

No 34.

therein is infest; and thereafter the granter of the wadset gives an eik for several back-tack duties, bearing annualrents therefore; the granter of the wadset continued possessor of the tenement, and after him his son. The wadsetter pursues the son, as possessor, for payment of the tack-duties, and for the annualrents of the eik. The appriser appears, and *alleges*, That the eik being after his infestment, cannot, in his prejudice, make the back-tack duty bear annualrent; *2do*, His apprising gives him a right, not only to the reversion of this wadset, but to the benefit of the back-tack, and thereby to the superplus mails and duties above the back-tack duty; and, though the wadsetter be preferable for the current back-tack duties, yet he cannot exhaust the superplus with bygone back-tack duties, which, though they affect the reversion, that the appriser cannot redeem till they be payed, as being conditions in the reversion, yet they are not *debita fundi*.

THE LORDS found, That as to the duties remaining unpaid in the possessors hands, the wadsetter is preferable for the back tack duty for all years unpaid, and that the appriser has right to the superplus, and that the eik hath no effect in prejudice of the appriser, as to the annualrents constituted thereby, but that the wadsetter must insist for the bygone back-tack duties in the eik that are due by the possessor defender; but that for any prior years the wadsetter could not affect the superplus in prejudice of the appriser, which would remain only as a condition and burden of the redemption.

Stair, v. 2. p. 495.

See Dirleton's report of this case, *voc* TACK.

No 35.

1687. February. SIR PETER FRASER *against* STRACHAN.

In a process of removing, at the instance of an heritor against a wadsetter, as not being infest, it was *alleged* for the defender, That the pursuer's right is acquired with the burden of the defender's wadset, which the LORDS sustained.

Harcarse, (REMOVING.) No 343. p. 241.

. Sir P. Home reports this case :

1686. December.—SIR PETER FRASER, as being infest in the barony of Cabperso, which was a part of the Earl of Marishall's estate, upon a disposition from the apprisers, having obtained a decret of removing before the Sheriff of Kincardine, against Strachan of Glendie, for removing from the lands of Glendie, which are a part of the said barony; whereupon being charged, he suspended, upon this reason, That the decret was null, and that the suspender could not be obliged to remove, because the pursuer's disposition from the apprisers did bear an express reservation of the suspender's right. *Answered*, That

the suspender's right being only but a personal disposition, from the Earl of Marishall, whereupon no infestment has followed, it could not defend against the removing, albeit that right was reserved in the charger's disposition, which reservation can only import that the charger should have recourse of warrandice against his author, but not validitate the suspender's right, so as to make it preferable to the charger's right, THE LORDS sustained the defence, viz. that the charger's right bears a reservation of the suspender's wadset, and finds the same proved by the right produced, and therefore suspended the letters *simpliciter*.

No 35.

Sir P. Home, MS. v. 2. No 835.

1715. February 10.

GEORGE HAMILTON, and HAMILTON of Grange, his Father and Administrator
against Captain GEORGE BOSWELL.

IN an action of removing, at the instance of these pursuers against Captain Boswell, it was, among other points, *alleged* for the defender, That the pursuer's title seemed defective, he being only infest on a precept of sasine granted by the father, as administrator of law for him; which is the same thing as if the pursuer, being major, had granted a precept for infesting himself, which could never be sustained.

No 36.
A precept of sasine by a father, as administrator in law for his son, a sufficient title.

Answered for the pursuers, That our custom has directed the method of a superior's establishing the right of property in his own person, upon that superveniency, viz. either by obtaining precepts from the Chancery, if the King be the superior's immediate superior, or by the superior's granting a precept for infesting himself in the property, which was done here. And though thus it falls out that the giver and receiver of the infestment is the same person, yet that is no matter; for one man often *sustinet duplicem personam*; and in different respects, and different rights, the same person may both give and receive. And this method of taking infestment was solemnly found to be proper, in the case of the Daughters of Mr. James Morton, No 34. p. 6917. 26th November 1608.

THE LORDS repelled the nullity, and sustained the summons and warning *adhunc effectum*, to make the defender liable to remove from the lands at Whitsunday next, but not for violent profits.

Act. *Dakerfj*

Alt. *Troup*

Clerk, *Dalrymple*

Bruce, v. 1. No 65. p. 79.