

## S E C T. IV.

Pactions, Declarations, &c. by Back-bond or otherwise, qualifying real Rights.

1621. December 21. L. BARNBARROW against L. of ISLE.

BARNBARROW pursues removing, upon a comprising from the Laird of Clerie, against the Laird of Isle and his Tenants, for removing from the comprised lands. Isle excepts, that he is heritably infest and confirmed long before the comprising, and by virtue thereof in possession. The pursuer *replies*, That that infestment cannot defend him, because he was depuded thereof in favours of the Duke of Lennox, who thereupon was infest; likeas the Duke was denuded in favours of Culriah, and he infest, and which Culriah concurred, being personally present in this pursuit with the pursuer. It was *duplied*, That his concurrence could not sustain this pursuit upon a warning not made at the concurrer's instance, but upon a right of comprising, which was not compatible with the concurrer's heritable right, specially seeing, if he were pursuer, he would exclude him, by alleging that he could not be in a better estate, nor the Duke his author, who, if he were pursuer, could not remove the excipient, seeing, at the time when the defender resigned the lands in his favours by his bond, he obliged himself not to remove him while he were paid of 3000 merks addebted to him by the Laird of Clerie, which is not yet paid. It was *answered* by the pursuer, That that was a personal bond, which could not oblige Culriah, if he were pursuer, far less can meet this pursuit, assisted by his concurrence.—THE LORDS repelled the exception, in respect of the reply, and of the concurrence; which concurrence they sustained to make the same warning, at the instance of the compriser, to subsist, without any respect that the compriser had only warned, or that the Duke had given his bond to the excipient, which they found would not bind Culriah, and so the concurrence of the heritor was sustained to make the warning and removing used at another party's instance, not having, or alleging right from the concurrer, to subsist.

Act. ———.

Alt. *Lawtis*.

Clerk, *Gibson*.

*Durie*, p. 7.

No 29.

A warning to remove was sustained at a creditor's instance, in consequence of the concurrence of the heritor, although the creditor alleged no right from the concurrer.