

No 11. suer. The pursuer took out a diligence, in general to prove interruptions; and having executed the same against the defender himself, the LORDS found that he was not obliged to depone unless a special condescendence were given of writs called for to be exhibited.

1736. *January 13.*

THE LORDS afterwards refused to oblige the defender to produce an inventory of his writings, particularly condescended on by the pursuer.

Fol. Dic. v. 1. 282.

* * This case is reported by Clerk Home, 8th July 1737, No 27. p. 358.

1761. *November 28.*

GEORGE-JAMES Duke of Hamilton and his TUTORS, and DUNBAR Earl of Selkirk, *against* ARCHIBALD DOUGLAS of Douglas, Esq.

No 12.

No person can be obliged to show his charter-chest *per aversionem*, although any particular writing being called for by a person having interest, the defender may be compelled to produce it.

ARCHIBALD Duke of Douglas was infeft in his estate upon a charter from the Crown in 1707, in favour of himself, and the heirs-male of his body; whom failing, to the heirs called by deeds executed by his father.

In 1759, the Duke became bound to settle his estate upon the heirs-male of that or any subsequent marriage; whom failing, upon the heirs-female of the marriage; whom failing, to such heirs as he had named or should name in the settlements made or to be made by him; and failing thereof, to his own nearest heirs and assignees whatsoever.

Upon the 11th July 1761, the Duke executed an entail, in which he granted procuratory for resigning his estate in favour of himself and the heirs whatsoever of his body; whom failing, the heirs whatsoever of the body of the deceased James Marquis of Douglas, his father; whom failing, Lord Douglas-Hamilton, second son of the deceased James Duke of Hamilton; whom failing, certain other substitutes.

The Duke, of the same date, having no heirs of his body, nor prospect of any, made a deed of appointment of certain tutors and curators to Archibald Stewart, a minor, son of the deceased Lady Jane Douglas, his Grace's sister, as the person who was to succeed to him, failing issue of himself.

The Duke died before the end of that month; and the said Archibald Stewart, now Douglas, took out a brieve from the chancery, in order to be served heir of provision in general to him, upon the deed 11th July 1761; and this service having come before the macers in September said year, a proof was led of his propinquity, and compearance was made for the Duke of Hamilton and

the Earl of Selkirk, the former of whom had purchased a brieve for being served heir-male and of provision to the Duke in his lands of the earldom of Angus, barony of Dudhope or Dundee, and Bothwell, and Wandell, as devised to heirs-male by the feudal investitures of the estate: The other competitor, Lord Selkirk, had also taken out a brieve, for being served heir of tailzie and provision to the Duke of Douglas in the estate of the earldom of Angus, and in the barony of Dudhope, which, he maintained, were descendible to him by the investitures.

Mr Douglas having been served by the inquest as heir of provision, under the tailzie 1761, a protestation was entered on the part of the Earl of Selkirk, that the service should not be retoured by the macers to the chancery, till the Earl should be heard upon his claim to the estate.

The counsel, however, for Mr Douglas moved, That his service should be retoured to the chancery in the common form; which was accordingly done; and Archibald Douglas having thereby acquired right to the procuratory in the tailzie 1761, put up a signature in the Exchequer for a charter of resignation of the whole estate, in order that he might complete a feudal title thereto. He also entered into possession, by appointing factors, and performing some other acts of property.

The Duke of Hamilton and Earl of Selkirk in the mean time raised actions of reduction and declarator before the Court of Session, for ascertaining their rights to the above mentioned parts of the estate; and having likewise brought forward their brieves to be served heirs in special upon the investitures as above, the same came before the macers on the 13th November 1761, when compearance was made for Archibald Douglas, who objected to their service; and the debate was reported to the Court of Session upon the 19th November.

While the above matter was in dependence, a petition was given in to the Court of Session for the Duke of Hamilton, and another for the Earl of Selkirk, praying to sequestrate the earldom of Angus, and other subjects in competition between them and Mr Douglas; and to appoint a factor for uplifting the rents till the issue of the competition: And to these petitions answers were put in for Mr Douglas.

Argued for the petitioners; There is neither reason nor justice, that, in questions of this kind, where the right of succession is claimed by different parties, and the matter rendered litigious by a competition of brieves, the one party should be allowed so great an advantage over the other, as to be let into possession of the estate. All parties are upon an equal footing; and, until the question of right is determined, the estate ought to be sequestrated, and a *curator bonis* appointed. The usual form of procedure in such cases, is to raise and repeat in the service, summonses of declarator and reduction, to be the foundation of the Lords assessors reporting to the Court the debate upon the point of right. Such

No 12. summonses have been accordingly raised in the present case, and the competition may be brought to a speedy determination ; but, in the mean time, it is not reasonable that either party should have the benefit of possession.

