

spect of the answer made to the reply ; and ordained the defender to depone upon his having a discharge of the debt, and to exhibit the same, if it was in his possession, that the pursuer might advise if he would enter heir or not.

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1673. *January 14.* CAPTAIN ROSS *against* The EARL of NIDSDALE.

CAPTAIN ROSS being infest in the Castle of Dumfriece *in anno* 1654, and in possession till the year 1657, did pursue the Earl of Nidsdale for intrusion, and to repossess him, and for the violent profits.

It was ALLEGED for the Earl, That the said house being garrisoned, by order of the Council, with a party of the king's forces, upon their removal, he did enter to the possession, which was *vacua possessio* ; and he, standing infest in the house, was not obliged to repossess the pursuer, seeing he had a full and perfect right thereto, and was content instantly to debate his right with the pursuer, whose right did only flow from the deceased Earl of Nidsdale, who was denuded by comprising.

It was REPLIED, That the pursuer, not having voluntarily quit his possession, but only in obedience of a public order, he did retain the same until that impediment should be removed ; which was in law sufficient against any allegiance of *vacua possessio*.

The Lords did sustain the action for repossession ; and ordained, that, *ante omnia*, he should be restored to the possession, reserving to both parties to debate their rights as accords.

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1673. *January 15.* The LAIRD of ROWALLAN *against* The LORD BARGENIE.

IN a pursuit at Rowallan's instance, as assignee constituted by the Laird Pinkell, in and to a bond granted by the Lord Bargenie, for implement thereof:—

It was ALLEGED, That it was offered to be proven, by the pursuer's oath, that he was only intrusted to the behoof of Pinkell, who was denounced the king's rebel, and so had not *personam standi in judicio*.

It was REPLIED, That that allegiance was only personal ; and the right of the bond being standing in the person of the pursuer, the defence could not militate against him, unless they could allege that he was at the horn.

The Lords did repel the defence, in respect of the assignation standing : which may seem hard, seeing that the trust was offered to be proven by Rowallan's oath ; which being granted, he could only be looked upon as a procurator ; in which case the defence was relevant : otherways, it were easy to rebels to evite the punishment of the law, which chiefly consists in that they cannot have *personam standi in judicio*.

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