No 65.

pursuer's comprising, three months deduced, within the time of his tack, could not defend against the prior comprising, notwithstanding of the possession had by the defender, which they found could not be ascribed to the comprising, as the defender would, seeing it was apprehended by the tack, after the expiring whereof he could not *mutare causam suæ possessionis*, in prejudice of the pursuer's prior comprising, *et sic in prejudicium alterius*, the prior compriser having done diligence; for the first warning made by him was an argument thereof, albeit it took no effect, by reason of the tack, and which the Lords sustained, seeing it was made before the defender's comprising; neither was it respected, that the defender alleged the denunciation to have preceded the warning, and so would have ascribed the continuing of his possession to the comprising, which was repelled as said is.

Act. *Mowat.* Alt. *Cunningham.* Clerk, *Gibson.*

1629. *January* 30.—An exception upon a comprising clad with possession diverse years before the warning, was not sustained against a removing founded upon a prior comprising, seeing the excipient's possession, which he had before the warning, was by virtue of a tack, which he had then standing, and before the warning the tack was expired; after the expiring whereof albeit he continued his possession, yet the same cannot make his second comprising to prevail against the prior, he acquiring no possession legally, by virtue of his comprising, but continuing that which he had by virtue of the tack before. *See* Tack.

Act. —— Alt. *Gibson.* Clerk, *Hay.*

*Fol. Dic. v.* 1. *p.* 598. *Durie, p.* 370. & 420.

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No 66.

Found in conformity with Earl of Annandale against Scot, No 64. p. 9211.

1683. *March.* Grant *against* Grant.

George Grant, as having right to several expired apprisings of the lands of Kirdells, pursues a declarator of expiring of the legal. *Alleged* for Colonel Patrick Grant, who had right to the reversion of the lands, That the pursuer was satisfied and paid by intromission with the rents of the lands, within the years of the legal. *Answered*, That any intromission he had was by virtue of a factory from the donatar of Grant of Kirdell's liferent escheat, who had obtained a decreet of special declarator against the defender, both for the bygone rents, and in time coming, which gift was preferable to the apprising. *Replied*, That the pursuer having entered to the possession, and intromitted with the rents several years before the gift of escheat, he cannot ascribe his intromission to the gift of escheat, as having a factory from the donatar, especially seeing it is offered to be proven, by the donatar's oath, that the gift was acquired to the defender's behoof; and it appears that the decreet recovered at the instance of

the donatar against him, was by collusion, it being only in absence; and the defender omitted to propone his competent exception, that he being *bona fide* possessor, he could not be liable to the donatar for bygones; and the gift being acquired to the defender's behoof, he cannot make use thereof to invert his possession; but his intromission must be ascribed to the apprising, as the most sovereign right, and *sors durior*, to stop the expiring of the legal.——THE LORDS found the pursuer having entered to the possession, by virtue of the apprising, he could not invert the possession, and ascribe the same to the gift of escheat, and that therefore his possession must be ascribed to the apprising. No 66.

*Fol. Dic. v.* 1. *p.* 599. *Sir P. Home, MS. v.* 1. *No* 462.

1685. *March* 24.

GLENDINNING and MAXWELL *against* GLENDINNING and CARSAN.

THE LORDS advised the count and reckoning pursued by Glendinning and Maxwell, against Glendinning and Carsan; and they found, that a ratification of a wadset right of 3000 merks did not hinder nor debar the granter of the ratification to propone payment upon discharges given by the wadsetter, prior to the said ratification, seeing it was only given in corroboration of the said right; and found these discharges were valid and probative, being between master and tenant, though not signed before witnesses; and that the wadsetter having been once in possession, he could not invert it by designing himself in the discharges only as factor to James Chalmers, an appriser; for though James was preferable, yet the wadsetter should not voluntarily have ceded the possession, unless he had been legally put from it; and they found a note of a messenger's poinding some oxen not sufficient to instruct that the creditor poinded them; because it was not by way of instrument, nor were the letters of poinding produced. No 67.

*Fol. Dic. v.* 1. *p.* 598. *Fountainhall, v.* 1. *p.* 356.

1686. *December* 7.

Mr GEORGE DICKSON and WILLIAM FOSTER, Writer, *against* Sir GODFREY M'CULLOCH of Ardwal.

IN Mr George Dickson and William Foster, writer, their case against Sir Godfrey M'Culloch of Ardwal, the LORDS inclined to think, a man might defend upon any right he had in his person when he was pursued, and that this was not ascribing his possession to one right more than to another; but if he pursue upon one particular title, as on a gift of escheat, a right of liferent, &c. No 68.