

1757. *January 28.* GARDEN *against* LINDSAY.

IN this case the Lords sustained a payment made by a tenant to his master, after he was cited by an adjudger in a process of maills and duties, and a decret taken against him in absence,—upon this principle, that a decret of maills and duties does not put an adjudger in possession, nor make him liable to account for the rents: nothing but actual uplifting of the rents can do that: and therefore if, after taking decret, he stands off, and does not charge, which was the case here, where the payment was not made till about fourteen months after the citation and eight months after the decret, the tenant may conclude that the adjudger does not mean to take possession, and therefore may pay safely to his master.

The Lords went unanimously into this opinion, which was moved by the President, though they acknowledged it was new to them. For the same reason, the President said that an assignation in security to any subject, though intimated by the assignee, would not make him liable to account, if he did not uplift.

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1757. *February 4.* PORTEOUS *against* BELL.

A WOMAN was heir of an estate, of which the superiority was in her grandfather, and the property in her father, who had infeft himself base, upon a disposition from the grandfather. She made up her titles by service to the grandfather, which carried the superiority; and she also served heir to her father, but she was not infeft upon a precept of *clare constat* from herself, so that the title to the property was not fully completed. Thereafter she died, and the question was, Whether her husband was entitled to the courtesy?

It was SAID,—That, having carried the nobler right, that swallowed up the baser right, like a man who gets a disposition, with procuratory and precept, and first infefts himself base upon the precept, then resigns the lands, and is infeft holding of the superior: that infeftment will swallow up the first one; so that there will not be two rights in his person to the subject. But the Lords did not think the cases parallel, in respect that here the last right was not completed, and therefore could not be said to be vested in the person of the lady, but remained in *hereditate jacente* of the father; whereas, in the case put, both rights are completed, and there is nothing wanted to extinguish the base right but a renunciation *ad remanentiam* in the person's own hands, which the law does not think necessary. The Lords therefore decided the cause in favour of the husband upon another point, namely *bona fides*, with which he had possessed these lands, as having right to the courtesy, for several years without any challenge; and this notwithstanding there were other claims in his person against the estate, to the extinction of which, it was said, the rents he had uplifted ought to be applied.