

ring all the years of his tack, for payment to the liferenter of the duty thereof; notwithstanding his infeftment of fee.

No 3.

*Fol. Dic. v. 1. p. 200. Haddington, MS. No 1821.*

1624. July 3.

E. ANNANDALE against JOHNSTON of Betock.

IN an action of removing, pursued by E. of Annandale, against Johnston of Betock, the defender having compeared, who had acquired the right of the lands from one ——— Graham of Thornik, heritor of the lands controverted, from whom he had acquired double infeftments; one holden of the said ——— Graham of Thornik's self, and another of the King, upon Thornik's resignation, in the King's hands; upon which resignation the defender was infeft, holding of the King; this infeftment granted to be holden of the King, to the defender, is reduced, and also decerned to make no faith, at the pursuer's instance, the defender compearing; after which sentence, this removing being intended, the defender compeared, and defended himself, with the other base infeftment, granted to him, to be holden of Thornik. *Item*, He defended himself, that he bruiked by right, or by tolerance of the said Thornik his author, who was neither called in that first reduction and improbation, nor was his right in that process drawn in question, but subsisted as a good right, untaken away; both which defences were repelled by the LORDS; for they found, that the defender could not have recourse to the base infeftment holden of Thornik, seeing the same was absorbed by the public right given to the defender, upon his author's resignation, after the accepting of which public right, the other was extinct, and the defender could not return thereto, neither could he defend himself with his author's right, as if the same were good; and that it was not reduced nor called for in that process, seeing no right remained in his author's person, he being lawfully denuded in the defender's favours, and the defender thereupon infeft, which infeftment being reduced against the defender compearing, he could never have recourse to cloath himself with his author's right, which he alleged not in that reduction, and so prejudged himself therein, suffering his own right, which depended thereon, to be reduced, by compearing; likeas, he being once heritor, upon his author's resignation, there remained no right in his author's person, which could furnish any defence to the excipient, as if he bruiked by his tolerance, for the accepting from him of an heritable right, barred him from alleging that he was his tenant, seeing he to whom he alleged himself tenant, retained no right in his person, neither of property nor superiority. This decision is remarkable; for Thornik's own right was never impugned, and so the defender's own oversight imported this decision, and was the only cause thereof, seeing he omitted to propone the same, which seeing he compeared, he might have done, and eschewed thereby the sentence of reduction and improbation; and it might appear, that albeit the infeftment given to the defender, holden of

No 4.

A man having acquired double infeftments, as is usual, and having taken infeftment public by resignation, to be holden of the superior, and that infeftment being thereafter reduced at the instance of a third party; the Lords found that he could not return and defend himself in a removing by the other base infeftment, but that the public one made the base to cease.

No 4. the King, was reduced, and decerned to make no faith, yet that he might have defended his possession with the base infeftment holden of his author, or that he was tenant to him, his author's infeftment being good in itself; for that sentence of reduction would appear to prejudge him no more than if the defender had renounced that public infeftment, *quo casu* he could not have been hindered to return the other, or to allege himself tenant to his master, who had a right. But the LORDS found the contrary, that the public infeftment made the base to cease.

Act. Hope.

Alt. Aiton et. Oliphant.

Clerk, Scot.

Fol. Dic. v. 1. p. 200. Durie, p. 136.

1628. March 12.

E. DUMFERMLINE against COUNTESS.

No 5. A TACKSMAN acquiring the property of the lands from the letter of the tack, may, after the infeftment is taken out of the way, recur to his tack to defend himself against a third party. See No 2. p. 3082.

Fol. Dic. v. 1. p. 200.

\* \* See This case voce TACK.

1634. December 11.

L. LESMORE against HUTCHESON.

No 6.  
A tacksman acquired a wadset of the lands. His right of wadset was set aside. He was found entitled to defend himself upon his tack against the donatar of the letter's liferent escheat, who had reduced his infeftment as granted in *curso rebellionis*.

L. LESMORE, younger, being constitute assignee, by the L. Caprington, donatar to old L. Lesmore's liferent escheat; after general declarator, in an action of special declarator, he pursues one called Hutcheson for payment of the mails and duties of the lands of ——— pertaining to the rebel; and the defender defending himself with a tack of the lands, set to him by the rebel before his rebellion, the pursuer *replied*, that he had passed from that tack, in so far as, since the date thereof, he had accepted an heritable infeftment of these lands from the rebel, he then being rebel unrelaxed, whereby the tack became extinct, so that he cannot have recourse thereto; and therefore the heritable right being acquired thereafter, at the which time he being rebel, and not relaxed within the year, he could not dispoise the lands within the year, the rebellion being *in cursu*; so that whenever the year of his author's rebellion expired, his liferent of the lands must belong to the superior, and the same cannot be excluded by returning to the tack, which was absorbed by the heritable posterior wadset. And the defender *duplicing*, That seeing the wadset is not a valid right to him, whereby to bruik, he may lawfully return to that right whereby he did bruik; for if his heritable infeftment were reduced, or that another had acquired a better right, which would give him preference to the lands before the excipient's right, *hisce casibus* his heritable right falling, he might return to his tack, and