1632. *January* 17. EARL of LAUDERDALE *against* ——.

No 28.
Case of removing, depending on the question, whether one tack had been superseded by another.

THE Earl of Lauderdale pursues removing against the tenant of the second part of the lands of Leillston. It is *excepted* for the defender, That he had years to run, set to his father, by the Lady Glencairn. To which it was *replied*, That the alleged tack cannot defend the defender, because it is offered to be proved, that the defender's father, to whom the alleged tack was set, accepted from the Laird of Craigmillar, a posterior tack for four years, and a less duty than was contained in the first tack, whereupon the exception is proponed, and conform thereto, made over payment since, of the said less duty; and farther, when the said Earl bought the said land from Craigmillar, the said Laird bound him to warrant the said land from all other tacks, but the last; and in a court holden by the said Earl, the defender compeared, and confessed that he had no other tacks but the last, as the judicial act of the court bore, in respect of which reply, all joined together, the LORDS repelled the exception.

*Auchinleck, MS. p.* 198.

*** Durie reports this case:

IN a removing, the defender defending with a tack set by the Earl's author, to the excipient's father, to whom he is heir, for terms to run; and the pursuer *replying*, That his father, after this tack, had accepted a posterior tack of shorter space and years of endurance, and for a less duty, and which less duty was ever since only paid; likeas, in the pursuer's court, holden by his Bailie of those lands, the defender hath declared judicially, that he bruiked by virtue of this last tack, and renounced all other tacks, as the act of court, subscribed by the clerk of court, bears; and the defender *duplying*, That the alleged paying of a less duty, seeing, he nor his father never paid a greater duty before the alleged setting of this posterior tack, so that the paying of that duty, cannot be ascribed to this alleged posterior tack, which they ever only paid before the said alleged posterior tack was *in rerum natura*; for their master, who was author to this pursuer, was never in use to take any more from them than this less duty; and further, this is not probable by witnesses, but by writ, or oath of party, to take away his tack, which is perfected by way of contract, and subscribed by both parties; whereas, his alleged posterior minute is not a perfected tack, but a minute for a tack, and is only subscribed by the party setter, and not by a tacksman, who subscribed the first tack by way of contract, and which posterior minute never came in the hands of this excipient, or his father, to whom it is alleged to be set, nor ever saw it, nor was it ever called in question in the father's lifetime, acquirer of the tack; albeit, the prior tack was set to the father and his heirs, this defender being his eldest son and

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.

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1632. *January* 25.
JAMES HAMILTON *against* MATTHEW WALLACE 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.

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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