No 98.
tenants, it is not necessary to call the master. In removings the heritor ought to be called. *See* No 95. No 101. No 104.

that land; which Graham being once called in this process, and dying *pendente lite*, the process ought to sist until it were transferred in some to represent him, that they might defend their own right, which he could not be compelled to do, nor to dispute upon his author's right, albeit he was possessor;——THE LORDS repelled this allegeance, and found no necessity of transferring, seeing the Lords found it not necessary *ab initio* to have summoned the defender's authors; but if the defender had any defence, which might defend him, that he should not pay the mails of the lands libelled to the pursuer, as was desired, he ought and might propone the same as he pleased; but, in this action, which was for mails and duties of lands, the pursuer needed to convene none but the possessors, against which pursuit it was not a competent defence to allege that their author or master was not summoned: Which defence, although it be proponed and received in actions of removing at some times, yet it is not alike receivable in causes for mails and duties, wherein either the possessor ought to maintain his possession by excluding of the pursuers, or else if he cannot do that, as not being acquaint with the ground of his master and author's right, who is not called, he must, after sentence, suspend upon double poinding.

Act. *Stuart* et *Craig*. Alt. *Nicolson* et *Mowat*. Clerk, *Gibson*.

*Fol. Dic. v.* 1. *p.* 140. *Durie, p.* 738.

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1664. *December* 9. MR CORNELIUS INGLIS *against* MR ROGER HOGG.

No 99.
In a removing, it was not sustained as a defence, that the defenders were tenants to another, and he not called; unless they could condescend upon their master's right, which might defend him and them.

MR CORNELIUS INGLIS pursuing a removing against certain tenants near Dunbar, upon an infeftment and apprising, it was *alleged* for the tenants, that they were tenants to Mr Roger Hogg by payment of mail and duty to him, and he was not called. The pursuer *answered*, *non relevat*, unless the defenders condescend upon Mr Roger's right, which might defend him and them. The defenders *answered*, 1*st*, That they could not be obliged to dispute their master's right, but he ought to be called to dispute his own right. 2*dly*, It was insinuate, that Mr Roger had an apprising, and a charge against the superior.

THE LORDS repelled the defence, unless the defenders condescended upon such a right as were valid to exclude the pursuer, being prior to his; but the tenants alleged no such right, and Mr Roger's charge was posterior to the pursuer's infeftment.

*Fol. Dic. v.* 1. *p.* 140. *Stair, v.* 1. *p.* 237.

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1664. *December* 15. INGLIS *against* KELLIE.

No 100.
The Lords found that a first compriser in posses-

THERE was a removing pursued at the instance of Mr Cornelius Inglis and Alexander Jack, as having right from him, against William Kellie tenant of certain acres, who having *alleged*, That his master Roger Hogg advocate, to

whom he was tenant by payment of the rents, was not called, he being a compriser, and upon the comprising having charged the superior; which allegeance the LORDS having repelled, and having ordained Mr Roger to compear for his interest, he did resume the allegeance founded upon the comprising and charge against the superiors, and his possession of the rents. To which it was *answered*, That a comprising and charge without a sasine, as it could not furnish a title for an action of removing, no more can it defend the tenant in a removing; otherwise, a charge without further diligence, should be equivalent to an infeftment, which is a real right. It was *replied*, That a charge is equivalent to an infeftment as to the recovery of rents and duties; because, the superior being *in mora* and *in culpa*, that the compriser is not infeft, no voluntary infeftment granted by the superior to any other compriser can prejudge the first compriser, having done diligence; and though he cannot pursue a removing without an infeftment, yet he may defend the tenant from removing at the instance of a party, who though infeft, yet his right is not so valid; just as an aparent heir may defend a tenant, though he cannot pursue a removing.

No 100. sion of the rents, having charged the superior, but not infeft, needs not to be called in a removing at the instance of a second compriser infeft.

THE LORDS found the allegeance relevant *in hoc judicio*.

*Fol. Dic. v.* 1. *p.* 140. *Gilmour, p.* 85.

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1665. *June* 10. SIR ALEXANDER HOME *against* ———.

No 101. Found in conformity with No 98. p. 2229. See No 104.

——— pursues for mails and duties of certain lands. It was *alleged* for the tenants, no process, because they offered them to prove, that they were tenants by payment of mail and duty to Sir Alexander Home their minister, before intenting of this cause, and he was not called. 2*dly*, Absolvitor, because they were tenants to the said Sir Alexander, who had a right of an apprising, and diligence thereupon, anterior to the pursuer's right. The pursuer *answered* to the first, *non relevat*, in an action of mails and duties; albeit it would be relevant in a removing. In which two actions the Lords have still keeped that difference, that in removings the heritor should be called, because thereby his possession was to be inverted; but, in mails and duties, the tenants might suspend on double poinding, and thereupon call both parties: Or, if a tenant did collude, the master might use the tenant's name, but double poinding could not have place in removings.

To the *second*, It is not competent to the tenants to dispute their master's right, which is to them *jus tertii*; but they should have intimate to their master to compear and defend his own right, who, if he will compear and produce his interest, may be heard.

THE LORDS repelled both defences, unless Sir Alexander compear and produce his interest.

*Fol. Dic. v.* 1. *p.* 140. *Stair, v.* 1. *p.* 281.