

unto the sasine was relative were produced *in initio litæ*, notwithstanding, the LORDS sustained process, the party used of the said sasine producing the said contract *cum processu*, before his contestation, not that the party's declaration was taken, that they had not the said contract in their hand, but behoved to seek it by action.

No 14.

*Fal. Dic. v. 2. p. 302. Auchinleck, MS. p. 209.*

1609. December 22.

COSSINDAE against ASLOUN.

THE Laird of Cossindae pursued the Laird of Asloun for contravention, by casting and transporting 300 or 400 loads of peats furth of his lands of Endbut and Polflug. It was *excepted*, That the pursuer could have no action for any deed done upon the ground of Polflug; because his goodsire, to whom he was heir, was denuded of the property thereof, by heritable infestment thereof, given to this Polflug's father, *in anno* 1557, by virtue whereof, they were in continual possession thereof; which allegiance the LORDS found relevant; because, they thought Polflug had action against Asloun for any wrong was done within his bounds, whereof he could not be relieved, neither by absolvitor or condemnator, to be given in this contravention. It was thereafter *replied* by the pursuer, That he offered him to prove, that this fact was committed in the Greenrisk, which was proper common betwixt his lands of Endovy and Polflug, and so he had good action of contravention, notwithstanding the feu given to Polflug, from whom the defender had no right. In respect of the which reply, the LORDS repelled the exception. ~~It was~~ thereafter *excepted*, That Asloun had done no wrong; because he was heritably infest in his lands, lying in Renfrew, with Endovy and Polflug; and the part libelled, when the said peats were casten, was proper part and pertinents of his proper lands, whereof he had had peaceable possession, past memory of man, as a part of the barony of Cluny, held by him of the Earls of Huntly. It was *replied*, That the exception was irrelevant, as contrary to his libel; because, that the bounds controverted were part and pertinent of the pursuer's lands, possessed by him and his predecessors, past memory of man, by casting and winning peats, and debarring others; likeas, by perambulation, his lands being bounded against this same Asloun, the lands controverted were decerned to lie within the meiths and marches of the pursuer's lands. It was *duplicated*, That the perambulation was only *declaratoria juris*, and altered not the possession: Likeas, a man possessing lands by tilling, sowing, &c. albeit, by decret of perambulation, part of the lands were found not to pertain to the possessor, yet he could not be *brevi manu* dispossessed from these lands, without decret of removing were obtained against him; and, therefore, the defender's lands, marching with the pursuer's lands, and the defender being in possession of lands controverted, no fact done therein by him, before the decret of perambulation, could infer contravention, and the pains

No 15.

Contravention being pursued for casting peats within a man's lands, wherein he alleges himself to be infest, he need not produce his infestment to instruct his summons; but it will be sufficient to produce it *cum processu*.

Effect of a decret of perambulation, as a title.

No 15. thereof, against him. The pursuer *triplied* upon his libel and decret of perambulation, and alleged a practice betwixt Trakommy and Thomas Kerr of Cavers, when a decret of molestation, given after the defenders of a contravention, was drawn back, and admitted to sustain the contravention, committed before the intending of the molestation. THE LORDS having exactly reasoned the matter, and considered the molestation was *judicium possessorum*, and perambulation were *petitorum*; yet because the pursuer and defender were alike stark in qualification of their right and possession in the libel and exception, nevertheless, the pursuer replying upon his decret of perambulation, which made him to have undoubted right, and the defender to have no right to the lands controverted, they admitted the libel and reply to probation.

*Fol. Dic. v. 2. p. 303. Haddington, MS. No 1715.*

1612. February 12. MUNRO against INNES.

No 16.

MUNRO, brother to the Guidman of Tarrell, assignee constituted by my Lord of Kinloss, to a tack of certain teinds, pursued the possessors for spuilzie. They *excepted*, That the assignation could give no action, the tack not being produced. It was found by the Lords, that the assignation was sufficient to instruct, the pursuer proving his author's tack *cum processu*.

*Fol. Dic. v. 2. p. 302. Haddington, MS. No 2399.*

1622. February 23.

Sir JAMES CLELAND against The TENANTS of ARBUCKLE.

No 17.

Found, that a sub tacksman, pursuer of a spuilzie of teinds, may produce the principal tack *cum processu*.

SIR JAMES, as assignee by Margaret Ker, to sub-tack of the teinds of Arbuckle, set to her for lifetime by Hamilton of Rosehalloch, her son, principal tacksman, serves inhibition, and pursues spuilzie of the crop 1620. *Alleged*, No process on the sub-tack produced, while it be shown, where the setter of the sub-tack had right himself, and his principal tack produced, and was decided betwixt the Earl Lothian and Captain Crawford. *Replied*, Offers to prove *cum processu*, that the granter of the sub-tack had tack for years to run set to him, which the pursuer could not now show, the same not being his evident. Repel the allegiance, in respect of the reply, that the principal tacksman has tacks for years to run.

1622. March 14.—*Alleged*, The defenders have tack from the pursuer's cedent of the lands libelled, by the which the cedent has obliged her to warrant