

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 tacksman, 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 tacksman 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.

No 27. cially if the pursuer allege possession in his own person or his author's, to whom he got back-tack during the non-redemption, in which case the heritor will be preferred in probation.

Fol. Dic. v. 3. p. 432. Haddington, MS. No 2110.

1630. February. MINISTER of Kirknewton *against* BALMERINO.

No 28. THE acceptation of a new tack bearing a greater duty takes away a prior tack containing a less duty.

Fol. Dic. v. 1. p. 432. Auchinleck, MS. p. 234.

1669. June 24.

Mr JOHN JAFFRAY, Minister of Mayboll *against* The HERITORS of Markwood and Grange.

No 29.

Found, that an heritor having a tack of teinds, and afterwards taking a new tack from a new titular, after expiring thereof, may return to his first tack, especially if he never entered on payment of the duty in the last tack.

THE kirk of Mayboll being a kirk of the priory of North Berwick, and upon dismissal of the prioress, being erected in a parsonage, with an express reservation, on a tack set by the prior, or convent, in favours of the Lairds of Bargenny, for several liferents, and nineteen years not yet expired; which tack, by progress, coming in the person of the Laird of Ballinmore, whose author had accepted of another tack from Mr James Bonar, as parson of the said kirk; Mr John Jaffray present minister, pursuing for the teinds of the said lands, Ballinmore, and the heritors having right from him, did defend themselves upon the foresaid tack granted by the prioress and convent, as being yet unexpired. It was *replied* for the Minister, That Ballinmore's author had accepted of a new tack from Mr James Bonnar the parson, and thereby had passed from any former tack, and acknowledged that the parson had the only right to the tithes.

THE LORDS did find, that the acceptation of a new tack from the parson for a distinct greater duty than was in the prior tack, was only sufficient to infer a passing from the first tack, if the second was clad with possession, or payment made of the tack-duty; otherwise they thought, that for eschewing of trouble and plea, the heritors having a valid tack, might take a second, which they never having ratified by payment, after expiring thereof they might return to their first tack, specially in the matter of teinds, whereof the rights are so uncertain; which case they found far different from a tack of lands and heritage taken by the heritor or tacksman from another, pretending *quo casu* they can never debate with the setter of the tack, as not having a valid right.

Fol. Dic. v. 1. p. 433. Gosford, MS. No 145. p. 56.