

No. 67. Town and their tacksman are *in possessorio*, the Ordinary “repelled the reason of suspension; reserving reduction or declarator as accords”

The suspenders reclaimed, on this ground, That a possessory judgment cannot be pleaded without a title: That mere possession, especially of exactions derogatory from the freedom of commerce, and which can only proceed from the authority of Parliament, cannot be the foundation of any claim or judgment: That such exaction, without a title, was oppression, which no continuance could sanctify.

The petition was refused. The chargers being a body corporate, their being in possession of a small duty was thought enough *in possessorio*.

*Kilkerran, No. 4. p. 580.*

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1747. December 1.

ELIZABETH COLQUHOUN, and SIR GEORGE COLQUHOUN, Petitioners.

No. 68.

A sale begun by an apparent heir may, after his death, be carried on by the purchaser or next heir.

By the death of Sir Humphry Colquhoun of Tillihewn, the estate of Tillihewn devolved on the now deceased Sir James Colquhoun, eldest son to Elizabeth the petitioner and the deceased Captain James Colquhoun. And the estate being overburdened with debt, a process of sale was pursued at the instance of the said Sir James, as apparent heir; and the lands being exposed to sale, Elizabeth, his mother, was preferred as highest offerer. Thereafter, the ranking proceeded upon the price; and after divers steps made therein, but before it was concluded, Sir James the pursuer died.

Application was now made by Elizabeth, who, beside being purchaser and sole debtor in the price, was also a creditor adjudger, and Sir George Colquhoun, the now apparent heir, that the process of ranking might be allowed to proceed in the name of one or other of them.

The doubt was, that before the act of sederunt 1711, the pursuer of a sale on the act 1681, dying before the conclusion of the process, the process of ranking and sale fell, till a title was made up by the heir; and the provision made by that act, that in the event of the pursuer's death, the process may be taken up by any other real creditor, concerns only sales pursued on the statute 1681.

But the Lords were of opinion, That this process might be carried on upon the footing of common law, either by the purchaser, who has an interest to have the price taken off her hand, or by the now apparent heir, who is entitled to the balance, if any be, without any service to the last apparent heir, the original pursuer, in whom there was nothing to be carried by a service; and, therefore “Found,” in general, “the petitioners entitled to carry on the process.”

*Kilkerran, No. 5. p. 580.*

\* \* This case is reported by D. Falconer :

No. 68.

Sir James Colquhoun, apparent heir of Sir Humphry Colquhoun of Tilloch, pursued a process of sale of his predecessor's estate which was purchased by Elizabeth Colquhoun, the pursuer's mother, a real creditor thereon.

Sir James died before finishing the ranking; whereupon, his brother, Sir George, the succeeding apparent heir, and Elizabeth, the creditor and purchaser, presented a petition, craving, that as the action had proceeded so far, it might be carried on to a conclusion, at the instance of one or other of them.

The Lords found, That the petitioners had right to carry on the process of ranking.

Pet. Macdougall.

Clerk, Forbes.

D. Falconer, v. 1. No. 213. p. 294.

1748. June 10. SIR DAVID CUNINGHAM *against* WHITEFOORDS.

No. 69.

Sir James Cuningham of Milncraig was possessed of an opulent estate, part whereof was destined to heirs-male, and part to heirs whatsoever; and he inclining to settle his succession, 23d November, 1741, disposed to Captain David Cuningham, his brother-consanguinean, and his heirs-male, and failing them, to his sister-german, Elizabeth, relict of Bryce Whitefoord of Dunduff, and her heirs-male, whom failing, to her heirs-female, whom failing, to his brother David's heirs-female, the eldest of either succeeding without division, his whole estate which he should have at his death, excepting the lands of Whiteburn, under the burden of his whole debts; and he disposed Whiteburn to his sister's eldest son, James Whitefoord of Dunduff, free of all debts and burdens, other than what sums of money he should name in favour of her other children, at any time of his life, *ac etiam in articulo mortis*; declaring, that this whole deed should be revocable at any time of his life, and *in articulo mortis*.

A disposition, revocable on death-bed, was revoked by a revocation contained in another disposition to the same person, with some small variations, and one double of the first was cancelled, though another remained. The heir was found entitled to reduce the second disposition, *ex capite lecti*, and not barred by the former.

He executed another deed, when on death-bed, 18th December, 1746, revoking all former ones, and disposing his estate, under the burden of his debts, excepting the lands of Whiteburn, to his brother David and his heirs-male; whom failing, to his sister and her heirs-male; whom failing, to David's heirs-female; whom failing, to her heirs-female; succeeding as aforesaid; and also under the burden of two bonds, of that date, granted to his sister's daughters, Jean and Katharine Whitefoords; and he disposed the lands of Whiteburn, free of all burdens, to James Whitefoord: At the same time, he executed two bonds, for £.600 and £.400 Sterling, to his two nieces.

At the executing these deeds, Sir James' factor, who was writer and witness, proposed to cancel the former deed; and accordingly, in Sir James' presence, did