

No 39.

whether the tenants should be any further liable than for what was in their hands the time of the citation, they ordained that to be heard in their own presence.

P. Falconer, No 44. p. 24.

*** Harcarse's report of this case is No 23. p. 10633, Sect. 3. *h. t.*

No 40.

1695. *February 19.* GRANT of Arndilly *against* LAW of Newton.

RANKIELER reported Grant of Arndilly *contra* LAW of Newton. THE LORDS found, *imo*, That an infeftment in multures, with seven years possession, gave not the benefit of a possessory judgment, being only a servitude, like an infeftment of annualrent; *2do*, That forty years possession was not sufficient, without some legal compulsitor, unless it were *in molendino regio*. But here they fixed on the contract that had passed betwixt the parties' predecessors in 1619, and decerned conform to the quantities therein contained.

Fol. Dic. v. 2. p. 91. Fountainhall, v. 1. p. 671.

No 41.

1698. *January 26.* STEWART *against* GRANT of Elchies.

In a process of abstracted multures, the defender having pleaded a possessory judgment upon a right to his lands *cum molendinis et multuris*, in consequence of which right he had a mill upon his own ground, and did grind his corns there above seven years; it was *answered*, That thirlage is *res incorporea*, no more capable of possession than annualrents or other *debita fundi*.—THE LORDS sustained the possessory judgment.

Fol. Dic. v. 2. p. 91. Fountainhall.

*** See the particulars of this case *voce* THIRLAGE.

1706. *July 2.*

HEPBURN *against* ROBERTSON.

No 42.

A tack of teinds held to have the benefit of a possessory judgment, as well as an infeftment, being a real right.

THE prioress of the nunnery of Haddington having set a tack of the teinds of the lands of Garvald and Nunraw to Patrick Hepburn, for sundry liferents and nineteen years, the right of this tack is assigned by Patrick Hepburn of Nunraw to John Hepburn, bailie of Swinton; and he pursuing for these teinds, compearance is made for George Robertson, who had adjudged the tack from Nunraw for his debt, and craved preference, as being seven years in possession by virtue of his adjudication, and so had the benefit of a possessory judgment.

Alleged, Whatever teinds constituted by infeftment may plead, yet tacks can never be the foundation to afford the benefit of a possessory judgment, that being only a location, and a servitude on other men's lands; and Stair seems to be of this opinion, book 4. tit. 17. *Answered*, The same reason and analogy of law that gives this privilege to infeftments, takes place in tacks, which by act 17th Parl. 1449, are declared real rights; and it is as fit to punish the heritor's negligence in the one case as the other, and to call the authors in a reduction ere my right be taken away; and the current of decisions run so; 1st December 1676, Home *contra* Scot, No 37. p. 10641.; 13th July 1636, the Bishop of Edinburgh *contra* Brown, No 34. p. 10640.; and 23d January 1678, the Duke of Lauderdale against the Earl of Tweeddale, No 31. p. 6427, where tacks of teinds clad with seven years possession, were found a habile subject of a possessory judgment. The Lords were generally clear, that a tack of teinds could afford a possessory judgment as well as an infeftment, it being a real right, complete *in suo genere*; but superseded to decide it, in regard two practicks were alleged to have found the contrary lately, viz. betwixt Sir William Bruce and the Laird of Arnot, (*voce* TEINDS), and the Earl of Galloway and Macguffock of Rusko; *IBIDEM*; and though it was answered that was only in the case betwixt the titular and the heritor, yet the LORDS, before answer, ordained them to be produced, that they might be as uniform in their decisions as possible; but otherwise, there seemed to be no great difficulty in the question.

Fol. Dic. v. 2. p. 90. Fountainhall, v. 2. p. 340.

S E C T. VI.

Against what Rights does it take place?—Runs not *contra non valentes agere*.—If competent against an Action of Warrandice?—Runs against Minors.

1662. June 26.

ADAMSONS *against* LORD BALMERINO.

A POSSESSORY judgment not admitted against an annualrent right, which is *debitum fundi*.

No 43.

Fol. Dic. v. 1. p. 91. Stair.

* * * This case is No 3. p. 3346. *voce* DEBTOR & CREDITOR.