

S E C T. VIII.

In Possessory Actions, Replies against the Defender's Right are reserved till Reduction.—Objections against Rights Granted by Ecclesiastics how Proponable.

1623. December 11. CUNNINGHAM against AUSTIN.

IN an action of removing betwixt Cunningham and Austin, THE LORDS found an exception relevant, founded upon an heritable infeftment granted to the excipient of the lands libelled, proceeding upon a comprising; and would not astrict the defender to produce the comprising to dispute thereupon in this judgment of removing; but found the exception, bearing the defender to be heritably infeft, relevant; albeit it was *replied* by the pursuer, that the comprising, which is the ground of the infeftment, will appear null, if the same were produced, seeing it is deduced upon an heritable bond, never made moveable by requisition or any preceding charge, whereas the comprising could not be deduced, except the sum had been first made moveable: Which reply the LORDS would not discuss in that place, nor urge the defender to produce the comprising.

Act. *Cunningham.*

Alt. *Russel.*

Clerk, ———.

Fol. Dic. v. I. p. 173. Durie, p. 90.

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In a removing this exception was found relevant, that the party was infeft upon a comprising; and the Lords refused to oblige the defender to produce the comprising, to dispute its sufficiency *hoc loco*, tho' it was alleged to be led for an heritable sum, not made moveable by requisition or otherwise.

1636. July 13. THE BISHOP OF EDINBURGH against BROWN.

THE Bishop of Edinburgh pursuing spuilzie against Gilbert Brown, and another defender, for the several teinds of their lands, and the said Gilbert Brown *alleging* a tack set to him by Mr Gilbert Gordon of Shirms, as abbot of New Abbey, by virtue whereof he had been in possession these 40 years bygone, for payment of his tack-duty allenary; and the Bishop *replying*, that the tack could not defend him, except he should allege that the setter was lawfully provided to the abbacy. THE LORDS found the allegiance relevant to defend the excipient in this judgment possessor, without prejudice to reduce thereon *prout de jure*; seeing it was not probable, that the tacksman could have the setter's provisions in his hands and keeping; but whensoever he should be pursued therefor, for annulling of his tack in an ordinary pursuit, he might then do his diligence to recover that provision, after what legal manner he best might, and upon his own peril. And sicklike it being *alleged* for another defender, that he had a feu-infeftment from another lawful titular of his lands, *cum decimis inclusis*, by virtue whereof he and his predecessors have been, past memory of man, in peaceable immemorial possession of these teinds, for payment of the duty contained in his feu; and produced his feu to prove the same; against which

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In a spuilzie of teinds, the defender excepted upon a current tack from an abbot. It was replied, that the tack is null, as set in diminution of the rental, against the act 1581. The Lords found, that this ought to abide reduction, and was not competent by way of exception.

No 39.

the Bishop *alleging* that the feu could not extend to the teinds, because the teinds were not disposed by the dispositive words of the charter; and albeit in the clause of *tenendas*, the words, *cum decimis*, were casten in among the words of that clause, yet being done either negligently by the writer, or cautelously put in with other words in the common stile, and so slipped into the clause *cum aucupationibus et venationibus, &c.* and albeit the same be also insert in the *reddendo*, which bore, *reddendo pro dictis terris, molendinis et decimis*, such a particular sum, yet whatever is in any of these clauses, not being contained in the dispositive words, as the teinds are not, nor yet the mills, therefore the feu cannot extend thereto; and the excipient opposing his feu, clothed with possession past memory of man, contended that the same was sufficient to defend him in this possessory judgment, ay, and while it were reduced; specially these teinds being of the vicar's lands, which teinds were never in use to be led, but go ever with the lands and possessors thereof, and no other person ever pretended right thereto;—THE LORDS found the exception relevant, to defend the excipient in this possessory judgment, and would not annul the feu in this place upon that allegiance, in respect the *reddendo* bore clearly, The duty to be paid for the teinds, which words *pro decimis* were expressly insert in that clause of the *reddendo*. *Item*, In this process it being *alleged* for the L. Lochnivar, that he had a tack set to him by the President, being then Abbot of New Abbey, for terms yet to run; and it being *replied*, that the tack is null, as set in diminution of the rental, against the act of Parliament 1581, seeing it was set for conversion of victual into silver, at a small price; THE LORDS found this nullity ought not to be received by way of exception, but ought to abide reduction; wherein it behoved to be libelled, that the teinds paid victual of old to the titular, and were so rentalled, against which the defender would be heard, and would have time to come instructed to defend himself, which in this place cannot be done.

Act. Nisbet.

Alt. Gilmore et M^cGill.

Clerk, Gibson.

Fol. Dic. v. 1. p. 172. Durie, p. 814.

 SECT. IX.

Objections against the Executions of Messengers, how Proponable.

1581. February.

KING'S ADVOCATE and LADY KILSYTH *against* LAIRD of WEDDERBURN.

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Found that
no allegiance

THE King's Advocate and the Lady Kilsyth persewed the L. of Wedderburu and John Hour of Cranston, for the deforcing of ane officer. It was *alleged* be