

No 28.

heir, to whom the right of that tack could only belong; whereas, that alleged second tack, or minute of tack, was conceived in favour of the said defunct, and a son of the second marriage, whereby this excipient could never have right thereto, and so could not be accepted by him; and whereby it is altogether improbable, that the excipient in the pursuer's court renounced his prior tack, and declared that he bruiked by the said last tack, whereas *per rerum naturam* he could not bruik thereby, he having no right thereto, as said is, and which cannot be taken away but by writ, or oath of party; and as to the confession contained in the act of court, the same being only subscribed by the alleged court clerk, and not by the party, or a notary for him, cannot be of force to derogate to his prior right, which cannot be taken away, but either by oath of party, or as great a solemnity in writ, as is the writ which is desired to be everted thereby; notwithstanding whereof, the exception was repelled, and the reply found relevant, and admitted to probation.

Act. *Stuart.*Alt. *Burnet.*Clerk *Scot.**Durie, p. 612.*1632. *January 25.*JAMES HAMILTON *against* MATTHEW WALLAGE of Dundonald.

No 29.

IN a removing, pursued by James Hamilton against Matthew Wallace of Dundonald, the pursuer's title being a sasine given upon a precept of *clare constat*, which precept was granted by the master of Abercorn, as having commission to do his brother the Earl's affairs in his absence; the LORDS, before they would sustain the pursuer's title, ordained him to produce the said commission, which was the warrant of the precept.

*Spottiswood, (REMOVING.) p. 288.** * Durie's report of this case is No 391. p. 12515, *voce* PROOF.1632. *July 17.*ARDWEL *against* M'CULLOCH.

No 30.

Where a liferenter was alive at the time of the warning, but died before the term of removing.

IN a removing, wherein the tenant warned, alleging him to be tenant to the Lady, liferenter of these lands, and who was living the time of the making of the warning, and who was also warned, and she being then living, albeit now dead, no process ought to be sustained against him upon that warning; and the pursuer *replying*, That albeit she was living when the warning was made, yet seeing she was dead before the Whitsunday to which she was warned, the warning now, and process thereon, ought to be sustained, her right becoming extinct; even as if a tack had been set, which would have endured to that

Whitsunday, the setter might have warned before the Whitsunday, to remove at the Whitsunday, which would have been sustained; notwithstanding whereof, the foresaid allegiance was sustained, and no process found upon that warning, albeit she died before the term; seeing it is not alike as if a tack had been set of that endurance to the term, seeing there it was constant, that the tack would then expire; but it is not so in warning of a liferenter living the time of the warning, for none can be certain that she will die before that term, and thereupon, to make the warning upon uncertainty of cessation of her right. And it being *alleged*, That the warning was made at the kirk of which is all ruinous, and not at the kirk of , to the which kirk, the kirk whereat the warning is made is united by act of Parliament, and only divine service used thereat, the LORDS were of the mind to sustain this allegiance, and to reject the warning therefore, but it was not decided, in respect of the discussing of the other allegiances, *ut supra*.

Act. *Cunninghame*.Alt. *Nicolson*.Clerk, *Scot*.*Durie*, p. 646.

1632. November 14. HIND against LAIRD OF WEDDERBURN.

THOMAS HIND pursues the Laird of Wedderburn for a husband land in Eymouth. It is *excepted* by Wedderburn, that no removing could be granted, because he is heir to his father, who obtained decret of removing against the pursuer's goodsire, to whom he is heir, and by virtue thereof he has been in peaceable possession by the space of 40 or 50 years. It was *replied*, That the exception founded upon the decret of removing is not relevant, except he say that he or his father were infest in the said lands. THE LORDS sustained the exception, in respect the defender standing so long clad with possession, untill the same be produced.

Auchinleck, MS. p. 201.

* * * Spotiswood reports this case.

IN a removing pursued by N. Hood against the Laird of Wedderburn, *alleged*, The defender's father, to whom he is heir or apparent heir, obtained decret of removing against the pursuer's grandfather, to whom he is heir; by virtue of which decret, he and his father had been in possession of the lands libelled for thirty or forty years. *Replied*, Nothing can maintain him but a real right, such as a tack, sasine, &c. As for the decret, not sufficient, especially seeing the ground whereupon it proceeded, viz. the defender's sasine, was null, being kirk-lands, not confirmed. *Duplied*, His decret was enough to maintain him in possession, being cloathed with so many years possession, till such time as