

No 5.

that Lurgiecraig was a part of Newthorn. It was *duplied*, That this was competent the time of litisecontestation; and the defender has fully proved, that Lurgiecraig has been possessed past memory by the heritors and tenants of Purdie's-Mill, as a part and pertinent thereof.

THE LORDS having considered the depositions, and having found that they fully proved the possession as a part and pertinent past forty years, they assoilzied the defender *ab hoc judicio possessorio*; and yet, in respect of the reply, omitted *bona fide*, which the Lords thought not fit now to discuss *post conclusionem in causa*, they reserved action of declarator of property to the pursuer, and the defender's defences against the same, as accords; and if the pursuer pleased, gave him liberty to turn his removing into a declarator.

*Gilmour, No 23. p. 18.*

1664. December 7.

No 6.

Lady CRAIG, and GREENHEAD Her Husband, *against* Lord LUIRE.

A possessory judgment not competent to a wife by her husband's possession against another deriving right from him.

THE Lady Craig being infest in liferent, pursues her tenants. Compearance is made for the Lord Luire, who apprised the lands of her husband, and *alleges* that he ought to be preferred, because he stands publicly infest, and any right the Lady has is but base, holden of her husband; and before she attained possession he was publicly infest. It was *answered* for the Lady, That her husband's possession is her possession, and so her infestment was clad with possession from the date thereof. It was *answered*, That that holds only in the case of an infestment to a wife upon her contract of marriage; but this was but an additional gratuitous infestment *stante matrimonio*, she being competently provided before by her contract.

In which case, such provisions cannot prejudice lawful creditors, neither can the husband's possession give the benefit of a possessory judgment to the wife, unless she had possessed seven years after his death.

THE LORDS found, That such infestments as these, being gratuitous and voluntary, could not be prejudicial to the husband's creditors, nor give the wife a possessory judgment; and the case here being with a creditor of the husband, they did not proceed further to consider, and determine if the husband's possession in such a case would not validate the base right as to any acquired right thereafter.

*Stair, v. 1. p. 235.*

No 7.

Forfeiture and five years possession were not found relevant to give the benefit of a possessory judgment, by exception or reply, without a retour by an inquest.

1666. June 13.

Sir HENRY HOME *against* TENANTS of KELLO and Sir ALEXANDER HOME.

JOHN HOME younger of Kello being forfeited in the Parliament 1661, for being with the English army against the King's army at Worcester 1651, Sir Alexander Home obtained gift of the forfeitry and thereupon came in possession. Sir Henry Home having apprised the lands of Kello from the said John Home and his father Alexander Home upon their bond, and having charged the superior in