

S E C T. II.

Who must be called.

1565.

JOHN LAING *against* N——.

IN a removing pursued by Mr John Laing parson of Luss, against N., *alleg- et*, That he was not lawfully warned, he being only a sub-tenant, and the principal tenant of whom he had the set not warned. *Replied*, That the principal tenant's tack was run out, so that he was not necessitated to warn him, he neither having tack, nor occupying the ground. *Duplied*, That the tenant who had the tack not being warned, was understood to possess *per tacitam relocationem*, ever till he were warned; neither might the sub-tenant *intervertere possessionem domini sui eo inscio*. THE LORDS found the warning not lawful, because the principal tenant was not warned.

No 40.
In a removing of a person holding from a principal tenant, the principal tenant must be called; but see No 46. and No 48.

Fol. Dic. v. 2. p. 338. Spottiswood, (REMOVING.) p. 284.

* * * Maitland reports this case:

IN an action of removing moved by John Laing, parson of Luss, against James ———, desiring him to remove from his glebe and kirk-lands of ———, who *excepted*, That he was not lawfully warned to remove, he being a sub-tenant, and the tenant of whom he had the tack set not being warned. It was *replied*, That the tacks of the said tenant were forthrun, and so he was not tenant to the said parson, because neither had he tack, nor yet occupied the ground. It was *answered*, That the tenant who once had tack not being warned to flit, had *tacitam relocationem*, and the sub-tenant might not *intervertere possessionem domini sui*, albeit he would have made payment to the said parson. It was found that the principal tenant behoved to be warned, or else this warning could not be lawful.

Maitland, MS. p. 201.

1627. February 17.

WILSON *against* LINDSAY.

No 41.

IN an action of Wilson against Lindsay, for removing from a waste ground and some lime-pots and houses, the LORDS repelled an exception proponed upon he defender's own infeftment of these same lands, and his author's infeftment likewise standing clad with 40 years possession; because the pursuer qua-

No 41.

lified a more pregnant possession in his own person of these same lands, by setting of the houses and receiving yearly mails therefor, and by barking of his skins in the lime-pot continually, and spreading and drying them upon the waste ground without interruption; which the LORDS sustained in fortification of the pursuer's right, to produce removing against the excipient in this same judgment, without necessity of any reduction of the excipient's right.

Act. *Craig.*

Alt. ———.

Clerk, *Gilson.**Durie, p. 278.*

No 42.

1628. *January 26.* CAPTAIN ANNAND *against* TENANTS.

IN a removing by Captain Annand against his Tenants, the defenders alleging that they were Tenants to their master, who was infest in the lands libelled before the pursuer's sasine produced, and by virtue thereof, who had been sundry years in possession; the LORDS sustained this exception, the same being proponed for Tenants, and found no necessity that the defenders being Tenants should be compelled, either to allege that their said master was infest by one having power, or that he was ten years in possession of the lands, but sustained the same, without alleging any further.

Act. *Dunlop.*Alt. *Mowat.*Clerk, *Hay.**Durie, p. 333.*

No 43.

1628. *February 20.*BANFF *against* TENANTS, and MARR *against* TENANTS of DRYBURGH.

IT is enogh for a tenant to say, that he is tenant to N. who is infest, and he not warned; and he needs not say, that his master is lawfully infest, but only infest; Laird of Banff against his Tenants, 7th December 1627. But if the lands be kirk-lands, he must say, infest and confirmed; because if his master's infestment of kirk-lands be not confirmed, it is null by way of exception, by the act of Parliament. Marr against Tenants of Dryburgh, 20th Feb. 1628.

Spottiswood, (REMOVING.) p. 276.

* * Auchinleck reports this case :

THE Tenants of Dryburgh pursued for removing, *alleged*, That they were Tenants to , who was infest. To which it was *replied*, That the exception is not relevant, they would allege lawfully infest and confirmed, in respect it was kirklands. THE LORDS repelled the exception, in respect of the reply.

Auchinleck, MS. p. 191.