

## No 22.

In a removing, this defence was sustained, that since the warning, the defender had done service to the pursuer, which was accepted, and that the service done was part of the old duty of the lands. It was found unnecessary to allege, that the service was required by the pursuer.

1626. July 12.

LA. KILBIRNIE *against* Her TENANTS.

IN a removing pursued by the Lady Kilbirnie against her tenants, the Lords sustained an exception proponed for the tenants, founded upon a tack set to them by the Lady, of the lands libelled, with consent of the Laird her husband; albeit she *replied*, that the tack could not defend them, seeing it was set by her principally (as was confessed by the defenders) with consent of her husband, she then having no right in her person to the lands therein contained; and albeit she had then right, as she had none, yet the tack ought to have been set by her husband, he then being living, and she should have been only made consenter: Far less can the same be sustained, where it is principally set by her, her husband being then living, who had the only right; and she then having no right, and his consent to her deed, which she had no power to do, cannot prejudice her: This exception was sustained, as said is, notwithstanding of the answer, because it was *duplied*, that the pursuer, after the setting of the tack, acquired a right to the lands, so that her supervenient right must be profitable to the tenants, to make that deed done to them by her to be valid, and to exclude her right, that she could not quarrel the same, being her own deed. In this same process also, the LORDS sustained an exception, bearing, that the defenders had done service to the pursuer since the warning, and that the same was accepted by her, without necessity to allege the same to be done at her command, seeing her acceptation was equivalent, being a ratihabitio; and found the same might be proven by witnesses, and was admitted so to be proven, without necessity to prove the same by writ or oath; but it was found necessary that the defender should allege and prove, that the foresaid service done by them to the Lady, was a part of the old duty accustomed to be paid for the lands before. See JUS SUPERVENIENS.

Act. Cunningham.

Alt. Belsher.

Clerk, Gibson.

Fol. Dic. v. 1. p. 432. Durie, p. 213.

\* \* Lord Kames mentions a case from Haddington, 14th March 1612, Hairstones against His Tenants, in which his Lordship says, it was found, that, service done by the tenant after the warning, and before the term of removing, did not invalidate the warning. The case is No 2439, of Haddington, but on a different subject, see TACK.

## No 23.

1629. March 5.

LADY BORTHICK *against* SCOT.

IN a removing the defender founding upon a tack, which though reduced, yet since the warning, he had paid taxation of the same lands for the pursuer's relief, and at her command and direction; the LORDS found this not relevant, unless it were alleged that he had paid it as part of the tack duty, because otherwise, if he had not been obliged to do it, it could not prejudice

the pursuer, although she had desired him, no more than if she had desired any stranger to do it.

*Fol. Dic. v. 1. p. 432. Durie.*

No 23.

\* \* See this case No 44. p. 914.

\* \* Spotiswood reports the same same :

1629. *February 6.* In an action pursued by the Lady Borthwick, against Sir William Scott of Goudilands, to remove from the lands of Pirntaton; *alleged*, no process upon the pursuer's warning, because it was prescribed by the act of Parliament 1579, the warning being made in April 1624; and the summons not being raised till May 1627; so that three years complete had intervened, *Replied*, the term whereunto the warning was made, was not till Whitsunday 1624, between which and his summons there were not three years. THE LORDS sustained the warning.

*March 5.* Afterwards in that same action, Goudilands having excepted upon a tack; which the pursuer *replied* was reduced; *duplied*, she could not quarrel his tack, because he offered to prove, that since the warning he had paid taxation of the same lands for her relief, and at her command and direction. *Triplied* not relevant, unless it were alleged, that he had paid it as a part of the tack-duty; for otherwise if he had not been obliged to do it, it would not prejudice her, although she had desired him, no more than if she had desired any stranger to do it. THE LORDS repelled the exception and duply, unless he would say as in the triply.

*Spotiswood, (REMOVING.) p. 286.*

1671. *June 24.*

MAIN *against* MARCH.

MAIN having gotten a decreet of removing against March, from a tenement in the Canongate, having thereupon charged him to remove, he did suspend upon this reason, that the charger after the decreet, had received mails and duties for terms subsequent to the removing, and therefore had past from the removing, and behoved to be of new warned. It was *answered*, that the payment of the mails and duties was not voluntary, but upon a decreet, and therefore was not a passing from the removing. THE LORDS did find the letters orderly proceeded, and found that albeit voluntary payment of a terms mail and duty subsequent to a warning, was a passing from the same, so that the tenants behoved to be of new warned, yet after a decreet of removing, he suffering the tenant to remain for another term, might pursue for mails and duties, and thereby did not prejudice his former decreet, both these remedies of law being consistent against an unjust possessor and tenant, to make use of his decreet of removing, and to charge and receive payment for the mails and duties.

*Fol. Dic. v. 1. p. 432. Gosford, MS. No 362. p. 177.*

No 24.

Voluntarily receiving of mails and duties after a decreet of removing is a passing from it, but if it be upon a decreet for terms subsequent to the warning, it hinders not to charge for removing, so that there needs no new warning.