

No 61.

Replied, That ought to be repelled, because any infeftment they had, was reduced at the pursuer's instance. *Duplied*, His allegiance stands relevant notwithstanding, because the pursuer's reduction was long after the warning, and they were *in bona fide* to possess still, knowing the pursuer to have no right, and should possess yet until they be warned of new. *Triplied*, All this has some force to free the defenders from violent profits, but cannot hinder the removing, seeing the defender's infeftments are now taken away by reduction. THE LORDS found they behoved to be warned of new again.

Fol. Dic. v. 2. p. 338. Spottiswood, (REMOVING.) p. 281.

1627. July 7. L. PITMEDDEN and LO. ELPHINSTON *against* SMITH.

No 62.

In a similar case, the defender was decerned to remove in the same process without a new warning, but not till the term, and without violent profits.

In a removing, pursued by Pitmedden and the L. Elphinston against Smith, the time of this warning, whereupon this removing was pursued, the defender had an heritable infeftment of the lands libelled, standing and clad with possession, which was reduced by the pursuer, after the making of the warning, the removing intended thereupon depending in the meantime undisputed, but lying over, not mentioned betwixt the parties, and after sentence of reduction, whereby the defender's right was taken away, which was standing when the warning was made; the pursuer insisting in his removing; and the defender *alleging*, That his infeftment foresaid standing untaken away the time of the warning, albeit since syne reduced, was enough to produce absolvitor from that warning, while he were warned of new again;—the LORDS, in respect of the said sentence of reduction, which reduction was intended before the warning foresaid was made, and the defender thereby summoned before the warning, for eschewing of pleas, and unnecessary actions betwixt parties, decerned the defender to remove, in this same process, by virtue of the foresaid warning; but assoilzied him from all violent profits, and found him possessor *bona fide*, and ordained him to remove from this land after separation of this crop, which was laboured before the sentence reductive, and that he should possess the barnyard, and also the barns, and likewise an house for winning and threshing of the corns, while Beltane thereafter.

Act. Baird.

Alt. Oliphant.

Clerk, Gibson.

Fol. Dic. v. 2. p. 338. Durie, p. 306.

* * Auchinleck reports this case :

A COMPRISER warns the tenant, who was infeft by him from whom the land was comprised, to remove, but after inhibition was served at the compriser's instance. So the compriser intents reduction of the tenant's infeftment, *ex capite inhibitionis*, and executes his summons of reduction first, and then makes warning; and a year or two thereafter obtains decret of reduction of the tenant's infeftment, and thereafter pursues removing upon the former warning. THE

LORDS decerned the tenant to remove after his corns are win, but sustained the action of violent profits upon that warning, made by the decret of reduction.

No 62.

Auchinleck, MS. p. 191.

1630. February 13. Laird ROWALLAN against The Relict of BOYD.

THE Laird of Rowallan having set a liferent tack personal to one Boyd, which tacksman dying before Martinmas, after his decease Rowallan immediately raises summons against the relict, for removing from the lands, and to hear it found, that he may enter to the lands; and the relict *alleging*, That this summary order cannot be sustained against her, but that she ought first to be warned before the term of Whitsunday, as use is in all other ordinary removings; the LORDS found, that this summary order of removing ought not to be sustained, and that the relict had no necessity to remove, until the time that she were warned before Whitsunday, conform to the order in other actions of removing; for albeit her husband had only a tack for his lifetime, yet the Lords found this cause to differ from a liferenter's right bruiked by infestment; in which case the fiar, after the liferenter's decease, gives no warning, but may then summarily remove, and enter to the possession of the land liferented, the same being laboured with the liferenter's own goods; albeit, if the liferenter had set the lands to tenants, *eo casu* the fiar could not remove the tenants summarily, without warning, but that then he had right to the duty, for which the lands were set by the liferenter; but this case of a liferent-tacksman was not found alike, and so that the privilege of the fiar, when the liferent of the fee ceases, is not to be extended further than that case; for the relict of the tacksman was not found to be in a worse case; than if her husband had been a naked tenant without a tack, *quo casu* the order of warning ought to have been used; and this was found, albeit the liferenter possessed, and at his decease laboured the land with his own plough; and albeit the pursuer alleged, that the liferent-tack was set for personal service, of riding on horseback with the pursuer, which he alleged could not be performed by the relict, nor by any other person, whom she could furnish to ride with the pursuer, whom she could not choose to the pursuer, seeing he had chosen the person of whom he required the service by the tack, and no other could be substituted by her in his place; notwithstanding whereof the order was not sustained, but the relict was ordained to furnish a competent man to the pursuer, to ride with him, when he should require the same.

No 63.

Where a tacksman was bound to give service on horseback, could his relict and children be summarily removed?

Clerk, *Gibson.*

Davis, p. 492.