

with the consent of the heritor, obtained a decret of removing against the Sub-tenants before the Sheriff of Lanerk, of which a bill of suspension was presented, on this, amongst other reasons, That the principal tacksman was not called; the LORD ORDINARY "refused the bill;" and a reclaiming petition being presented,

"THE LORDS were of opinion, the Sub-tenants could not be removed, unless their author were called; and therefore remitted to the Ordinary to pass the bill."

Act. Lockhart.

Alt. Haldane.

Clerk, Gibson.

Fol. Dic. v. 4. p. 222. D. Falconer, v. 1. p. 77.

SECT. III.

Warning, in what Cases necessary.—How to be executed.

1549. May 28.

RAMSAY of DUNOON against STEWART.

In causa Domini de Dunoon contra William Stewart in Dunfermline casus erat talis. Umquhile Archibald Ramsay of Dunoon, father to John Ramsay, now Laird thereof, and pursuer in this cause, set in anno 1528, his lands of Castleland for nineteen years to the said Robert, with clause of warrandice of the said tack during the said space. An year thereof being run, the lands fell in ward in the King's hands, and their ward being disposed to the Laird of Rosyth and Overbarton, the said Robert proponed now again for tacks of the same, for the time of the ward, and so bruiked all the eighteen years, resting of his nineteen years tack, the said lands of the wardatar, for mails and duties alienarly contained in the said tack. The ward being furthrun, the Laird of Dunoon sold the lands from himself. The said eighteen years being by-past, or at least run for the most part, the said Robert called this John Ramsay, as heir to Archibald, to warrant to him the said eighteen years of the said tack, which he might not bruik, because of the ward; for the King, incontinently, that land came to him by ward and non-entry, at the next term removes the tenants, and keeps no tacks set of before, and his donatar has the same privilege by the practick of Scotland; the cause hereof is, the general act made by all the Barons in King James IVth's days, as is contained in his act of Parliament, granted to the King, and his successors; the marriages of all the heirs of wardlands, and the profits thereof, during the ward; because his predecessors grant-

No 50

No 51.

Though a tacksman cannot maintain his possession against the superior during the ward, yet he cannot be summarily removed, but must be warned in common form.

No 51.

ed and gave to who were Kings of this realm, to all the Barons, and their heirs, all their wards in heritage, which before were the Crowns, and, in recompense of that gift of the King, the marriages and wards were granted by the whole Barons to his Grace's support; and there may no Baron set or dispone his lands in long tack, the which tack may oblige thereto the ward durand or non-entries of lands, for he has that jure coronæ, as titulo oneroso utpote in compensationem ut supra. Videbatur, tamen aliquibus senatoribus, that because the King, in these cases, succeeds in locum dominorum defunctorum, he should keep the tacks, as they should have done themselves, ut emptor terrarum de practica Scotiæ tenetur stare locationi prius factæ per venditorem, nec potest remove de terris ipsos tenentes durant. terminis assedationis earund. ut notatur, licet de jure scripto secus sit, nisi hoc expresse contineatur, et conventum fuerit inter venditorem et emptorem, L. 9. C. Locato: Attamen de practica et municipale jure Scotiæ non scripto et consuetudinario utitur rex jure prædicto inconcusso; sed ad rem revertamur; so the said Robert was put from his tack by the donatar of the said ward, et noscitur that the King does this without any calling of the tenants or others to hear the lands decerned in ward, sed ad manus proprias et de facto he puts his hands to the lands, and takes them, and intromits and dispones thereupon; nevertheless, first needs to warn, lay out and denude orderly, the tenant and occupier thereof of the ground; but before the King put his hand to land, ratione non intructa, he must first get the land decerned by decret of the Lords of Session to be in non-entry. Sed ad rem revertamur; the donatar would not suffer the said Robert to bruik the lands by the tack, and so, by the donatar of the ward's right, he bruiked the lands, and not by virtue of his tack foresaid, during the eighteen years. The said Robert, *in anno* 1549, obtained a decree of the LORDS, decerning the said John, as heir foresaid, to warrant to him the foresaid eighteen years tack, because his father set the same, and took the said Robert's grassum therefor; also, in his assedation, obliged him and his heirs to warrant the said nineteen years tack to the said Robert. Thereafter, letters of four forms being raised upon that decret against the said John; for suspension thereof he called by a supplication the said Robert to hear the said letters and horning thereintill suspended, till the liquidation of the said Robert's damage and skaith, through not warranting to him the said eighteen years tack, and offering him to pay the same, it being liquidated; for he might not set him as many tacks after the ward, because he had also annalzed the lands of Castleland, which he had then in his hands unannalzed; he had been compelled to suffer the said Robert to bruik for the said eighteen years, because of the practick of Scotland, wherever a man, by reason of ward or non-entries, is stopped to bruik

