

1669. February 13. GILBERT M'LELLAN *against* LADY KIRKCUDBRIGHT.

No 48.

Possessory
judgment
runs not a-
gainst non
valentem agere.

GILBERT M'LELLAN being infeft by the Lord Kirkcudbright in an annualrent effeiring to 4000 merks out of the lands of Auchinflour, thereafter my Lady was infeft in property, or an annualrent out of the lands, at her pleasure, for her liferent use; and after my Lady's infeftment, my Lord gave a corroborative security of the property of Auchinflour, and stated the 4000 merks of principal, and the 2500 merks of annualrent in one principal, and infeft him thereupon in property, wherein Gilbert was many years in possession before my Lord's death: In the competition betwixt my Lady and him, he craved preference, because he was seven years in possession; *2dly*, Because his first right of annualrent still stands, and was corroborated; and therefore, as he would undoubtedly have been preferred to my Lady for all his annualrents, for the sum of 4000 merks by his first infeftment, which is prior to my Lady's, and as an apprising by poinding of the ground for these annualrents, though posterior to my Lady's infeftment, would be drawn back *ad suam causam* to his infeftment of annualrent, and be preferred; so my Lord having voluntarily granted this corroborative security to prevent an apprising, it should work the same effect as if an apprising had been then led, and an infeftment thereupon, which would have accumulated the annualrents then past, and made them bear annualrent in the same manner as this corroborative security does.

THE LORDS preferred Gilbert for the whole annualrents of his 4000 merks, conform to his first infeftment; but would not sustain the corroborative security, being posterior to my Lady's infeftment, as if it had been upon an apprising, to give him annualrent for 2500 merks then accumulated; but found no moment in his allegiance of the possessory judgment, unless it had been seven years after my Lord's death, when my Lady might have preferred her right, and not *contra non valentem agere*.

Fol. Dic. v. 2. p. 91. Stair, v. 1. p. 604.

*** See Gosford's report of this case, *voce* QUOD POTUIT NON FECIT.

1673. December 17.

HADDEN *against* MOIR.

No 49.

There is no
benefit of a
possessory
judgment a-
gainst *debita*
fundi.

PATRICK HADDEN pursues the Tenants of the estate of Glenegies, for mails and duties. It was *alleged* for John Moir, Absolvitor, because he brooks by a wadset from Glenegies, by virtue whereof he had been in peaceable possession more than seven years; and albeit the pursuer be infeft on an apprising anterior to his wadset, the defender having the benefit of a possessory judgment, is secure till reduction. *2do*, He is secure even as to the point of right in a re-