

No 68. he cannot afterwards vary so as to ascribe his possession to another title, and pretend he then bruiked by a comprising, because he hath already elected.— See Stair, B. 2. T. 1. § 27.

*Fol. Dic. v. 1. p. 599. Fountainhall, v. 1. p. 435.*

1710. June 16.

JOHN MURRAY, eldest Son to the deceased GILBERT MURRAY of Conheath, *against* JAMES MURRAY, his younger Brother.

No 69.

An appriser having entered into possession of lands, it was found that he could not thereafter invert his possession, and ascribe it to any other title, although such title was in his person prior to the apprising.

IN the action of count and reckoning, at the instance of John Murray, against James, his younger brother, who had accepted a factory from the pursuer, bearing 'power and commission to uplift and manage the rents of the lands of Conheath, pertaining to their father, and to submit, transact, compone, and agree all pleas, differences, and controversies arisen, or that might arise thereanent, without prejudice to James, of any acquisition made or to be made by him, of the lands and heritages aforesaid, upon his own industry, pains, and expense, either before, during, or after the factory;' the LORDS found, That whatever rights the factor acquired of the said lands, conform to the last clause of the factory, viz. 'That his acceptance should not be prejudicial to his acquisitions made or to be made,' must stand good only for a security to him for the sums principal, annualrents, and expenses, and interests thereof, expended by him, in purchasing and prosecuting these rights during the factory; and that upon John Murray's making payment thereof, deducting James's intromissions, the said rights shall be redeemable, and James be holden to denude in favour of the constituent, who must have the benefit of the eases, without prejudice to rights in the factor's person before the factory. Albeit it was *alleged* for James Murray, That since he might accept the factory with what conditions he pleased, *quæ dant legem contractui*, the last clause must operate something, viz. That his acceptance should not oblige him to communicate to John the eases of his acquisitions aforesaid, otherwise it should have no effect, and James should be equally liable as if he had accepted a simple factory; and such a clause is not inconsistent with the nature of a factory, there being mandates *in gratiam et mandantis et mandatarii*. For it was *answered* by the pursuer, That a factor, by the nature of his trust, is obliged to make the best he can of his constituent's pretensions relative to the subject of the factory; Fraser *contra* Keith; No 23. p. 6953.; 15th November 1667, Maxwel *contra* Maxwel, *voce* TRUST. Albeit all factories are not of a like nature, yet the clause founded on by the defender must be held *pro non adjecta*; since it is not only contrary to the very design of the factory, but also to law, *cui non derogatur pactis privatorum*; and is equally reprobated as if a tutor should adject to his acceptance of the office,

that it might be lawful for him to acquire, to his own behoof, rights affecting the pupil's heritage. No 69.

1712. *January 4.*—IN the count and reckoning at the instance of John Murray against James Murray, mentioned *supra June 16. 1710*, the LORDS found, that the defender having acquired a right to the lands of Conheath, from Elizabeth Maxwell, his mother, before the pursuer granted to him the factory, and entered to the possession by virtue of an apprising acquired by him during the factory, he could not alter or change the title of his possession, but must be understood to possess by virtue of the apprising, and be countable to the pursuer for his intromissions, ay and while the said right be extinct, or he denuded thereof in favour of the pursuer; but found, that after the said apprising is extinguished, or the defender denuded thereof, as aforesaid, he may compete for the possession.—See PACTUM ILLICITUM.

*Fol. Dic. v. 1. p. 599. Forbes, p. 411. & 569.*

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S E C T. VII.

Possession must be restored at the termination of the Right.

1583. *November.* CUNNINGHAM *against* COOK.

THE LORDS found, that, if a person who has heritable right to lands; shall thereafter take a tack thereof, he may be decerned to remove from the same (notwithstanding his heritable right) at the issue of the tack, without prejudice of his heritable right, *in judicio petitorio*.

*Fol. Dic. v. 1. p. 599. Colvil. Spottiswood.*

\* \* \* This case is No 26. p. 6424. *voce* IMPLIED DISCHARGE AND RENUNCIATION.

1591. GEORGE HARRIS *against* ANDERSON.

GEORGE HARRIS having pursued one Anderson for ejection, obtained decret, and for the violent profits comprised the lands; and after comprising, obtained infestment and sasine thereof, and warned the tenants to remove; and having gotten decret of removing, was, by virtue thereof, put in possession. This