testation, John Rollane writer compears for his interest and produces an apprising at his instance, with a charge against the superiors. It was *alleged* he could not be admitted in this state of the process. THE LORDS admitted him, in respect he craved no alteration to be in the litiscontestation, but concurred therein and craved preference to what should be found due thereby. The said John being admitted, *alleged*, He ought to be preferred, because he had charged the true immediate superior, whereas the other two apprisers had taken infeftment, as if the lands had holden immediately of the King. It was *answered* for James Hamilton, That he ought to be preferred, because he was infeft long before John Rollane, and supposing his infeftment were not of the immediate superior, yet being in possession by virtue thereof five or six years, he hath the benefit of a possessory judgment, and his infeftment cannot be taken away without reduction.

No 4.

THE LORDS preferred John Rollane, and granted not the benefit of a possessory judgment without seven years possession.

Fol. Dic. v. 2. p. 88. Stair, v. 1. p. 69.

1662. *January* 25. KER of Littledean *against* PRINGLE of Stitchel.

ANDREW KER of Littledean pursues a removing against Robert Pringle of Stitchel, from the lands of Lurgiecraig, as a part and pertinent of the lands of Newthorn. It was *excepted*, That the said lands were a part and pertinent of the the lands of Purdie's-Mill; and so bruiked by him, his authors and predecessors past memory; and which lands of Purdie's-Mill were acquired by a number of authors, who held the same of the house of Borthwick. This exception being admitted to probation, there were witnesses adduced, who proved, That the defender, his predecessors, and authors, had possessed the lands past forty years, as part and pertinent of Purdie's-Mill; but the infeftment produced by the defender, did not prove the lands to be holden of the Lord Borthwick, but of the Earl of Home. The time of the advising of the cause, it was *alleged* by the pursuer, That the allegeance was not proved, viz. that part thereof bearing, That the lands holds of the house of Borthwick. It was *answered*, That there was sufficient probation *ad victoriam causæ*; to wit, that the lands were possessed as part and pertinent of Purdie's-Mill; and it was superfluously alleged, and not profitable nor necessary to be proved, of whom holden. It was *replied*, That the pursuer finding the allegeance so strong, and knowing that he could not prove the samen as it was conceived, he suffered the same to be admitted to the defender's probation; whereas if it had been otherways, he would have taken him away with a reply, viz. that he would have offered him to have proved, That the defender's author, after that he was denuded of Purdie's-Mill, possessed Lurgiecraig as tenant to the heritor of Newthorn: That there is a muir proper to Newthorn, interjected betwixt it and Purdie's-Mill: That it lies in a several parish; and that the pursuer's author acknowledged under his hand,

No 5.
Possession as part and pertinent for 40 years being proved, the defender in a removing was assoilzied, and it was reserved to the pursuer to bring a declator of property.

No 5.

that Lurgiecraig was a part of Newthorn. It was *duplied*, That this was competent the time of litiscontestation; 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.*

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

No 6.

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

THE Lady Craig being infeft 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 infeft, and any right the Lady has is but base, holden of her husband; and before she attained possession he was publicly infeft. It was *answered* for the Lady, That her husband's possession is her possession, and so her infeftment was clad with possession from the date thereof. It was *answered*, That that holds only in the case of an infeftment to a wife upon her contract of marriage; but this was but an additional gratuitous infeftment *stante matrimonio*, she being competently provided before by her contract.

In which case, such provisions cannot prejudge 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 infeftments 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