1769. *December 5.*

JOHN EARL of HYNDFORD and Others, Trustees of the deceased JOHN DICKSON of Kilbucko, *against* DAVID DICKSON, D. D. Minister of Newlands.

No. 16.
Sequestration of rents, awarded upon the application of the trustees of the proprietor of the estase, deceased, tho' opposed by the heir, who had brought a reduction of the trust deed.

JOHN DICKSON was in possession of the estate of Kilbucko and other lands upon the following titles. Part of the barony of Kilbucko he had a right to, and was in possession of, by a disposition, charter, and sasine in 1733; the remainder of said barony, both by disposition from his father in 1762 and by his service in July 1766, as heir of provision under his father's marriage-contract in 1705 and infeftment following. He had right to the lands of Coulter, in which his father died infeft, both as apparent heir general and of line to his father, and by virtue of his father's general disposition in 1762. He had right to the lands of Whitslaid by his special service as heir of line to his father, and infeftment thereon. And he had right to five acres of land near Edinburgh by contract with the magistrates.

In the year 1767 John Dickson executed a trust disposition in favour of the Earl of Hyndford and others, for certain purposes therein expressed, for payment of the debts, which were considerable, and for provisions in behalf of his brother David's family, with an annuity of £100 a-year to David himself. John Dickson died on the 2d December, 1767. The trustees accepted, and took infeftment upon the precept in the disposition to the lands of Kilbucko. David Dickson, John's next brother, took also some steps to shew his intention of entering into possession as heir to his brother. He prevailed upon some of the tenants to pay him rent, and even went the length of getting himself served heir in general both to his father and brother; and which, after some opposition from the trustees, was at length accomplished. He in the mean time also brought an action of reduction of the trust-deed; which was accordingly in dependence, and not decided.

In this situation the trustees applied to the Court, praying for a sequestration of the rents; and on the 1st of August, 1769, the following interlocutor was pronounced: "The Lords sequestrate the within mentioned estate, heritable and moveable, which belonged to the deceased John Dickson of Kilbucko; and remit to Lord Elliock to name a factor thereon, with the usual powers, upon his finding sufficient caution in terms of the act of sederunt.

David Dickson opposed the sequestration; and, in a reclaiming petition,

Pleaded: That he, as apparent heir, was by the act of law vested in and entitled to continue his predecessor's possession preferably to any third party, having a right to the whole estate from the last proprietor till he was legally removed at such third party's suit. As a consequence of this, when an apparent heir was in possession, and had exceptions to the disponee or third party's claim or title, which were already made the subject of a proper action, such disponee could neither turn out the heir to assume possession himself, nor do the same thing in another shape by obtaining a sequestration. A sequestration was a remedy applicable only where neither party had obtained possession, and where it was doubtful which of

No. 16. them had best right to it; but this was not the case at present, as the petitioner was both *de jure* and *de facto* in possession. Bankton, B. 4. Tit. 24. § 1. B. 1. Tit. 15. § 15. 18th July, 1727. Ogilvie *contra* Reid of Barra, No. 9. p. 5242. 24th June, 1698, Home of Renton *contra* Sir Patrick Home, No. 5. p. 5235.

Some arguments also were offered, upon the ground that part only of the estate stood vested in John Dickson, in such a manner as that he could effetually convey it by the gratuitous deed in question; but as in part of the family estates he had never been infeft, the trust disposition as to them was ineffectual. The application for a sequestration came with a bad grace from the trustees, whether the trust right was good or bad; for if it was good, they were bound to execute the trust without attempting to throw the load off their own shoulders; and if it was bad, it was a manifest hardship and injustice to turn the petitioner out, whose possessions was maintained upon the legal title of apparency, and who in that case would have the absolute right to the property of the whole estate.

Answered for the trustees: Though the law might continue the possession of the apparent heir where there was no other right in competition, yet where a proprietor had alienated or disponed his estate, though only by a personal deed, the personal right, until it was set aside by one having interest to challenge the same, would still prevail; as it was a valid assignment to the rents, which, in a competition for mails and duties, was all that was requisite. In a competition accordingly between the apparent heir and disponee of the predecessor, it had been found that the disponee was preferable, even where the disposition was *ex facie* liable to challenge, as being granted on death-bed. Such was the decision in the case of Hamilton *contra* Douglas, No. 12. p. 3966; and upon the same principles in a competition for the office of executor, the general disponee, as having a more solid and substantial interest in the executry fund, had been preferred to the nearest of kin. Nor did it vary the question that the trust disposition had been brought under challenge, as no case could be figured, even the most desperate, where, if the effect intended was to be given, such an attempt would not be made; and as to the possession which it was said the petitioner had obtained, and the rents which the tenants had been prevailed upon to pay, these were acts not only without authority, but irregular and illegal, and such as merited the censure rather than the countenance of the law.

The judges were unanimous that in a competition for the rents, the disponee was preferable to the heir; but some of them demurred as to the necessity of a sequestration in this instance, conceiving the trust deed to be a good one, and sufficient to enable the trustees to uplift the rents without the authority of the Court; more especially as they were by that deed empowered to name a factor. A great majority however were of opinion, that the circumstances of the case rendered a sequestration not only expedient but necessary; and hence it was carried—adhere.

For Dickson, *Macqueen, Rae.* For the Trustees, *Al. Lockhart.*

R. H. *Fac. Coll. No. 6. p. 14.*