which happened thereafter by Mrs Jean's dying without children of her body; and Mr Charles was returned and infeft as heir to her in the said estate, for payment of the sums in the bond aforesaid. Kimmerghame led an adjudication against the estate of Aitoun after Mr Charles Hume's rights thereto was irritated and fallen, by assuming the title of Earl of Hume; upon which irritancy being declared, Mr James Hume, the said Earl's second son, was served and infeft as heir of tailzie to the said Mrs Jean Hume. No 11.

The Earl of Marchmont, who has right by progress to Kimmerghame's adjudication, pursued an action of mails and duties against the tenants of Aitoun. Compearance was made for Mr James Hume, who claimed his benefit of a possessory judgment, not by virtue of his own infeftment, which was only in March this year, but by joining his possession to that of Mrs Jean Hume, his predecessor.

The Lords found this reply for the Earl of Marchmont relevant to elide the defence of a possessory judgment, viz. that Mr Charles Hume, afterwards Earl of Hume, was infeft as heir of tailzie to Mrs Jean Hume, and not restrained from contracting debt by any prohibitory clause or irritancy, and that he granted the bond whereupon the adjudication proceeded.

Forbes, MS. p. 10.

1724. *January* 21.

Dame Martha Lockhart, and Sir John Sinclair of Stevenson her Husband for his Interest, *against* Richard Meikle of Tweedyside and Others.

No 12.
Found, that a party could not acquire the benefit of a possessory judgment, in opposition to a decree declaring the marches.

Dame Martha Lockhart having, in virtue of her right of property, insisted in an action of removing from certain parts of the muir of Stenhouse; the benefit of a possessory judgment was *pleaded* for Meikle, one of the defenders, in regard he had been seven years in possession of the lands from which he was warned to remove, as part and pertinent of his lands of Tweedyside, wherein he stood infeft upon a precept of *clare constat* granted by the pursuer. And for the other defenders it was *alleged*, That they possessed as tenants to John Armour, and could not be removed until their master was called.

It was *answered* for the pursuer; That Meikle never was infeft in the muir of Stenhouse, neither could his possession of any part of it be connected with his title to the lands of Tweedyside; for, by a decreet of the Lords of Session, in the year 1681, the muir of Stenhouse was bounded by certain marches, and declared to belong in property to the pursuer's predecessors. And to the defence for the Tenants, it was *answered*, That since the pursuer acknowledged no other heritor of the muir of Stenhouse, she could not call any as such, and was in virtue of her right entitled to remove all possessors from any part of her property.

No 12.

THE LORDS found, That the defender had not the benefit of a possessory judgment in respect of the decreet declaring the marches; and found, that the pursuer ought to call the master *cum processu*.

Reporter, *Lord Grange.* Act. *Arch. Hamilton*, sen. Alt. *Ja. Boswell.*
Clerk, *Mackenzie.*

Edgar, p. 1.

1724. *July* 16.

ELIZABETH MOYS and her SISTERS, *against* ROBERT Earl of MORTON.

No 13.
In a process of mails and duties, at the instance of an appriser from a wadsetter, against tenants, pleaded for the proprietor, that he had possessed more than seven years on infeftment. Answered, the defender represented the granter of the wadset. Replied, this could not be tried *incidenter*. The Lords sustained the possessory judgment, reserving reduction.

WILLIAM Earl of Morton having granted a wadset-right of a part of his lands of Aberdour in the year 1645, the same was adjudged from the apparent heir of the wadsetter, but subject to the liferent-right of the wadsetter's wife, who survived him, and continued to possess the lands till the year 1690.

The pursuers having right by progress to the said adjudication, insisted in a mails and duties against the tenants, and called the Earl as possessor and intromitter, for whom it was *pleaded*, That he and his predeeessor had been in possession in virtue of their infeftments, viz. his immediate predecessor's sasine *anno* 1705, and his own *anno* 1720, much more than seven years, and so must have the benefit of a possessory judgment, until the pursuers prevail in a process declaratory of their own, and reductive of his rights, especially since they had not produced the original wadset.

It was *answered* for the pursuers; That they produced the sasine taken on the original right, and a registrate eik to the wadset, wherein the original was *verbatim* repeated; and as to the possession, that they were all under age, and wanted tutors at the time of the liferentrix's death, by which means the Earl's predecessor attained a wrongous possession. 2*do*, The Earl could not have the benefit of a possessory judgment in exclusion of his predecessor's deed, whom he represented either as heir served, or at least upon the act 1695, for obviating the frauds of apparent heirs.

Replied for the Earl, 1*mo*, That he did not represent the granter of the wadset, neither as heir served, nor upon the act 1695, at least he had the benefit of the act 1696, explanatory of the said act 1695. 2*do*, Admitting that the Earl did represent, yet he could not be denied the benefit of a possessory judgment after upwards of a septennial possession, upon titles by infeftment, since that was good to its proper extent against all rights exclusive of his, and was a sufficient defence, till declarator and reduction, against every claim except *debita fundi*, such as infeftments of annualrent or feu-duties, &c. and the reason and necessity of admitting such possessory defence till declarator and reduction, was particularly evident from the points which occurred in this very process concerning the Earl's representation, which could not, according to any form of judicial procedure, be tried *incidenter* in a process of mails and duties.