1675. *July* 22. MENZIES *against* CAMPELLS.

No 51.
A possessory judgment found not relevant, unless there had been seven years peaceable possession of warrandice lands after eviction, of the principal lands.

COLONEL MENZIES being infeft in the lands of Stronardin, and in warrandice thereof, in the lands of Orchard, and being excluded from the principal lands by a prior wadset thereof granted to Mr Alexander Colvil, pursues a regress to the warrandice-lands against Campbell of Ardintinnie possessor thereof, for payment of the mails and duties, who *alleged* absolvitor *in possessorio*, because the defender is infeft in the lands, and seven years in possession.

THE LORDS repelled the defence, unless he had possessed seven years after the eviction, because before the eviction the pursuer *non valebat agere*.

The defender further *alleged*, That recourse could only be had to the warrandice-lands, effeiring to the distress, which being only a wadset granted to Colvil, the pursuer could crave no more but so much of the mails and duties as was answerable to that wadset.

THE LORDS found, that the pursuer might have regress to the full duties, applying the superplus more than the annualrent of the wadset sum for payment of the principal.

Stair, *v.* 2. *p.* 358.

*** Gosford reports this case:

IN an action for warrandice pursued at the instance of Colonel Menzies, as being infeft by the Marquis of Argyle in the lands of Stronardine, as principal, and the lands of Orchard in warrandice, against John Campbell of Ardintinnie, to whom the said Marquis had disponed the said warrandice lands, upon that ground that the principal lands were evicted from the pursuer by Archibald Colvil, who had a prior right from the Marquis; it was *alleged*, Absolvitor, from the eviction of the whole lands, because the ground of the distress being only 4000 merks, the pursuer can have no right of warrandice, but to as much as will satisfy the distress, and the defender ought to bruik the rest. 2*do*, The defender having been seven years in possession ought to have the benefit of a possessory judgment, and so ought to continue until his right be reduced. It was *replied* to the *first*, That the pursuer's infeftment of warrandice being simple and absolute, without any restriction, he ought to have the benefit of the full possession of the warrandice, which being prior to the defender's right, *fictione juris* he is in possession of the warrandice lands as well as the principal whensoever a distress occurs. THE LORDS did repel both the defences, and found, that an infeftment in warrandice lands being simple and absolute, and not restricted to the quantity of a distress, albeit the same be far inferior in worth to the warrandice lands, the person infeft will have right to the whole duty, ay and while he be paid and relieved of the distress, or otherwise force the person who had the second right of property to purge or pursue the com-

mon author upon his warrandice, to satisfy the distress, that he may continue to possess; and as to the *second*, they found, that one being infeft in principal and warrandice, and in possession of the principal, no posterior right clad with natural possession, can pretend to the benefit of a possessory judgment against them, to force them to reduce, our law making no difference betwixt possession *fictione juris*, and that which is natural by uplifting of the mails and duties. No 51.

Cosford, MS. No. 786. p. 494.

1683. *January* 17. CANT *against* AIKMAN.

No 52.

A POSSESSORY judgment, was found not competent to a right of property against an annualrent right, being of another nature, compatible with a right of property.

Harcarse, Falconer.

*** This case is No 23. p. 10633., & No 39. p. 10643.

1695. *January* 4. WALLACE *against* CAMPBELL.

No 53.

PHILIPHAUGH reported Hugh Wallace of Ingliston *contra* Sir George Campbell of Cesnock. THE LORDS found Cesnock, though within year and day of Ingliston, could not claim the benefit of his infeftment, till he paid the expenses of it; and that there was no possessory judgment of a prior apprising to exclude a second, where they were within year and day; but that, before citation or interpellation at the second appriser's instance, the rents uplifted by the first were *fructus bona fide percepti*, yet so as what he uplifted more than paid his annualrents was to be ascribed *in sortem*; but after citation, they behoved to communicate the rents proportionally effeiring to their sums, seeing law reputed them *tanquam jus individum*. See this so decided 15th July 1675, Boyd *contra* Justice, No 50. p. 10650.

Fountainhall, v. 1. p. 655.

1739. *December* 21. SOMERVIL *against* AITKEN.

No 54.

WHERE a defender called in an action of mails and duties before an Inferior Court is entitled to a possessory judgment, the inferior judge is judge-competent in that question; and therefore a pursuer of mails and duties, against