

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