the tack made before to him by the Laird of the lands, the Laird is obliged to thole him to bruik, and keep him as many years of that land after the ish of the ward or non-entries, as was to run of the tack when the said ward or non-entry began, and lasted; as there were this day in special produced before the LORDS by Mr James M'Gee, procurator for the said Robert, a decret of the Lords of Council, given betwixt the Laird and Lady Barnbougel, et quondam William Moubray ratifying and confirming a rollment of Court, given by the Sheriff of ——— for the said William Moubray to bruik the four oxen-gang he claimed, for as many years after the outruning of the ward of the said lands, as was to run of the said William's two-years tack made to him before the said ward by the said Lady. Sed ad questionem nostram. THE LORDS, upon the supplication foresaid, assigned a term to the said Robert to liquidate his said damage and skaith, which being made viz. by probation judicial made of the mails and duties of the said lands paid by the tenants for all mails and duties of the ground aughting to the Laird first, and now to the wardatar, being deduced, the LORDS decerned by their decret the said John to pay to the said Robert the sum of the prices and quantities specially proved. Now this day (28th May 1549) the said John called Robert to produce the decret of warrantice and liquidation, and to hear the same reduced, cassed, and annulled diversis ex causis, primo quia dictum decretum of warrantice was evil and wrongously given, et causa non relevante nec sufficiente, viz. quia the said Archibald was obliged, in his assedation, to warrant the same to Robert, and did not the same, nor the said Robert might not bruik the lands by that assedation, and was put therefrom by reason of the ward, as the decree of warrantice bore expressly, which cause the said John alleged was not relevant of the law, in respect that the said impediment of the tack came ex causa subsequente casu fortuito, viz. morte domini superioris terrarium assedatarum ultra moram aut culpam ullam ipsorum Archibaldi aut Joannis; nec de jure, nec de practica regni Scotiæ tenetur warrantizare terras venditas a wardis relevas et non introitibus, nisi hoc specialiter tractatum sit inter contrahentes; ergo nec in contractu locationis venit homini wardum et non introitum warrantizare, nisi specialiter in contractu hoc dictum sit et expresse ad hoc se obligaverit locator quia ad paria regulantur emptio et venditio, conductio et locatio; et hinc inde eadem ratio militat; ergo servanda eadem juris dispositio; ergo dictum decretum erat injuste latum decernendo warrantizationem ut supra et similiter decretum liquidationis et condemnationis in interesse ipsius Roberti, through not bruiking of the said lands ratione assedationis, quia ipse nihilominus Robertus bruiked the said lands all the eighteen years, paying to the wardatar allenarly therefore the mails and duties contained in the fore-

No 51. said assedation, and no more; and so, since he bruiked the lands, the hail space foresaid, for the said profits, he was wrongously condemned to warrant these years; and that the decret of liquidation was also unjust, decerning interest where none was, quia the said Robert paid no more yearly to the said wardatar than he should have paid to him, and so he had no skaith; and that it was wrong to make to the said Robert, for eighteen years, twice eighteen years, and profits also double, as said is, et quia hoc casu ipse Robertus locupletatur cum jactura ipsius Joannis, for he got the profits of eighteen years, which John had no penny worth for, and which the said Robert bruiked; and so there were reasons in effect for reduction of the said decret, with other diverse frivolous reasons, quas superfluum foret recensere. To the first reason, Mr James, procurator for the said Robert, *answered*, That this impediment wherethrough the said Robert might not bruik the lands ratione assedationis comes ex causa præterita et antecedente, viz. by the common law and practick of Scotland, by which the ward pertains to the Crown, and from this law no man is exempt. Non obstat practica regni hujus wherever the tacksman is put from his tack by ward of the lands happening within the years of his tack, then the ward being ended, the tacksman ought to have back as many years thereafter, conform to his tack, as the ward took from him, et ita obtentum fuisse in foro contradictorio ut super relat.; et illud decretum dominorum concilii inter dictas partes de data at Edinburgh, the day of years, authenticum produxit, together with the Sheriff's rollment foresaid; and because, through the said Laird Denoon's deed, that had analzied the lands, he might not get 18 years' tack, after the ward outrunning, therefore the said Robert behoved to call him for warrandice of these years, and then to come to the liquidation of the mails and duties, et sic ad interesse suum quid facto locatoris impediatur uti, conform to the law and practice of this realm, re locata, L. 9. D. Locati; and where John said, intus habebat quod petebat et dictos integros 19 years he bruiked, as said is; the said Robert *alleged*, That he bruiked not these lands by virtue of Archibald's assedation, but by virtue of a new right and title, obtained by him from the wardatar; and in case he had been put from the lands allenarly, he would, without doubt, after the practice of Scotland, have obtained the profits foresaid; and if he, by his labour and industry, has made his own condition better, he should not be therethrough of worse condition; and that he bruiked these lands durante warda but as a stranger et nullo modo jure assedationis; ideo, in respect of the said assedation, and action that he for not bruiking of the same, has of the practice contra locationem, est provisum ac si omnino esset remotus a dictis terris per wardatarios.

Fol. Dic. v. 2. p. 335. Sinclair, MS. p. 99.