

are restored to all rights and possessions they had *in anno* 1637, when they were expelled: so that the heritors are liable to the dean of St Andrew's; and the minister must apply himself to the commission for a new locality. It was answered, That, albeit the Act of Restitution would exclude the minister's interest as to the tack-duty due to the dean, yet that Act cannot be extended to the benefit of a possessory judgment, or *decennalis* or *triennalis possessor*, attained by the minister after the Act of Parliament; so that he, having bruiked seven, ten, or more years after the Act of Restitution, by virtue of his presentation and decret of locality, he is preferable *in hoc judicio possessorio*, till, *in petitorio*, the dean reduce the minister's right, or declare his own: and here the Dean concurs, and alleges, There is sufficient free teind in the parish, both to give the dean his full tack-duty, and likewise the minister his whole stipend. The Lords found the allegiance for the minister, of seven years since the restitution, relevant *in possessorio*; but did not prefer both the dean and minister, upon sufficiency of teind, which is only competent to the commission for plantations.

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1675. *February* 18. JOHN DAIKELL *against* DAVID HUME.

JOHN Daikell, merchant in London, having charged David Hume for payment of £20 sterling, due to him by bond, granted by the late Earl of Hume, as principal, and him as cautioner, whereupon he had obtained decret of suspension; the said David suspended, the second time, on this reason,—That this bond being granted in England, to a merchant there, the Earl of Hume was incarcerated, or arrested in prison, upon this very bond; and, before he was liberated, (being under the guard of his keeper,) he died: and, by the law of England, the principal debtor so dying in prison extinguisheth the debt, and there can be no farther satisfaction thereof. It was answered, That the decret of suspension *in foro* is opposed, wherein this was proponed and repelled; and so is not now receivable. It was replied, That the decret bears it was repelled, in respect it was not eiked nor libelled; yet, upon consigning of £12, the same was receivable; and, *medio tempore*, it was unwarrantably extracted shortly thereafter. The Lords reponed the suspender, upon consignment of the £12, and paying the expenses of the decret of suspension; and sustained the reason of suspension, to be proven by the judgment of the Judges of the Common Pleas in England, by the mouth of the Chief Justice.

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1675. *February* 23. The MARQUIS of DOUGLAS *against* WILLIAM SOMERVEL.

THIS cause being debated upon the 23d day of December last, the Marquis further insisted, upon this ground:—That William Somervel could not defend himself with the rental of the lands in question; because, after the rental, his father had taken a feu-right of the same lands, in favours of his son, to whom he had formerly procured the rental: which feu, as being a more noble and incom-

patible right, did absorb and extinguish the rental; and which feu, being delivered up to the marquis, and past from,—all right in that feuar's person is thereby extinct. It was answered, That, albeit a rental and a feu cannot both have effect at the same time, yet they may consist as cumulative securities,—the one, failing the other, to subsist; so that the possessor may defend himself with either; and, if either should be reduced, the other would remain as the effectual right: and, therefore, the giving up, or renouncing the feu, to the marquis, doth only evacuate the same, but doth not take away the rental, which was anterior thereto; and no renunciation can be further extended than to what is expressed, unless it were for an equivalent onerous cause, with absolute warrandice. It was replied for the pursuer, That the giving up of the evidents of the feu by the father, who acquired both rights for his son, an infant, and for onerous causes, doth import absolute warrandice; and must be presumed to renounce all rights, unless the rental had been expressly reserved. The Lords ordained the pursuer to condescend how and when the evidents of feu were delivered up; and to examine the comuners and witnesses thereanent, that it might appear *quid ageretur*; whether to quit all right, or only the feu-right.

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1675. February 23.

NASMITH *against* SMITH.

NASMITH pursues Smith, as behaving as heir to his brother by intromission with the rents of the lands wherein his brother died infest, for payment of a debt of his brother. The defender alleged Absolvitor, because his brother was never lawfully infest; in so far as he was infest by the usurpers, in place of the Duchess of Hamiltoun, being then forefault; whereas the true superior was Colonel Inglisbie, by a gift from the usurpers; and all these being void after the king's return, the defender infest himself as heir to his father, and so did not represent his brother. The pursuer answered, That the defender, having entered in possession after his brother's death, did enter in his brother's possession; which he could not introvert, though there had been defects in his brother's infestment; who, having been publicly infest, and in possession, and, upon the confidence thereof, having contracted debts with several creditors, the defender could not summarily pass by his brother's right and enter as heir to his father; but ought first to have raised reduction or declarator of the nullity of his brother's infestment, and called his creditors thereto; for, if such courses be sustained, it lays a patent way to deceive all creditors contracting *bona fide* with the fiar for the time, by entering to a former predecessor, and abstracting and quarrelling the last fiar's right. The defender replied, That behaving as heir is always with presumption of *animus immiscendi*; which cannot be in this case, for the defender shows he had no mind to meddle with his brother's heritage; and that he would not enter heir to him, but to his father. The Lords ordained the defence, as to Inglisbie's right of superiority, to be first proven; reserving to themselves,—if it should be proven how far the defender should be liable, in regard of his brother's infestment,—whether for the duties intromitted with by him, before his brother's right were found null, yea or not.

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