No 13. stance upon that warning, only executed at his umquhile father's instance, which became extinct by his decease; and this pursuer could not be heard to do any legal deed thereupon by removing, unto the time a new warning was executed lawfully at his own instance: And also *alleged*, That the pursuer's retour and sasine were both after the term, before which the warning was made; so that albeit the warning had been at his own instance, yet the same cannot be sustained, he neither being then, nor yet at the term, nor before it, either retoured heir or seased, far less can it be sustained to maintain the warning at his instance, which was executed by the defunct.——The Lords repelled both these allegeances, and found, That the heir might prosecute the warning, and intent action thereupon, which was used by his deceased predecessor, albeit nothing had been further prosecute thereupon by the defunct before his decease, and which the Lords found the heir might competently do, as well where the defunct dies before the term to which the warning was made, as when he dies after the term; neither was it respected, that the gross profits of the first year after the warning, might be claimed by the executors of the defunct who survived the term, and that the heir could not have right thereto: And also, the Lords repelled the other allegeance; for they found that the retour and sasine, albeit both after the term, gave the pursuer sufficient title and interest to pursue this removing, against a party who had no right to the land himself, and that the retour and sasine should be drawn back; but I find a scruple in this decision, and for the back-drawing of the retour and sasine, I conceive not how they can be drawn back to give the pursuer right to a personal act as warning, which then he could not make or do, the defunct who then had the only right being living for the time.

Act. *Advocatus et Stuart.* Alt. *Craig et Gilmore.* Clerk, *Scot.*

*Fol. Dic. v.* 1. *p.* 210. *Durie, p.* 855.

## SECT. V.

### Judicial Deeds, after the Judges death or removal.

1627. *March* 9. Stuart *against* Fleming.

No 14.

In an action betwixt Stuart and Fleming, the Lords found, That after the decease of the judge and clerk, the intrant and succeeding clerk might extract an act out of the books of that jurisdiction, which was registrate therein of before, and that there needed no transumpt or warrant to add force thereto, as in

prothecals, where the clerk of burghs or notaries are dead. This was in the town books of Glasgow. No 14.

Act. *Cunningham.* Alt. *Frazer.*
*Fol. Dic. v.* 1. *p.* 210. *Durie, p.* 287.

---

1629. *January* 22. MASTERTON *against* ROBERTSON.

No 15.
An exception of lawful poinding was sustained to elide an action of spuilzie, although the Sheriff who directed the precept of poinding was now two years out of office, and another in his place. The Lords found no necessity to put the lieges to the charges of a new precept, in such a case.

AN exception of poinding was sustained to elide an action of spuilzie, albeit the goods were intromitted with by the defender at his own hand, by the space of three hours before the officer who pointed, or entered to an act of poinding; and also, albeit the Sheriff who directed the precept of poinding was not in office, nor Sheriff at the time when the precept was execute, but that the time of the poinding there was another Sheriff; which was not respected, but was found that a precept direct by a Sheriff before, albeit not execute so long as he was in office, yet might be execute thereafter in the time of the next succeeding Sheriff, without any new precept to be directed by him, for that would put the subjects to unnecessary charges; and there was two years almost betwixt the date of the precept and the time of the execution; yet the same was nevertheless sustained.

Act. ——. Alt. *Nairn.* Clerk, *Gibson.*
*Fol. Dic.* v. 1. *p.* 210. *Durie, p.* 416.

*** Spottiswood reports the same case, calling the parties Robertson against Myrton:

ALEXAMDER ROBERTSON convened Alexander Myrton for spoliation of 27 wedders.—*Alleged*, No spuilzie, because he only assisted the officer in poinding of the wedders by virtue of a sentence.—*Replied*, The poinding was not lawful, because the precept was direct by the Laird of Bonniton, being then Sheriff; and it was not execute till he was out of his office, which could not be.—*Duplied*, No necessity to raise new precepts in the new Sheriff's name, where they are changed yearly. It is true that the prince, *qui est fons jurisdictionis*, being altered, *cessat jurisdictio;* but to say when a Sheriff cedeth his place to another, that his precept expireth, the King living, is absurd. Many of the LORDS found the exception only relevant to elide the spuilzie, but not for wrongous intromission and restitution of the goods, in respect of the reply; yet the most part sustained the exception even against wrongous intromission.

*Spottiswood*, (SHERIFF.) *p.* 311.