No 10.
not sustained to hinder the building of a new mill upon the astricted lands, in respect the thirlage was constituted with this express quality, that the same should cease upon the building of such a new mill.

ed his lands of Bemmerside to the said Mill till such time as there should be a mill built upon these lands; which was not to be done till after the death of the parties contractors; and all of them being now dead of a long time, Anthony Haigue present heritor of Bemmerside, and Zerobabel his son, proceeded lately to the building of a mill upon their ground, but were stopped by a suspension at the instance of Thomas Halyburton of Newmains present heritor of the Mill of Dryburgh.

At the calling whereof, compearance was made for Margaret Rutherford, the old Lady Newmains, and a liferent sasine produced, whereby she stood infeft in the mill of Dryburgh, and astricted multures and sequels thereof. Upon which it was contended that she being, by virtue of that infeftment, upwards of seven years in possession, had the benefit of a possessory judgment; and her possession could not be overturned summarily by building of a mill within the lands of Bemmerside, but the right of building should be declared *via ordinaria.*

Answered; A possessory judgment is a privilege competent only to proprietors of lands, that they may not be put summarily to produce their rights and debate their interests in possessory actions, and not competent to pretenders to servitudes; 2*do*, The astriction in the foresaid contract of marriage being constituted with that express quality, that the same should cease upon Bemmerside's building a mill within his own bounds, the liferenter could not enjoy the servitude but qualified as her authors had it, and therefore could not stop the building.

Replied; The Lady Newmains being seven years in possession upon an infeftment in the mill and thirlemultures, has *eo ipso* a possessory privilege; and the exception in the original constitution of the thirlage being never to this hour declared, it cannot be summarily applied *via facti* in prejudice of her right and possessory judgment.

THE LORDS found no possessory judgment in the person of the Lady, in respect of the clear quality of the right. *Forbes, p.* 24.

1713. *December* 8. Earl of MARCHMONT *against* JAMES HUME of Aitoun.

No 11.
Effect of connection of the possession of author and successor.

ALEXANDER HUME of Aitoun tailzied his estate of Aitoun to his daughter, Mrs Jean Hume Lady Kimmerghame, and the heirs of her body; which failing, to Mr Charles Hume, brother to the Earl of Hume, and the heirs-male of his body, &c.; with this express provision and irritancy, that in case the said Mr Charles Hume and the heirs of tailzie should succeed to the title and dignity of Earl of Hume, they should *eo ipso* lose all right to the estate of Aitoun, and the lands should fall to the next heir. Mr Charles, before Mrs Jean Hume's death, granted bond to the Laird of Kimmerghame her husband, for payment of certain sums, in case of his succession to the estate of Aitoun,

which happened thereafter by Mrs Jean's dying without children of her body; and Mr Charles was returned and infeft as heir to her in the said estate, for payment of the sums in the bond aforesaid. Kimmerghame led an adjudication against the estate of Aitoun after Mr Charles Hume's rights thereto was irritated and fallen, by assuming the title of Earl of Hume; upon which irritancy being declared, Mr James Hume, the said Earl's second son, was served and infeft as heir of tailzie to the said Mrs Jean Hume. No 11.

The Earl of Marchmont, who has right by progress to Kimmerghame's adjudication, pursued an action of mails and duties against the tenants of Aitoun. Compearance was made for Mr James Hume, who claimed his benefit of a possessory judgment, not by virtue of his own infeftment, which was only in March this year, but by joining his possession to that of Mrs Jean Hume, his predecessor.

The Lords found this reply for the Earl of Marchmont relevant to elide the defence of a possessory judgment, viz. that Mr Charles Hume, afterwards Earl of Hume, was infeft as heir of tailzie to Mrs Jean Hume, and not restrained from contracting debt by any prohibitory clause or irritancy, and that he granted the bond whereupon the adjudication proceeded.

Forbes, MS. p. 10.

1724. *January* 21.

Dame Martha Lockhart, and Sir John Sinclair of Stevenson her Husband for his Interest, *against* Richard Meikle of Tweedyside and Others.

No 12.
Found, that a party could not acquire the benefit of a possessory judgment, in opposition to a decree declaring the marches.

Dame Martha Lockhart having, in virtue of her right of property, insisted in an action of removing from certain parts of the muir of Stenhouse; the benefit of a possessory judgment was *pleaded* for Meikle, one of the defenders, in regard he had been seven years in possession of the lands from which he was warned to remove, as part and pertinent of his lands of Tweedyside, wherein he stood infeft upon a precept of *clare constat* granted by the pursuer. And for the other defenders it was *alleged*, That they possessed as tenants to John Armour, and could not be removed until their master was called.

It was *answered* for the pursuer; That Meikle never was infeft in the muir of Stenhouse, neither could his possession of any part of it be connected with his title to the lands of Tweedyside; for, by a decreet of the Lords of Session, in the year 1681, the muir of Stenhouse was bounded by certain marches, and declared to belong in property to the pursuer's predecessors. And to the defence for the Tenants, it was *answered*, That since the pursuer acknowledged no other heritor of the muir of Stenhouse, she could not call any as such, and was in virtue of her right entitled to remove all possessors from any part of her property.