

No 44. the Tenants were *in bona fide* not to remove, knowing that the pursuer, at the time of the warning, had no real right. *Replied*, That ought to be repelled, in respect of her diligence she had used to get herself infeft before the warning, viz. she had charged the heir of her first husband, who should have infeft her, and for his disobedience had got him decerned to lose the superiority of his lands during his lifetime; likeas, she had done the same diligence against the next immediate superior, viz. the Bishop of Galloway, and had obtained decret against him; likeas further, she was infeft not long after the warning in May before the term. In respect of which concurrences, the LORDS found the reply relevant.

Spottiswood, (REMOVING.) p. 284.

* * * Auchinleck also reports this case :

A WOMAN obtains a charter from her husband conform to her contract of marriage. Her husband deceases before she got sasine. She obtains decret against the heir to give her sasine. Upon his refusal, she charges the superior and she gets sasine before the term of Whitsunday; but after the warning made to her Tenants, she pursued removing. The Tenants *excepted*, That she could have no process upon that sasine, because she was not seised the time of the warning. THE LORDS sustained action upon the sasine, in respect of her other diligence, but reserved the modification of the violent profits to themselves.

Auchinleck, MS. p. 193.

No 45. 1628. July 17. Laird of DRUMQUHASHILL *against* CLELAND.

A SASINE given 40 days before Whitsunday, although given after the warning, was sufficient to pursue removing by reason the pursuer was retoured.

Fol. Dic. v. 2. p. 310. Auchinleck, MS. p. 210.

* * * Durie reports this case :

1628. July 17.—IN a removing, the L. Drumquhashill against Sir James Cleland, the LORDS sustained the warning and summons and process of removing, albeit that at the time of the warning the pursuer was not infeft nor seised, seeing he was seised 40 days before the term, to the which the warning was made, which sasine proceeded not upon a retour, but upon a precept of *clare constat* given by the Duke of Lenox superior, and which, albeit it was not of a date anterior to the warning, yet being being 40 days before the term, as said is, was sustained.

Act. *Cunninghame.*

Alt. ———.

Clerk, *Gibson*

July 23.—In the removing, Laird of Drumquashill against Cleland, mentioned 17th July 1628, the LORDS found the exception relevant against the warning, that the same was null, because it was not executed at the parish-kirk where the lands lay, in so far as the teind-sheaves and other teinds, both parsonage and viccarage of the said lands, are paid to the parson of the kirk of

to whom the same pertains, and are noways paid to the titular of the kirk where the warning is executed, and that he hath no right thereto, whereby the said lands must be found to lie in that parish where they pay their teinds, and consequently the warning not being executed there, must be null; which allegiance was found relevant, notwithstanding of the reply, bearing, "That the indwellers of the lands libelled have had continual repair past memory of man, and went to the kirk where the warning was executed, and hear continually the word and preaching there, and receive baptism and the Lord's Supper and marriage there, and their dead are buried in the church-yard there," so that they must be reputed parishioners there; and the warning at the kirk being ordained that the persons warned get knowledge thereof, that was the surest way to make it come to their knowledge, it being done at the part where they only resort; which was repelled, and this qualification not respected to sustain the warning.

December 4.—In a removing, L. Drumquashill *contra* Sir John Cleland, the defender defending himself with a disposition of the lands libelled, from Lodovick Duke of Lennox, with charter and sasine thereon, and sixteen years possession conform thereto, and that his author was in possession also before him; this exception was repelled, and the pursuer's reply was admitted, and the pursuit sustained, viz. that he was infeft by a precept of *clare constat*, by the now Duke of Lennox, heir to Duke Lodovick, granter of the excipient's right, which precept is given to him as heir to his goodsir, who was infeft by umquhile Matthew Earl of Lennox in the lands libelled, and that his said goodsire and grandsire were in possession thereof all the days of his lifetime. This reply was sustained, seeing the defender alleged not that his author was infeft in the lands; and albeit he alleged so many years possession, and that both parties rights flowed from one author, and that he had a standing infeftment, which could not be taken away summarily in this possessory judgment without reduction; yet the same was repelled in this same judgment in respect of the reply, without necessity to reduce.

December 10.—In the action, L. Drumquashill against Sir James Cleland, mentioned the 23d July 1628, the pursuer, as infeft in the lands of Dormondside, upon the Duke of Lennox's precept of *clare constat*, as heir to his goodsire, who was infeft therein, craving removing, and the defender alleging a right granted to him of the lands by umquhile Lodovick Duke of Lennox, to whom the granter of the pursuer's precept was heir, and by virtue thereof.

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thirty years in possession; this exception was repelled, notwithstanding this possessory judgment, in respect of the reply made by the pursuer, that his umquhile goodsire was infest by umquhile Matthew Earl of Lennox, and by virtue thereof in possession the time of his decease; and he being received by precept of *clare constat*, as heir to him, and being also retoured heir to him, whatsoever right or possession was acquired by the defender since his goodsire's decease, cannot prejudge his right, seeing the Earl of Lennox was denuded before by the right granted to his goodsire who died in possession. This reply was admitted, albeit the excipient alleged, that there were diverse others condescended on by him in possession of the said lands diverse years before the decease of the pursuer's goodsire, and that he alleged that in this possessory judgment his rights clad with possession should be maintained, while his right were otherwise taken away in some ordinary pursuit; which was repelled, and the pursuer preferred in his reply, offering to prove that his goodsire continued possessor to his decease.

Durie, p. 391. 392. 405. & 408.

1632. December 18. DALRYMPLE against DOUGLAS.

No 46.

An appriser having charged the superior, pursued a removing. This was sustained, tho' the infestment was after the warning, but the Lords superseded removing till Whitsunday, and refused violent profits.

ANDREW DALRYMPLE having comprised from George Douglas of Waterside, some lands to be holden of the said George his father, superior thereof, and the father being denounced to the horn, upon letters of four forms, for not receiving of the compriser; and thereafter he being received, and infest by the Lord Loudon, superior, to the father, of the lands, pursues removing against the debtor, from whom he comprised, and against the father his son's superior, and against the son's son, and their tenants; but the title of this pursuit, was only the comprising, and the horning against the goodsire, who was superior to his son; against which the defender *alleging*, That the said comprising, and horning, were not such a real title as might produce removing, the pursuer not being infest in the lands, without which he could never be heard to seek any person to be removed, specially after seeing the horning is after the warning, and so he could not warn upon the first charge, which only preceded the warning, all the rest of the charges and hornings being sinsyne; and where the pursuer *replied*, That he was upon the superior's disobedience infest, as said is, by the immediate superior; he *duplicated*, That this pursuit was not founded upon that title, and he could not be heard to reply upon a writ which is no title of the pursuit, and which ought to be produced *in ingressu litis* and shown to the party; and if it were produced, and libelled, yet it is after the warning, and so cannot sustain the warning preceding. THE LORDS repelled this exception, and duply, and sustained the pursuit fortified with the reply, which was received by way of reply, and sustained to produce this action, albeit both the