

S E C T. V.

Accepting a Tack, Whether it implies Renunciation of the Property;
Whether it implies Renunciation of a former Tack.

1565. December 18. SINCLAIR *against* MANDERSON.

No 25.

Taking a short tack prejudices not the tenant of a longer or of a rental, which he had before, unless they differ in *substantialibus*.

ANENT the action pursued by Sinclair of L , against John Mander-son, for removing from certain lands as he that was lawfully warned, it was *alleged* by the said defender, that he should not remove from the said lands, because he has the said lands in liferent, set to him by the pursuer's father, to whom he is heir. It was *alleged* by the pursuer, that the said defender should remove from the said lands, because the said defender took of the pursuer, first seven years tack, and thereafter five years tack, and therefore, howbeit, he has liferent, as he alleges he passes from the same, by reason of taking two tacks. It was *alleged* by the said defender, that the taking of the said tack should not prejudice him in his liferent, because he entered to the said lands by virtue of the said liferent, and has bruiked the same ay since syne; and albeit he had taken such tacks as the pursuer *alleges*, (which he grants not,) he past never from his liferent, but bruiked possession of the said lands by virtue thereof, and not by virtue of the tacks. It was found by the LORDS' interlocutor, that a man having liferent of lands, that albeit he tacks there- after his tack being run out before the liferenter die, that he may bruik the lands by virtue of his liferent, notwithstanding the tacks, they being given from the giver of the liferent, or his heirs; and therefore the LORDS repelled the allegiance of the pursuer, and admitted the defender's allegiance.

Fol. Dic. v. 1. p. 433. Colvil, MS. p. 162.

No 26.

Accepting a tack found to take away an infestment formerly granted by the same au- thor.

1583. November —. CUNNINGHAM *against* COOK.

IN an action of removing pursued by James Cunningham pensioner of Les- mahago, against a woman called Cook, excepted by the defender, that she was heritably infest in the same lands by the pursuer's predecessor, and that long before the warning. *Replied*, that since the date of the said infestment, she had taken tack and assedation of the same man, and so acknowledging herself once to be tackswoman, she behoved to remove after the ish of the said tack. *Duplied*, that the tack could not prejudice her heritable right, at least it was sufficient to stop the removing. To this *triplied*, that after the the common law, *L. 25. Codicis de Loc. et Cond. Si quis conductionis nomine, agrum vel aliam quamcunque rem accepit, possessionem prius restituere debet, et*

tunc de proprietate litigare, and so before ever the defender be heard to clothe herself with any title or heritable right, she behoved to remove, *salva sibi quæstione proprietatis et dominii in alio judicio*; which triply was admitted by the LORDS, and the defender decerned to remove without prejudice to her heritable right *in judicio petitorio*.

Fol. Dic. v. I. p. 432. Spotiswood, (REMOVING.) p. 277.

* * * Colvil reports the same case.

JAMES CUNNINGHAM pensioner of Lesmahago, pursued a woman called Cook, to flit and remove from a mill and certain lands. It was *answered* by her, that she was heritably infest unto the same lands by umquhil Andrew Cunningham his predecessor, and whose person the said James represented. It was *replied*, that notwithstanding of any infestment given and disposed to her by the said Andrew, she ought to flit and remove, because since the date of the said infestment, and sasine following thereupon she had taken tack and assedation of the said Andrew, and so acknowledging him once as to be tacksmen, she behoved to flit and remove after the ish of the said tack, at the instance of the said James, who was *una et eadem persona cum defuncto fictione juris*. To this was *answered*, that she being heritably infest and the tack expired, the tack after the expiring of the same could *nullo modo* prejudice her heritable right and infestment; and that when any person is warned to flit and remove, the exception of heritable infestment and sasine before the warning will ay stop the removing. To all this was *answered, partim ab advocatis partim inter dominos ipsos, quod secundum jus municipale in L. C. Locat. quod si quis conductionis titulo, agrum vel aliam quamcunque rem accepit possessionem prius restituere debet, et tunc de proprietate litigare*, and so after the meaning of the said law, or ever the defender be heard to clothe her with any title or heritable infestment of the property of the said land, she behoved to flit and remove, *salva sibi quæstione proprietatis et dominii in alio judicio*. The which allegiance was admitted by the LORDS, and the defender decerned to flit and remove without prejudice of the heritable right, *in judicio petitorio*.

Colvil, MS. p. 381.

1611. *January 22.*

L. of PITSLIGO *against* PHILORTH, FRASER, and STEWART.

A TACKSMAN not having apprehended possession of the lands contained in his tack, before the same lands be annailized heritably to another party, the tacksmen may not defend himself in a removing against the conquerer of the lands by that tack; and possession apprehended after the pursuer's infestment, espe-

No 27.
Found in conformity with
Cunningham
against Cook,
No 27. p.
6425.