

No 15.

possession, after that citation, is neither interrupted nor vitious; and these being no stop to take away the effect of that citation, it were of bad consequence, if persons infest 39 years after a citation behoved summarily to dispute their rights.

THE LORDS sustained the defence of the possessory judgment, upon seven years peaceable possession before the citation, and repelled the reply.

The pursuer further *replied*, That, in the seven years after the citation, there were some years wherein there was a surcease of justice, and no courts in Scotland; *2dly*, The citation was by his tutors and curators, and he was minor during the seven years. It was *answered*, That a possessory judgment was competent against minors, and there was no respect of minority therein, which is only excepted in the great prescription extinguishing the right; but in the possessory judgment, in relation to the way of process, and the fruits in the mean time, as in all prescriptions, *tempus continuum*, and not *tempus utile*, is respected.

THE LORDS also repelled both these replies, and, notwithstanding thereof, sustained the exception on the possessory judgment.

Fol. Dic. v. 2. p. 88. Stair, v. 1. p. 552.

* * * See Gosford's report of this case, Section 6th, *h. t.*

No 16.

Possessory judgment not competent, by obtaining decrees for seven years rent.

1672. January 25. HARPER against ARMOUR.

IN a competition betwixt Harper and Armour for mails and duties, the LORDS found, that civil possession, by obtaining two decreets for seven years rent, was not sufficient to give the benefit of a possessory judgment, which could only be effectual by the continuance of the possession seven years, either by labouring or lifting the duties, during that time.

Fol. Dic. v. 2. p. 89. Stair, v. 2. p. 55.

No 17.

Three years possession will not defend a singular successor against an action of intrusion, to make him liable for the ordinary duty, if his author's possession was *vi aut clam*.

There can be no benefit of

1673. June 24. HUGH MAXWEL against ALEXANDER FERGUSON.

IN an action of intrusion pursued at the instance of the said Mr Hugh against Mr Alexander, as succeeding in the vice of his father, it being *alleged*, That the said action was prescribed, not being pursued within three years; and the defender ought to have the benefit of a possessory judgment, because that he offered to prove, that he stands infest in the lands of Isle, whereof the lands libelled are a part and pertinent. It was *replied*, That albeit the ejection may prescribe as to violent profits, and craving only retrocession, this pursuit ought to be sustained, and the defender cannot crave the benefit of a possessory judgment, because it is offered to be proved, that the pursuer and his authors, by virtue of their infestments of the saids lands, as a part of the barony of Dalswinton, were in peaceable possession of the saids lands, until the defender's father taking advantage at his own hand, without any process, did set down march-stones, and thereby included nine or ten acres of the pursuer's land,

and did violently debar the pursuer and his tenants from the possession.—THE LORDS sustained the pursuit, and repelled the defence; and found, that the defender's entry to the possession being at first vitious, he could never thereafter claim the benefit of a possessory judgment, which is only competent to one who is *bona fidei* possessor, whereas one that enters *vi et clam*, that vice doth so affect the possession, that it continues, and is transmitted to the successors in that vice, so that an intrusion may be pursued against him, after three years, to make him liable for the ordinary duties, but reserved to the defender himself, upon a valid title, as accords.

Fol. Dic. v. 2. p. 88. Gosford, No 598. p. 341.

. Stair reports this case :

MR HUGH MAXWEL, as now having right to the barony of Dalswinton, pursues Mr Alexander Ferguson, as succeeding in the vice of Alexander Ferguson his father, who did intrude himself in the possession of a part of the said barony, and did adject it to his own lands, and set up march-stones about it, as a part of his own lands, without the consent of the heritor for the time, or the authority of a judge. The defender *alleged*, Absolvitor, because actions of intrusion, and consequently succeeding in the vice of the intruder, prescribe, when not pursued within three years after the intrusion, and it is many years since this alleged intrusion, and the party dead; *2do*, The pursuer stands infest in his own lands, and hath possess this ground in question as part and pertinent thereof by the space of seven years before this process without interruption, and so hath the benefit of a possessory judgment, and cannot be quarrelled till his right be reduced. The pursuer *answered*, That prescription of ejections is only as to the oath *in litem*, and violent profits; and the pursuer restricts to restitution, and the ordinary profits, which are still competent without warning, when the defender's entry to possession was violent and vitious, neither can the defender have the benefit of a possessory judgment, unless his possession had been lawful.

THE LORDS sustained the process, restricted as said is, and found that the defender had not the benefit of a possessory judgment, his possession not being lawful.

Stair, v. 2. p. 193.

1679. January 24. MENZIES *against* CAMPBELL.

MENZIES of Shian pursues a removing against Campbell from a meadow. It was *alleged* for Campbell, That he has been in possession of the meadow in question, as part and pertinent of his lands, by the space of seven or ten years, and so secure, *in hoc judicio possessorio*, till his right be reduced. The pursuer *answered*, *Non relevat* to pretend to this land as part and pertinent, because it is far distant from any part of the defender's lands; *2do*, A possessory judgment is only by a lawful possession; but it is offered to be proved, that the

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possessory
judgment
where the en-
try to posses-
sion has been
by intrusion.

No 18.
A possessory
judgment of
of land, as
part and per-
tinent, by
seven years
possession,
was elided,
because the
possession