

1566. February 8.

M'DOUGAL against CAMPBELL.

No 2.

A tacksman acquiring the property of the lands from the setter of the tack, may, after the infeftment is taken out of the way, recur to his tack to defend himself against a third party.

UTHRED M'DOUGAL of Garthland, heir of line to the Laird of Corswall, warn- ed Alexander Campbell, bastard son to Corswall, to remove from certain lands pertaining to him as heir to Corswall. *Alleged*, That he had tacks of them to run, set to him by his father, which the pursuer, as heir, should warrant to him. *Replied*, He ought not to warrant these tacks to him, because after the date of his tack he had taken heritable infeftment of the same lands, whereby he had past from his tack. *Duplied*, His infeftment was reduced and decerned to have no faith, in respect whereof, his tack should stand in force to him. Which allegiance was found relevant, and the pursuer debarred from removing of the defender, *quia quem de jure tenet evictio, eundem ab agendo repellit exceptio*.

Fol. Dic. v. 1. p. 200. Spottiswood, (DOMINIUM.) p. 84.

* * * Maitland reports the same case :

ANENT the action pursued be Uthred M'Dougal of Garthland, aire of line to the Laird of Creswell, against Alexander Campbell, bastard son to the said Laird ; the said pursuer warned the said defender to remove fra certain lands pertaining to him, as aire to the Laird of Creswell. It was *alleged* be the de- fender, That he had tacks of the said lands made to him be the said Laird his father, and years thereof to run ; wherefore, the said pursuer, as aire foresaid, should warrant to him the said lands. It was *alleged* be the pursuer, That he sould not warrant the same, because after the date of the said tacks, the said defender had taken heritable infeftment thereof, and thereby he past frae his tacks be reason of his infeftment heritably. It was *alleged* be the said defender, That the said infeftment was reduced be the LORDS of Council, and found be their interlocutor and decret, to have no faith, in respect whereof, his tacks should stand in effect, and he had guid action to pursue warrandice thereupon ; whilk allegiance was admittit, and fund be interlocutor, that the said pursuer should warrant the said lands, conform to the tack, notwithstanding the alle- gance foresaid of the pursuer.

Maitland, MS. p. 172.

* * * See No 5. p. 3084.

1610. February 23.

LD OF CAUDER against Mr JA. HAMILTON.

No 3.

Found as above.

A MAN who has tacks of land, taking thereafter an infeftment of fee of the same land, with a reservation of another man's liferent, his infeftment will not take away his tack; but he bruike the lands during the years of the tack, and maintain his possession by virtue of the same against the foresaid liferenter du-

ring all the years of his tack, for payment to the liferenter of the duty thereof; notwithstanding his infeftment of fee.

No 3.

Fol. Dic. v. 1. p. 200. Haddington, MS. No 1821.

1624. July 3.

E. ANNANDALE against JOHNSTON of Betock.

IN an action of removing, pursued by E. of Annandale, against Johnston of Betock, the defender having compeared, who had acquired the right of the lands from one ——— Graham of Thornik, heritor of the lands controverted, from whom he had acquired double infeftments; one holden of the said ——— Graham of Thornik's self, and another of the King, upon Thornik's resignation, in the King's hands; upon which resignation the defender was infeft, holding of the King; this infeftment granted to be holden of the King, to the defender, is reduced, and also decerned to make no faith, at the pursuer's instance, the defender compearing; after which sentence, this removing being intended, the defender compeared, and defended himself, with the other base infeftment, granted to him, to be holden of Thornik. *Item*, He defended himself, that he bruiked by right, or by tolerance of the said Thornik his author, who was neither called in that first reduction and improbation, nor was his right in that process drawn in question, but subsisted as a good right, untaken away; both which defences were repelled by the LORDS; for they found, that the defender could not have recourse to the base infeftment holden of Thornik, seeing the same was absorbed by the public right given to the defender, upon his author's resignation, after the accepting of which public right, the other was extinct, and the defender could not return thereto, neither could he defend himself with his author's right, as if the same were good; and that it was not reduced nor called for in that process, seeing no right remained in his author's person, he being lawfully denuded in the defender's favours, and the defender thereupon infeft, which infeftment being reduced against the defender compearing, he could never have recourse to cloath himself with his author's right, which he alleged not in that reduction, and so prejudged himself therein, suffering his own right, which depended thereon, to be reduced, by compearing; likeas, he being once heritor, upon his author's resignation, there remained no right in his author's person, which could furnish any defence to the excipient, as if he bruiked by his tolerance, for the accepting from him of an heritable right, barred him from alleging that he was his tenant, seeing he to whom he alleged himself tenant, retained no right in his person, neither of property nor superiority. This decision is remarkable; for Thornik's own right was never impugned, and so the defender's own oversight imported this decision, and was the only cause thereof, seeing he omitted to propone the same, which seeing he compeared, he might have done, and eschewed thereby the sentence of reduction and improbation; and it might appear, that albeit the infeftment given to the defender, holden of

No 4.

A man having acquired double infeftments, as is usual, and having taken infeftment public by resignation, to be holden of the superior, and that infeftment being thereafter reduced at the instance of a third party; the Lords found that he could not return and defend himself in a removing by the other base infeftment, but that the public one made the base to cease.