

1695. November 16.

SIR ROBERT BAIRD of Saughtonhall *against* JAMES LAW of Hillhousefield.

IN advising the concluded cause, Sir Robert Baird of Saughtonhall against James Law of Hillhousefield, for a spuilzie of teinds, it occurred to be reasoned among the Lords, if seven years possession of teinds, by virtue of a disposition without infestment, might give the benefit of a possessory judgment, seeing some right of teinds may be conveyed without infestment, as by tacks, prorogations, &c. But the LORDS thought it could not plead that benefit. *2do*, It was *alleged* by the defender, he had a renunciation from Sir Robert the pursuer, of all claim he could pretend to his lands or teinds: *Answered*, That renunciation was in so far as extended to a comprising standing then in his person, and there was no more deduced nor narrated, and he had other rights. THE LORDS having compared the deduction of the title with the renunciative part, they found it could extend no farther than to the title expressed, especially seeing the transaction followed after a debate on that apprising only. *3tio*, The defender offered to reform to his allegiance, and propone it in different terms from what it stood in the act of litiscontestation; which the LORDS would not allow, it being a judicial contract; and if he had proponed his defence in that manner *ab initio*, the pursuer might have elided it by a reply, which he cannot prove now.

November 23.—IN the pursuit at the instance of Sir Robert Baird against James Law, mentioned 16th current; on a new hearing, the LORDS thought, though the defence of a possessory judgment was not sufficient in this case, yet his long possession by virtue of a colourable title was enough to make him *bona fide* possessor as to bygones. The only question was, when his *bona fides* was to be reputed interrupted; whether from the date of the citation in this process of spuilzie, or from the inhibitions, or the act of litiscontestation, or the sentence? THE LORDS found the renunciation of Spence's apprising in his favour was so dubious a case, that he was not *in mala fide* till the date of the Lords' interlocutor, finding that renunciation did not comprehend all rights in Sir Robert Baird's person; so this made the case little different from the sustaining the benefit of a possessory judgment; for that would only have lasted till Sir Robert had prevailed in his reduction on his preferable right; by which it appears how much the extension or termination of a possessor's *bona fides* is *in arbitria judicis*.

Fol. Dic. v. 2. p. 88. Fountainhall, v. 1. p. 678, & p. 680.

1705. July 5.

ANTHONY and ZEROBABEL HAIGUES, Elder and Younger of Bemmerside, *against* Mr THOMAS HALYBURTON of Newmains, and MARGARET RUTHERFORD His Mother.

ROBERT HAIGUE of Bemmerside having, in his daughter's contract of marriage with James Halyburton, heritor of the Abbey-Mill of Dryburgh, astrict-

No 9.

Seven years possession of teind in virtue of a disposition without infestment cannot give the benefit of a possessory judgment.

No 10.

A possessory judgment and seven years possession of a thirlie mill

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; *2do*, 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 thirlmultures, 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,