

1670. July 14. SIR ALEXANDER HUME *against* The EARL of HUME.

THE right of the erected barony of Coldingham being derived from John Stuart of Coldingham, and Sir Alexander Hume younger of Renton, he pursues a declarator against this Earl of Hume, and the Creditors and Apprisers of the estate of Hume, to this effect, that there being a contract betwixt umquhile James Earl of Hume and Stuart and others, whereby it was declared, that the Earl being infest in an annualrent of L. 200 Sterling out of the said barony, there was L. 19,000 of bygones of the said annualrent, at the date of the contract *in anno* 1631, therefore it was agreed, that the Earl of Hume should be put in possession of the said barony, for payment of the said annualrent, for terms subsequent, and for the L. 19,000 made up of the bygone annualrents, *fructibus non computandis in sortem*, and that the Earl of Hume who last deceased, having assignation to the said contract from the heirs of line, of the said umquhile James Earl of Hume, recovered a decret of possession upon the said contract *in anno* 1643, and entered in possession accordingly; and that the said annualrent of L. 200 Sterling, after the decease of the said James Earl of Hume, did cease, being only provided to the heirs male of his body, which failing, &c.; that therefore the L. 200 Sterling affecting the barony in the first place, and being free, did satisfy the L. 19,000, and freed the barony thereof. Comparance being made for the Earl of Hume, and the Creditors who had apprised the barony of Coldingham, it was *alleged*, That the Earl's intromission was not to be ascribed to his decret of possession *in anno* 1643, because he had another anterior title in his person, *viz.* A former contract betwixt the deceased James Earl of Hume and the heritors of Coldingham, by which he was allowed to possess till he were paid off L. 4000 Sterling, payable at four terms, for which, or any of the terms, he was to enjoy without an account *fructibus non imputandis, in sortem*, of which contract there was L. 1000 unpaid; and upon which contract James Earl of Hume had obtained possession *in anno* 1630; so that the late Earl having right to both these contracts and decreets from the heirs of line, and having entered to the possession without any process of removing, or mails and duties against the tenants, but the former possessors leaving the possession, the Earl entered without opposition, and might ascribe his possession to either of these rights he pleased, and does most rationally ascribe the same to the first, especially seeing he had both the rights from the same party, and was not introduced to the possession by them, more upon the one right than the other. It was *answered* for the pursuer, That albeit parties may make use of any right, they have to defend their possession, without interverting the same, yet that must always be where the posterior right doth not derogate from the former, either as to right or possession. But here the second contract and decret is inconsistent with, and derogatory to the former; for the Earl having power to enter by the first, till he were paid off L. 1000 Sterling, resting of four, *fructi-*

No 22.

Where a party had two rights, his possession was ascribed to the last decree, which only had *paratam executionem primo loco*.

No 22. *non computandis in sortem*, taking a posterior right, whereby he was to enter for payment of L. 19,000, *fructibus non computandis in sortem*, he derogated so far from the first, that he must possess *primo loco* by the last, seeing the first is not reserved; *2dly*, The late Earl could only be understood to enter in possession by that right, or the former heritors to relinquish the possession to him upon that right, which then had *paratam executionem*, and could then instantly have forced them to quit the possession; but that was only the last contract, and last decret, whereupon the late Earl had obtained sentence; in his own person *in anno 1643*, when he entered in possession. But as for the first contract and decret of possession, it had not then *paratam executionem*, never being established in the persons of the heirs of line, much less in the person of the late Earl, who had right from the heirs of line by assignation himself, being only heir-male.

THE LORDS found, That the possession was only to be ascribed to the last decret, which only had *paratam executionem primo loco*, without prejudice to the Earl, if that right were exhausted, to defend himself with the first right in the next place.

Stair, v. 1. p. 695.

No 23. 1682. November 4.

CAMPBELL against CHRISTIE.

IN an action of spuilzie pursued by Duncan Campbell against Christie, wherein the libel being admitted to probation, and it being only proved by the depositions of the witnesses against the defender, that one of the beasts spuilzied was in his possession; the LORDS, in respect it was a depredation, found the having of one of the goods taken away by way of depredation, made the defender liable for the whole goods which were proved to have been spuilzied, and the profits thereof, albeit it was not proved, that the defender had any accession to the depredation otherwise than that he had one of the beasts spuilzied in his possession, as said is.

P. Falconer, No 24. p. 13.

1682. November 11.

LISK against SCOT.

No 24.

IN an action of spuilzie pursued at the instance of Lisk against Scot, upon this ground, That Scot having set to Lisk a house in Aberdeen, and Lisk having entered to possession of the said house, the landlord, within three months after Whitsunday, before there was a term's mail due, excluded Lisk from possession of the house, by putting a padlock thereon, and so secluded him from the use of his moveables, and refused to allow him entrance to the house;—the LORDS sustained the spuilzie, and allowed Lisk *juramentum in litem*.

P. Falconer, No 27. p. 14.