; who was infeft as heir to his grandfather; who was infeft upon the resignation of Frazer of Doors; and also upon the resignation of the Laird of Pitsligo, who was infeft upon an apprising led against Doors; and also as being infeft upon an apprising at the instance of one Henderson, led against Doors; and declared that he insisted *primo loco* upon the two first rights flowing from Doors and Pitsligo. The defender *alleged* absolvitor, because the defender, in an improbation against the pursuer and his father, obtained certification against Doors' sasine, so that it being now improved, all the rights libelled on, fall *in consequentiam*, because Doors is the common author to them all; and if he had no real right, all their rights are *a non habente potestatem*; so that now the pursuer has no more in his person, but a disposition made by Phillorth's grandfather to Doors, and a charter following thereupon, and is in the same case, as if Doors upon that ground were craving declarator of property, which he could not do, nor would the Lords sustain it, albeit there were no defender, because that can be no right of property where there is no sasine. The pursuer *answered, imo*, That the defender is no ways relevant, nor is the pursuer in the case of a declarator, upon a disposition or charter without a sasine, because he produces a progress of infeftments, and is not obliged *hoc ordine*, to dispute Doors his authors' rights as being *a non habente potestatem*, which is

only competent by way of reduction; some representing Doors his author being called. *2do*, The defence is no way competent to this defender, unless he allege upon a better right than the pursuer's; for the pursuer hath done all that is requisite to instruct his declarator, by production of his infeftments, and his author's rights are presumed, and need not be instructed; and albeit the defender be called, yet he cannot quarrel the pursuer's author's right, or hinder his declarator, unless he allege upon a more valid right in his own person. *3tio*, The defence ought to be repelled, as proponed by this defender, because he represents Frazer of Phillorth his grandfather, who disposed the lands in question to Doors, and was obliged to infeft him, and did *de facto* resign in the King's hands in his favour, and so *personali objectione*, umquhile Phillorth Door's author, would be for ever excluded from objecting against Door's right which flowed from him; so neither can the defender, who represents him, object against the pursuer, who is successor in Doors' rights. The defender *answered*, That being called, albeit he had no right in his person, he might propone a defence upon a nullity in the pursuer's right, viz. that it is *a non habente potestatem*, which is very competent here by exception, this declarator being *judicium petitorium*, wherein he may well repeat this defence, without necessity to call Doors; because Doors being called in the improbation, all infeftments in his person are improven for not production, and so the reason is instantly verified; and albeit he were successor to his grandfather, (which he denies) yet he may well allege that any right flowing from his grandfather is personal and incomplete, and can be no ground of declarator of property.

“ THE LORDS repelled the defences, and found it not competent to the defender to quarrel the pursuer's author's right, unless he had a better right.”

*Fol. Dic. v. I. p. 519. Stair, v. I. p. 128.*

1668. July 21.

JOHNSTON against ARNOT.

MR SAMUEL JOHNSTON having comprised certain lands belonging to John Arnot, and having assigned the Laird of Collington thereto to his own behoof, infeftment was taken in Collington's name; after which, Mary Arnot, daughter to the said John, having comprised a part of the said lands, and having been many years in possession, James Johnston, son to the said Mr Samuel, being infeft upon Collington's resignation, and pursuing a reduction of the said Mary's comprising, it being *a non habente potestatem*, the father being denuded by the first comprising; there was likewise a reduction raised at the said Mary's instance, of the foresaid comprising, and infeftment following thereupon, which was repeated, by way of defence, against the pursuer's title upon two reasons; *First*, That the infeftment, taken in the name of Collington, was null, being without any warrant, the assignation and disposition made by Mr

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In a competition between two appraisers, it was objected by the one, that the other, being an assignee, produced no assignation. This plea found not *justitii*.