

No 12.

THE LORDS found, That the defender had not the benefit of a possessory judgment in respect of the decretet declaring the marches ; and found, that the pursuer ought to call the master *cum processu*.

Reporter, *Lord Grange.*
Clerk, *Mackenzie.*

Act. *Arch. Hamilton, sen.*Alt. *Ja. Boswell.**Edgar, p. 1.*

1724. July 16.

ELIZABETH MOYS and her SISTERS, *against* ROBERT Earl of MORTON.

No 13.

In a process of mails and duties, at the instance of an appriser from a wadsetter, against tenants, pleaded for the proprietor, that he had possessed more than seven years on infetment. Answered, the defender represented the granter of the wadset. Replied, this could not be tried *incidenter*. The Lords sustained the possessory judgment, reserving reduction.

WILLIAM Earl of Morton having granted a wadset-right of a part of his lands of Aberdour in the year 1645, the same was adjudged from the apparent heir of the wadsetter, but subject to the liferent-right of the wadsetter's wife, who survived him, and continued to possess the lands till the year 1690.

The pursuers having right by progress to the said adjudication, insisted in a mails and duties against the tenants, and called the Earl as possessor and intrormitter, for whom it was *pleaded*, That he and his predecessor had been in possession in virtue of their infetments, viz. his immediate predecessor's sasine *anno 1705*, and his own *anno 1720*, much more than seven years, and so must have the benefit of a possessory judgment, until the pursuers prevail in a process declaratory of their own, and reductive of his rights, especially since they had not produced the original wadset.

It was *answered* for the pursuers ; That they produced the sasine taken on the original right, and a registrate eik to the wadset, wherein the original was *verbatim* repeated ; and as to the possession, that they were all under age, and wanted tutors at the time of the liferentrix's death, by which means the Earl's predecessor attained a wrongous possession. *2do*, The Earl could not have the benefit of a possessory judgment in exclusion of his predecessor's deed, whom he represented either as heir served, or at least upon the act 1695, for obviating the frauds of apparent heirs.

Replied for the Earl, *imo*, That he did not represent the granter of the wadset, neither as heir served, nor upon the act 1695, at least he had the benefit of the act 1696, explanatory of the said act 1695. *2do*, Admitting that the Earl did represent, yet he could not be denied the benefit of a possessory judgment after upwards of a septennial possession, upon titles by infetment, since that was good to its proper extent against all rights exclusive of his, and was a sufficient defence, till declarator and reduction, against every claim except *debita fundi*, such as infetments of annualrent or feu-duties, &c. and the reason and necessity of admitting such possessory defence till declarator and reduction, was particularly evident from the points which occurred in this very process concerning the Earl's representation, which could not, according to any form of judicial procedure, be tried *incidenter* in a process of mails and duties.

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.