

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

No 17.  
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

No 18.  
was not law-  
ful.

The long  
prescription  
excludes all  
enquiry as to  
the entry to  
possess.

defender's father, to whom he succeeds, was tenant, and paid mail and duty for this meadow to the pursuer, his predecessors or authors, and therefore could not intervert his possession, and pretend the meadow to be part and pertinent of his own lands, at least the defender's tutor paid mail and duty therefor.

THE LORDS repelled the defence of a possessory judgment, in respect of the reply of interverting the pursuer's possession, by the defender's father having paid mail and duty to the pursuer, his predecessors or authors, but would not sustain it upon the tutor's payment, for though the long prescription excludes all question, as to the entry of the possession, yet the possession requisite for a possessory judgment must be lawful.

*Fol. Dic. v. 2. p. 89. Stair, v. 2. p. 679.*

1696. January 17.

MR GEORGE ANDERSON, Minister at Tarves *against* SIR ALEXANDER FORBES  
of Tolquhoun.

No 19.  
Where there  
was a reduc-  
tion of  
a party's  
right, though  
in absence,  
which behov-  
ed to put him  
*in mala fide*,  
so that he  
could not  
have the bene-  
fit of a posses-  
sory judg-  
ment, by pos-  
sessing *de  
novo*, after the  
decree, he was  
accordingly  
not found  
entitled to  
the benefit of  
a new posses-  
sory judg-  
ment.

His defence was, Absolvitor from bygones of the vicarage teinds, because I stand infest, and am seven years in possession, and so must have the benefit of a possessory judgment; *2do*, I have been *bona fide* possessor, by virtue of a right from Panmuir, Lord of the erection of Arbroath, and so *fructus perceptos et consumptos fecit suos*. *Answered*, His infestment can found no possessory judgment, being on a comprising led by a creditor of his father's against himself, as lawfully charged to enter heir, and who at random comprised teinds and all; so this gives no right, unless he instruct a right standing in his father's person to these teinds, antecedent to the comprising; *2do*, The seven years were interrupted by a decret of reduction of Tolquhoun's right to these tithes, obtained by Mr John Strachan, the minister's predecessor in that kirk; *3tio*, There were yearly inhibitions served at the kirk-door, which was sustained 23d January 1678, Duke of Lauderdale against The Earl of Tweeddale, No 31. p. 6427.—THE LORDS found Tolquhoun liable for the bygones since the minister's admission in 1683, as being sufficiently put *in mala fide* by Dr Strachan's decret of reduction, though it was in absence; and that being so interrupted, he could not prescribe judgment by seven years new possession again, as was found by the Lords, 22d July 1664, Montgomery *contra* Home, No 14. p. 10627.; but did not think the inhibition of teinds (though sufficient to stop tacit relocation) was enough *inducere malam fidem*, being general against all and sundry, and neither executed personally nor at one's dwelling-house.

*Fol. Dic. v. 2. p. 88. Fountainhall, v. 1. p. 701.*

No 20.  
To acquire  
the benefit of  
a possessory  
judgement

1698. December 15. COUNTESS OF DUNFERMLINE *against* LORD PITMEDDEN.

IN the debate betwixt the Countess of Dunfermline and the Lord Pitmedden, my Lady craved to be preferred to bygones, because she had the benefit