

THE LORDS sustained the defence of a possessory judgment proponed for the Earl, reserving reduction, &c. as accords.

Act. Alex. Hay.

Alt. Ja. Graham, sen.

Clerk, Gibson.

Edgar, p. 86.

No 13.

SECT. II.

What sort of possession requisite.

1664. July 22.

MONTGOMERY against HOME.

WILLIAM MONTGOMERY pursues Alexander Home to remove, who *alleged*, Absolvitor, because he stands infest, and by virtue thereof in seven years possession, and so hath the benefit of a possessory judgment. It was *replied*, That, before any such possession, a decret of removing was obtained against the defender, which made him *mala fide* possessor. It was *duplicated*, That since that decret, which was in absence, the defender had possessed it seven years without interruption, which acquired the benefit of a new possessory judgment; and *alleges*, that an interruption of possession ceases by seven years, albeit in the point of right, it ceases not till forty.

THE LORDS found the interruption stands for forty years, and that no possession thereafter, upon that same ground, could give a new possessory judgment, the possession being interrupted, not only by citation, but by a decret of removing, which stated the other party in civil possession.

Fol. Dic. v. 2. p. 88. Stair, v. 1. p. 222.

No 14.

After decree of removing, which stated the pursuer in the civil possession, the defender continuing to possess seven years without interruption, was not found to have the benefit of a new possessory judgment.

1668. July 15. EARL of WINTON against GORDON of Letterfury.

THE Earl of Winton having apprised certain lands in the North, pursues for mails and duties. It was *alleged* for Gordon of Letterfury, That he stands infest in these lands; and, by virtue of that infestment, is seven years in possession, and thereby has the benefit of a possessory judgment, and must enjoy the mails and duties till his right be reduced. The pursuer *answered*, That he had intented process upon his right for mails and duties *anno* 1658, whereby the matter became litigious, and which stops the course of any possessory judgment till that citation expire, by the course of 40 years, in the same way as it is in removings or ejections, where summons once intented does not prescribe by three years thereafter, but lasts for 40 years. The defender *answered*, That the case is not alike; for the benefit of a possessory judgment is introduced for the security of persons infest, that they be not summarily put to dispute their authors rights, which are oft-times not in their hands, but in the hands of their authors or superiors; and there was never any reply sustained against the same, unless it were vitious or violent, or interrupted; but here the last seven years

No 15.

A possessory judgment sustained on an infestment on a voluntary disposition, against an appriser who had denounced the lands before that disposition.

Citation has not such an effect as decree had in the case above.

No 15.

possession, after that citation, is neither interrupted nor vitious; and these being no stop to take away the effect of that citation, it were of bad consequence, if persons infest 39 years after a citation behoved summarily to dispute their rights.

THE LORDS sustained the defence of the possessory judgment, upon seven years peaceable possession before the citation, and repelled the reply.

The pursuer further *replied*, That, in the seven years after the citation, there were some years wherein there was a surcease of justice, and no courts in Scotland; *2dly*, The citation was by his tutors and curators, and he was minor during the seven years. It was *answered*, That a possessory judgment was competent against minors, and there was no respect of minority therein, which is only excepted in the great prescription extinguishing the right; but in the possessory judgment, in relation to the way of process, and the fruits in the mean time, as in all prescriptions, *tempus continuum*, and not *tempus utile*, is respected.

THE LORDS also repelled both these replies, and, notwithstanding thereof, sustained the exception on the possessory judgment.

Fol. Dic. v. 2. p. 88. Stair, v. 1. p. 552.

* * * See Gosford's report of this case, Section 6th, *h. t.*

No 16.

Possessory judgment not competent, by obtaining decrees for seven years rent.

1672. January 25. HARPER against ARMOUR.

IN a competition betwixt Harper and Armour for mails and duties, the LORDS found, that civil possession, by obtaining two decreets for seven years rent, was not sufficient to give the benefit of a possessory judgment, which could only be effectual by the continuance of the possession seven years, either by labouring or lifting the duties, during that time.

Fol. Dic. v. 2. p. 89. Stair, v. 2. p. 55.

No 17.

Three years possession will not defend a singular successor against an action of intrusion, to make him liable for the ordinary duty, if his author's possession was *vi aut clam*.

1673. June 24. HUGH MAXWEL against ALEXANDER FERGUSON.

IN an action of intrusion pursued at the instance of the said Mr Hugh against Mr Alexander, as succeeding in the vice of his father, it being *alleged*, That the said action was prescribed, not being pursued within three years; and the defender ought to have the benefit of a possessory judgment, because that he offered to prove, that he stands infest in the lands of Isle, whereof the lands libelled are a part and pertinent. It was *replied*, That albeit the ejection may prescribe as to violent profits, and craving only retrocession, this pursuit ought to be sustained, and the defender cannot crave the benefit of a possessory judgment, because it is offered to be proved, that the pursuer and his authors, by virtue of their infestments of the saids lands, as a part of the barony of Dalswinton, were in peaceable possession of the saids lands, until the defender's father taking advantage at his own hand, without any process, did set down march-stones, and thereby included nine or ten acres of the pursuer's land,

There can be no benefit of