

and his being at consultations was not relevant, unless it had been since the Lords, by their act before answer, allowed the several points of fact alleged to either party's probation, but since that time he had never been present at any. THE LORDS thought this an affected abstinence, and therefore rejected him from being a witness. The Lady and her son did also recriminate against Sir Patrick, that he had tampered with her witnesses, by asking what they would depone, which Sir Patrick *contended* was wholly calumnious. She also adducing some witnesses to prove the rental of the estate, Sir Patrick craved they might be also interrogated on his brother's condition and sensibleness to go about business. Sir Robert and his mother *contended* that they did not adduce the witness for that, but on quite separate points. THE LORDS found the other party might make use of her witnesses for any thing contained in the act, though not cited by them. See IMPROBATION.—PROVISION TO HEIRS and CHILDREN.—WITNESS.

Fol. Dic. v. 1. p. 357. Fountainball, v. 2. p. 6. 21. 34. & 57.

No 5.

1741. February 19. M'KIE *alias* HERON *against* M'KIE.

WHERE a man had disposed his estate in prejudice of his heir, whereof reduction was pursued on the head of death-bed, the disponee having applied for the possession, at least for sequestration; it was found, 'That the apparent heir had right to continue the possession.'

Kilkerran, (HEIR APPARENT.) No 1. p. 237.

No 6.

1796. March 9.

The Honourable Mrs MARIANNE MACKAY and Colonel WILLIAM FULLERTON *against* Sir HEW DALRYMPLE, and Others.

THE honourable Mrs Marianne Mackay, with consent of her husband, Colonel Fullerton, in 1793, brought a reduction and declarator of irritancy against John Hamilton, (who had been infeft in the estate of Bargany upon a charter of resignation in 1742, and had been in the uninterrupted possession of it ever since,) and against Sir Hew Dalrymple, his nearest heir both of law and provision, in which she narrated an entail of the estate executed by Lord Bargany in 1688; the manner in which the succession under it had devolved on the late Sir Hew Dalrymple, and his renouncing it in favour of his younger brother Mr Hamilton; from which she inferred, that the late Sir Hew by granting, and Mr Hamilton by accepting this renunciation, and thereby altering the course of succession, had incurred an irritancy for themselves and their descendants; that the pursuer, as next substitute to them, was entitled to the estate;

No 7.

Notwithstanding the dependence of an action of reduction and declarator of irritancy brought against a proprietor and his heir-apparent, the latter, upon the death of the former, is entitled to continue possession till decree be obtained.

No 7.

and that the titles made up by Mr Hamilton in 1742, and a settlement made by him in 1780, upon which infeftment had followed, were null and void ; and concluded, that decree of reduction and declarator should be pronounced accordingly.

The defenders produced Mr Hamilton's charter and infeftment in 1742, which, with the subsequent possession, they founded on as a title to exclude the pursuer by the positive prescription.

THE COURT, (9th February 1796,) repelled this defence, upon the ground of Mrs Fullerton's minority during a part of the time requisite for prescription*.

Mr Hamilton died 12th February ; and the pursuer immediately presented a petition to the Court, praying, that the estate might be sequestrated till the issue of the cause.

In support of this demand, she

Pleaded ; As Mr Hamilton was in possession before the action was raised, he could not have been turned out of it till decree was pronounced. The dependence of the action, however, made the subject litigious ; and as Mr Hamilton's death left the possession vacant, no good reason occurs for preferring either competitor to the rents in the mean time, and therefore the estate should be taken into the hands of the Court till the merits of the cause be determined ; Stair, b. 1. tit. 13. § 5. ; b. 4. tit. 50. § 27. ; 1769, Dickson against the Earl of Hyndford, *voce* SEQUESTRATION ; 1795, Duff against Earl of Fife, See APPENDIX.

A person claiming the privilege of apparenry must be called to the succession, not merely by the act of the person last in possession, but by the subsisting investitures of the estate ; and, in this case, the entail 1688, according to which, as their warrant, the titles made up in 1742 and 1780 must be interpreted, did, in consequence of the irritancy which has been incurred, *ipso facto* exclude the defender from the succession.

Answered ; It is admitted, that the late Mr Hamilton was entitled to retain possession till decree should be pronounced against him ; and it is a settled point, that an heir-apparent, who, in law, is held to be *eadem persona cum defuncto*, is entitled to continue the possession of his predecessor ; Bankt. vol. 2. p. 324. 377. ; Ersk. b. 3. tit. 8. § 58. ; b. 2. tit. 12. § 61. ; *Voet depositi*, § 14. *et seq.* ; Home *contra* Home, No 5. p. 5235. ; Duke of Hamilton against Douglas, No 12. p. 3966. But it is impossible to figure a more complete state of legal apparenry than that of the defender, both as being heir at law, and of the last investitures ; while, on the other hand, the right of the pursuer consists merely in a title to insist in certain conclusions, the issue of which must at present be uncertain. Were this application, therefore, supported, the most groundless claims might have the effect of inverting possession, and the established privi-

* This point was not finally decided till Winter-session 1796. See SEQUESTRATION.

leges of apparençy be destroyed whenever the right of the predecessor was disputed.

No 7.

THE LORDS unanimously refused the petition, upon advising it with answers, &c.

Lord Ordinary, *Justice Clerk.*

Act. *Solicitor-General Blair, Tait, Hope, et alii.*

Alt. *Geo. Fergusson, H. Erskine, Thompson, et alii,*

Clerk, *Sinclair.*

D. D.

Fac. Col. No 212. p. 500.

SECT. II.

Competition about the Possession.

1712. *January II.* LORD HAWLEY against EARL of DALHOUSIE.

WILLIAM Earl of Dalhousie being sent with his regiment to Spain, died there in October 1710. On the news, Mr. William Ramsay, his cousin, serves himself heir-male, not to the said last Earl, but to his father, who died in 1682, conform to the ancient investiture of the family running to the heirs-male. Lady Elisabeth Ramsay, married to my Lord Hawley, observing her brother's infertment was taken to his heirs whatsoever, she serves herself heir of line to him; and both of them claiming the rents, the tenants are forced to suspend on multiplepointing, that they may know to whom they may safely pay. The Earl having stept into the void possession, on his cousin's death, craved to be preferred *in hoc judicio possessorio* till the point of right be determined. The Lady Hawley contended for preference, in regard she produced her brother's charter and sasine, and instructed he was seven years in possession by virtue thereof, and so had the benefit of a possessory judgment, ay till her right be reduced. *Answered, imo,* An heir cannot found upon the predecessor's possession, unless upon his death they have attained it themselves; but where they are only *in acquirenda possessione*, they cannot plead a possessory judgment. It is true, an heir may continue their predecessors possession, and if attained, and thrust out, they may demand repossession; but if there be a middle impediment of another's entry to it, it quite cuts the thread of his possessory judgment; but so it is the Lady is but *in adipiscenda possessione*, and therefore can never be heard to dispossess the Earl; especially seeing the last Earl's title was only an adjudication for a small sum of L. 1900 Scots, which, by his possession, was paid long within the legal, and extinct; and if my Lady will produce it in

No 8.

In a competition for the present possession of an estate, betwixt an heir-male who possessed it, and an heir of line, who, being out of the kingdom, authorised her agent to take possession, the Lords sequestered the rents till the issue of the process.