

leges of apparency be destroyed whenever the right of the predecessor was disputed.

No 7.

THE LORDS unanimously refused the petition, upon advising it with answers, &c.

Lord Ordinary, *Justice Clerk.*

Act. *Solicitor-General Blair, Tait, Hope, et alii.*

Alt. *Geo. Fergusson, H. Erskine, Thompson, et alii,*

Clerk, *Sinclair.*

D. D.

*Fac. Col. No 212. p. 500.*

## SECT. II.

### Competition about the Possession.

1712. *January II.* LORD HAWLEY against EARL of DALHOUSIE.

WILLIAM Earl of Dalhousie being sent with his regiment to Spain, died there in October 1710. On the news, Mr. William Ramsay, his cousin, serves himself heir-male, not to the said last Earl, but to his father, who died in 1682, conform to the ancient investiture of the family running to the heirs-male. Lady Elisabeth Ramsay, married to my Lord Hawley, observing her brother's infertment was taken to his heirs whatsoever, she serves herself heir of line to him; and both of them claiming the rents, the tenants are forced to suspend on multiplepointing, that they may know to whom they may safely pay. The Earl having stept into the void possession, on his cousin's death, craved to be preferred *in hoc judicio possessorio* till the point of right be determined. The Lady Hawley contended for preference, in regard she produced her brother's charter and sasine, and instructed he was seven years in possession by virtue thereof, and so had the benefit of a possessory judgment, ay till her right be reduced. *Answered, imo,* An heir cannot found upon the predecessor's possession, unless upon his death they have attained it themselves; but where they are only *in acquirenda possessione*, they cannot plead a possessory judgment. It is true, an heir may continue their predecessors possession, and if attained, and thrust out, they may demand repossession; but if there be a middle impediment of another's entry to it, it quite cuts the thread of his possessory judgment; but so it is the Lady is but *in adipiscenda possessione*, and therefore can never be heard to dispossess the Earl; especially seeing the last Earl's title was only an adjudication for a small sum of L. 1900 Scots, which, by his possession, was paid long within the legal, and extinct; and if my Lady will produce it in

No 8.

In a competition for the present possession of an estate, betwixt an heir-male who possessed it, and an heir of line, who, being out of the kingdom, authorised her agent to take possession, the Lords sequestered the rents till the issue of the process.

No 8.

his reduction and improbation, it will soon appear who has best right. *Replied*, I am not bound to debate the import of my brother's right *in hoc statu processus*, but I'll maintain it in its due time; but for the interim I must be preferred in the possession, because I, by a written mandate to Mr Patrick Middleton, desired him to continue my brother's possession: And as for yours, it is not universal, but only partial as to some of the tenants. *2do*, It was clandestine and violent in breaking up the gates of Dalhousie tower. *3tio*, It is precarious and momentary, not being yet a full year since you were served heir. And the Roman law provided two remedies to heirs for attaining their possession; the first was in *l. ult. C. de edicto Divi Adriani tollendo*, where the *hæres in testamento institutus* is yet in possession, notwithstanding of other competitors; the *2d* is the *interdictum quorum bonorum*, so called from its initial words, where the prætor gives the *hæres ab intestato* the possession; all which favour the heir of line's case. *Duplied*, It seems very incongruous to put the Lady in possession, who, within a few months, on discussing her right, must just cede it, and give it back again to the Earl. So the interdict *uti possidetis ita possideatis* must take place here; and her missive letter is neither a factory, nor does it prove the date it bears.—THE LORDS were somewhat divided; but the plurality seemed to incline to sequester the rents during the dependence, and till the event of the Earl's reduction, and so would give neither of them the prerogative of the possession during the interim, till it was known on whose side the right lay.

*Fol. Dic. v. 1. p. 357. Fountainhall, v. 2. p. 702.*

1727. July 18.

SIR ALEXANDER OGILVY of Forglen *against* SIR ALEXANDER REID of Barra.

No 9.

THE LORDS found the apparent heir of the investitures was entitled to continue his predecessor's possession, notwithstanding the defunct, by a personal deed, had made a settlement of his estate to others; for whom it was *contended*. Though commonly apparent heirs may continue their predecessor's possession, yet where that apparency is cut off, even by a personal deed, all the privileges of it fall to the ground: Accordingly, in similar cases, the Lords have always been in use to give possession *secundum tabulas*, and there is good ground in equity as well as law, *quia frustra petit quod mox est restitutus*; which was repelled, in respect that a disposition is no title for possession, except in consequence of infeftment, though containing procuratory and precept; and, in the present case, where there was neither procuratory nor precept, the disposition could import nothing but a mere personal obligation upon the heir of investiture, to denude in favours of the donee, which was perfectly consistent with the apparent heir's possessing the subject, ay and while he should be obliged to make up his titles and dispone. *See APPENDIX.*

*Fol. Dic. v. 1. p. 357.*