No 45.

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 infeft 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 infeftment was after the warning, but the Lords supersededremoving 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 theippriser; and thereafter he being received, and infeft 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 infeft 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 infeft, as said is, by the immediate superior; he *duplied*, 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

horning and infeftment replied upon were after the warning; and this was the rather found by the LORDS, seeing this removing was sought only against the debtor, from whom he comprised, his son, and his father, and their tenants, and not against any other, who clothed themselves with any other right to the lands, which might have excluded this compriser, and maintained their own possession; but the LORDS superceded the execution of removing to Whitsunday, betwixt and which the defenders might remove; and declared they would grant no violent profits, the defenders paying to the pursuers the ordinary duties of the lands.

No 46.

Act. ——— & *Belshes*. Alt. *Gilmore*. Clerk, *Gibson*.

Fol. Dic. v. 2. p. 306. *Durie, p.* 659.

1666. *November* 15. KENNEDY *against* HAMILTON.

No 47.

THE LORDS found a comprising, upon a charge to enter heir, null; because the person, at whose instance the charge was, had no right to the debt the time of the charge; the assignation, whereby he had right, being acquired thereafter, so that the charge was *inanis*, and without ground. *Me referente.*

Fol. Dic. v. 2. p. 304. *Dirleton, No* 47. *p.* 19.

*** This case is mentioned by Stair in his report of Abercrombie against Anderson, which follows.

1666. *November* 15. ABERCROMBIE *against* ANDERSON

No 48.

FOUND that a pursuit upon an assignation after the summons executed, should not be sustained, though the cedent concurred, the pursuit not being at his instance.

Reporter, *Newbyth*.

Fol. Dic. v. 2. p. 304. *Dirleton, No* 46. *p.* 19.

*** Stair reports this case:

MR JOHN ABERCROMBIE, as assignee, having pursued Anderson, as debtor for the debt assigned, he *alleged*, No process, because the assignation was posterior to the date of the summons and executions; so that the assignation being his sole title, the process could not be sustained. It was *answered*, That the defender had no prejudice, and that the cedent concurred. It was *answered*, That the summons was not in the cedent's name, and so his concourse could operate nothing, so that the decreet thereupon would be null; for, in the like case, the LORDS, last week, in the cause betwixt David Hamilton and John Kennedy, and Symington, *supra*, reduced an apprising led twenty years since, because the apprising proceeded upon a charge to enter heir; and