Answered for Mr Douglas ; When the question of right comes to be debated in the proper shape, he will be able to show, that the former settlements and investitures stand in his favour : But, independent of these, he maintains, that, as heir of line and of provision, served and retoured upon the deed 1761, and lawfully in possession, he is entitled to hold that possession until the rights of the contending parties are finally judged and determined.

Mr Douglas, in the *first* place, has, by his service as heir of provision to the Duke upon his last deed in 1761, carried right to the procuratory in that deed, and is vested in the personal right to the lands, which gives him a good title of possession against the granter of that right, and against every person claiming as heir under him. He is in the same case with a disponee, whose want of infestment cannot be challenged by the disponent or by his heir. The disponent is obliged to put him in possession, though his right be only personal ; and therefore the disponent's heirs cannot dispute the possession with him.

Neither does it make any difference that the deed 1761 is said to have been on death-bed. A deed granted in these circumstances is not null by the law of Scotland, it is only liable to be challenged by the heir, who shall instruct a proper title so to do, and who brings a regular process for that purpose ; but, in the mean time, the deed is held to be good, and will afford an undoubted title to possess.

Further, Mr Douglas is not only heir of provision served and retoured upon the last deed 1761, and whose titles will soon be completed by charter and infestment, but he is the apparent heir of line, called as such to the succession, by the contract of marriage 1759, failing any nomination ; and he is likewise in the possession of the estate, entitled to continue that possession till the same be evicted from him in the regular course of law, by some person having a better right.

‘ THE LORDS refused to sequester *in hoc statu*.’

Thereafter, applications were made by the Duke of Hamilton and the Earl of Selkirk, for access to the charter-chests and papers of the late Duke of Douglas, and to have it found that Mr Douglas had no preferable right to the keys and custody of the charter-room, and other repositories. It was *answered* for Mr Douglas, That, as heir of line and provision, served and retoured to the Duke, and in possession of his estate, he had right to the custody of his papers, and that no man could be obliged to show his charter-chest *per aversionem* ; though, if any particular writing was called for by a person having an interest in it, he might be forced as a haver, or in a process of exhibition, to exhibit such paper ; case of Francis Scott *contra* Lord Napier, No 11. p. 3965 ;

and cases of Hamilton of Dalziel, and competition for the estate of Balnagowan. See APPENDIX.

No 12.

' THE LORDS refused the desire of both petitions.' See SERVICE OF HEIRS.

For Mr Douglas, *Hamilton-Gordon, Burnet, Montgomery, Garden, M^cQueen, Rae, Ilay Campbell, Alexander Murray.*

For the Duke of Hamilton, *Lockhart, Sir John Stewart, John Campbell jun. Walter Stewart, William Johnston, Sir Adam Ferguson.*

For the Earl of Selkirk, *Advocate, Sir David Dalrymple, Patrick Murray, Wight, Crosbie.*

I. C.

Fol. Dic. v. 3. p. 195. Fac. Col. No 69. p. 158.

* * * The like was decided 27th February 1762, Ross of Pitcalny against Lockhart Ross. See APPENDIX.

1763. July 20.

The MINISTERS of Edinburgh, *against* The MAGISTRATES and TOWN COUNCIL.

THE objections moved by the Magistrates and Town Council of Edinburgh to the jurisdiction of the Court, in the process of augmentation brought by the Ministers, having been over-ruled, See 19th January 1763, *voce* JURISDICTION; the pursuers *insisted*, That the defenders should either produce or give inspection of the grants of the several funds that, from time to time, had been allocated for the sustenance of the Ministers of Edinburgh; and also produce or give inspection of their books, that so the extent of the funds out of which their stipends fell to be modified might appear.

To this demand the defenders again *objected*, That, as the jurisdiction of the Court stands limited to the modifying and augmenting stipends out of the tithes of the parish only, the Lords could grant no augmentation out of the funds condescended on by the pursuers; and, therefore, the defenders were not bound to exhibit any particular state of these funds, or of the grants by which they were constituted.

' THE LORDS, upon the 23d February 1763, before answer, ordained the Magistrates to produce all charters and grants from the Crown, or from private persons, towards the sustenance or maintenance of the Ministers of Edinburgh; or, at least, full excerpts from the same, to be taken at the sight of the Clerks of Court.'

Pleaded in a reclaiming bill, *imo*, No person is entitled to demand any inspection or exhibition of any other writings than such as he can specially condescend upon, and qualify an interest in. A general inspection or exhibition has always been refused; nay, in such cases, the Court has even refused to oblige a defender to produce an inventory of his writings, though particularly

No 13.

Defenders in a process of augmentation of stipend, are bound to produce all grants from the Crown, or from private persons, towards the minister's sustenance.