REMOVING.

SECT. I.

Who entitled to purſue a Removing.

1542. *June* 13. SANDILANDS *againſt* CARMICHAEL.

No 1.
A principal tenant may remove his sub-tenant by his own precept.

IN a cauſe, moved by amicable way, before the Lords, by John Sandilands against Gavin Carmichael, anent all things that any of the ſaid parties had to lay againſt other, the ſaid John *alleged* he was violently put forth by the ſaid Gavin, of his mailing of ——. The ſaid Gavin *alleged*, That he was orderly removed therefrom, by the ſaid Gavin's precept, who was tackſman of the lands to the Maſter of Eglinton and his Lady, and he was in poſſeſſion thereof, and the ſaid John paid him the mails thereof for certain years bypaſt. THE LORDS decerned, that becauſe the ſaid Gavin was principal tackſman of theſe lands, and in poſſeſſion thereof, that he might warn, remove, and eject orderly, as uſe is, the ſaid John, his ſub-tenant; albeit a tenant or tackſman may not do the ſame, till he get intereſt or poſſeſſion of his mailing and tacks; and ſo the ſaid Gavin was aſſoilzied from the alleged violent and wrongous ejection of the ſaid John, forth of his mailing foreſaid.

Fol. Dic. v. 2. *p.* 335. *Sinclair, MS. p.* 32.

1582. *January.* Laird of WEDDERBURN *againſt* Laird of BLACKADDER.

No 2.
Effect of poſſeſſion to bar removing.

THE Laird of Wedderburn warned the Laird of Blackadder to flit and remove from the lands called the Hilton. It was *alleged* by Blackadder, That he ought not to flit and remove, becauſe his predeceſſor's lands of Blackadder, to whom he was lineal heir, and he himſelf alſo was and has been in poſſeſſion, by virtue of the ſame, by the ſpace of three or four ſcore year. This exception being admitted to probation, and referred to ſay *contra producenda*, the Laird of Blackadder produced an inſtrument of ſaſine, making mention, how one Andrew Blackadder of that ilk his predeceſſor was ſeiſed in the

No 2. lands, per preceptum ex capello Domini Regis post inquisitionem debito modo factam; and as to the possession both of his predecessors and himself, it was granted by the party's self. It was *alleged contra* the instrument of sasine, That it could not prove the exception, because it was null of itself, by reason it was taken away thereafter, by a decreet of recognition for the self same lands of the Hilton, being holden immediately of the King, by the Earl of Glencairn thereafter recognosced; which recognition was instantly produced, together with a reversion made by Andrew Blackadder to the Earl of Glencairn, for the redemption of the said lands, as being wadset by the Earl of Glencairn to Blackadder; and so the two *fuerunt incompatibilia*, that the Laird of Blackadder's sasine was true in itself, making mention the lands to be holden of the King, and that he had taken them in wadset from the Earl of Glencairn, and they were recognosced and evicted thereafter from the Earl of Glencairn. Many and sundry exceptions were proponed against the sasine; as a gift of non-entry obtained by Blackadder's goodsire thereafter; to which was *answered*, That this judgment, the sasine standing so long time as the space of fourscore years, with the continual and uninterrupted possession by virtue of the same, could not be taken away by way of exception, but behoved to be reduced *ordinaria via et modo*, for all the exceptions made against the sasine were not concluding, except there had been an express declarator of the annulling or away-taking of the said sasine. To this was *answered*, By the act of Parliament anno 1555, cap. 42, that nullities of titles may come in by way of exception, in the same instance that they are proponed, and there was sufficient reason to declare the said instrument of sasine to be null, or at least not sufficient to prove the exception, quia juxta doctores, id quod imperfectum est dicitur, nullum sicuti testamentum imperfectum dicitur, nullum nisi quibus modis testatur; and this instrument of sasine was *omnino in se imperfectum*, for it declared and made mention of a precept directed forth of the Chancery, and the tenor of the precept was not inserted in the body of the same, nor yet was the precept shewn; and it made mention of the retour and inquisition, and nothing shewn; and so there mistered no declarator of the instrument, but its own self; and that it might be decerned not to prove the exception, because it never proved the lands to be holden of the King, and the narrative of the notary's self could not prove, *juxta Authen. C. De edendo.* To all this was *answered*, partly at the bar, partly by reasoning among the Lords, That as to the act of Parliament, the express words of the act were of "nullities of the law," and that is to be called null of the law, that is express against an expressed law, vel contra legem regni, aut jus commune, as to a pupil to dispone or contract without the consent of his tutor and curator; as a charter or instrument of sasine of the feu-farm of Kirklands to be without a confirmation; an instrument of sasine to be given of a precept direct forth of the Chancery of our Sovereign Lord, by another no-

tary, than the Sheriff-clerk; sasine within burghs to be given by others than the Bailies; these may be called null of the law, as done against the expressed law, but such writs or instruments of sasine that are not against the expressed law, and are authentic of themselves, they can never be called null of the law, sed veniunt annullanda ordinaria via et modo; and also of the law, this action being intented in a removing, et in recuperanda possessione, prius terminandum est possessorium, quam petitorium L. 13, C. De rei vindicatione; et ait Bald in L. Unica, C. Uti possedetis, quod finis retinendi possessorii est initium petitorii, et in retinenda possessione sufficit titulus putativus et titulus bonæ fidei; et is dicitur bona fide possidere, qui nec vi, nec clam, nec precario possidebat, et is qui ita possidet non debet a possessione sua removeri nec inquietari, nisi proprietate prius discussa, prout in lege unica et titulo unico, C. Uti possidetis; and so the said sasine stood unreduced with the long continual and uninterrupted possession, and behoved to stand at least as *titulus putativus*, and could never be taken away in this judgment possessory, but behoved to be taken away in the judgment petitory, and by way of reduction; and it was never seen, in any time past, that a title with so long possession, was taken away by way of exception. The matter being, with long continuance of time, reasoned at the bar, and among the Lords themselves, the LORDS pronounced *definitive* that the exception was not proved, and that the said sasine might be taken away by nullity of exception; *licet bona pars*, &c. No 2.

Colvill, MS. p. 351.

1582. *February.* LADY ESSILMONT *against* Her TENANTS.

No 3.
Effect, to bar removing, of a deed by a wife, alleged to be *donatio inter virum et uxorem.*

THE Lady Essilmont sometime Countess of Errol, pursued the Tenants of —— to flit and remove. It was *answered* by the Tenants, Se non debere migrare et removere se, quia the said Lady bound and obliged her, to her husband, ante suum obitum et in tempore nuptiarum, that in case she, after his decease, intromitted with his goods or gear, she should renounce and overgive all right that she had to the said lands, for her lifetime, as it was subscribed; and that she had, *de facto*, intromitted. It was *alleged*, That this bond made between my Lord her husband and her, de jure non valuit, quod fuit donatio inter virum et uxorem, quæ regulariter prohibetur. To which it was *answered*, That donatio hæc morte et obitu maritu confirmatur; and so, albeit it was revocable during the lifetime of the husband and wife, yet by the decease of the Lord and husband, it was ratified and approved. The which the LORDS found relevant. 2*do*, It was *alleged*, That the bond of renunciation made by the woman, behoved to have a declarator, and could not be admitted *via exceptionis*. THE LORDS found, that in so far as it was alleged that she had intromitted with the gear, that the deed's self was sufficient declarator, and where the deed is followed, there mistered no declaration, *vel ubi res devenit in actum.*

Colvil, MS. p. 353.