

No 12.

viso, by a title, bars summary removing from the other parts.

quarter of the lands of _____, or else to remove from the lands as if he had no tack, conform to the order usual in such causes; the LORDS found, That albeit the defender found no caution to pay the duty, yet that the conclusion of the summons ought not to be granted, viz. to decern him to remove therefrom, because the defender *alleged*, That he bruiked the pursuer's third part of the lands contained in the tack libelled, with the two parts pertaining to the Earl of Linlithgow *pro indiviso*, so that he could not know the third part thereof to remove therefrom: This allegiance was found relevant, albeit the pursuer *replied* that the defender ought not to be heard, to make that a pretence of his not removing, seeing he had become his tenant in his third part, and taken tack from him thereof, and paid him duty therefor, and so could obtrude nothing against his removing therefrom, being his own deed, which he could not misken; especially seeing he clothes not himself with any other right to the said third part, nor with any right to the other two parts; and therefore, with the more reason, he ought to give again the land which he received from the pursuer by virtue of the tack, and that it was not necessary to him to allege or prove against his own tenant, that the third was severally known from the two parts, which he should dispute when he had to do with the heritor, or any other except his own tenant; notwithstanding of the which answer, the exception was sustained, and the defender assoilzied from the removing.

Clerk, Hay.

Durie, p. 88.

1630. July 2.

JOHN ROSS *against* The TOWN of PERTH.

No 13.

A comprising clad with possession, defends from wrongous intromission against a prior right.

IN a spuilzie at the instance of John Ross, he having right made to him by his father the Laird of Craigie, of the teinds of the kirk of Perth set to him during his lifetime, viz. "the father's lifetime, and thereafter for the space of two nineteen years tack to the heirs-male gotten of his own body, which failing, to their heirs-male whatsoever;" to the which tack the father, who was tacksman for his lifetime, *primo loco* as said is, made the said John assignee, with reservation of his own liferent, and accordingly retained the possession, he surviving divers years thereafter, after whose decease the right of the tack is comprised from his heirs-male by the Town of Perth, who, conform thereto, came in real possession of the teind-sheaves divers years; and the Town of Perth being convened for wrongous intromission, against which they opponing the tenor of the said principal tack, and their comprising, clad with real possession many years together, which they alleged should give them preference to the pursuer's anterior right which never took effect by any possession or intimation of his right, except only by executing of an inhibition twelve years since thereon, whereupon nothing more was prosecuted nor done by him *sinsyne*,

specially seeing they alleged, that the nature and tenor of the tack being set to the father during his lifetime, and the nineteen years tack therein to his heirs-male, therefore that he had no power to dispoise upon this nineteen years tack, which was to take beginning after his decease in the person of his heirs-male, whom he could not prejudge in his right: THE LORDS found this exception relevant, and preferred the compriser to the anterior right acquired from the father by the pursuer, as said is, seeing the pursuer had no possession; but this was in this judgment possessory, and to defend the possessor against this pursuit of wrongous intromission.

Act. ———.

Alt. Chair.

Clerk, Gibson.

Durie, p. 524.

1635. December 16.

MAXWELL against WRIGHT.

ALEXANDER MAXWELL having comprised the lands of Wringly, from Ker of Redpath his debtor, in January 1632, and being thereupon infest by public infestment upon the 2d of March that same year, and pursuing for the mails and duties of these lands, James Wright the defender *alleging* a prior infestment *in anno* 1630, granted to him to be holden of the granter, viz. the said Ker of Redpath, for most onerous and just causes, which, albeit base, yet was for a true and just debt, and done *in anno* 1630, long before this party's public right, by virtue whereof he alleged and claimed preference in respect of anteriority, and that he had become in possession of the lands by virtue of his right, by putting one of six score of sheep and sixteen kine, and some yeld goods of his own proper goods, and by conducting and hiring of herds for keeping of them and paying the herds their fees; and it being a grass-room, this should be found sufficient possession, for whatever corns were thereupon, he could not have more possession than of the grass, seeing before the acquiring of his right the corns were sown on the ground, so that he could not have any other possession of labouring; likeas, when he put on his goods, as said is, his debtor being then possessor, he removed off all his goods and sold and dispoised thereupon, and made the ground void and redd to the defender, and the next year he arrested in the tenants' hands their farms, and obtained thereupon decret against them, which is all the diligence that could be done, seeing this pursuer had neither done diligence nor recovered any possession by virtue of his public right; this allegiance was repelled, and the pursuer's right upon the comprising sustained and preferred to the excipient's prior base right, in respect that the pursuer offered to prove, that Ker of Redpath, their common debtor, remained in continual possession of the whole lands notwithstanding of the excipient's right, continually to the time of his comprising, and had his own goods pasturing thereupon; and whatever alleged goods the defender had thereupon, the same

No 13.

No 14.

Effect of possession, by tolerance, in competition between a public and a base right.