

THE LORDS repelled the defence simply, unless the erection were alleged as aforesaid, and found in that case the reply relevant to elide the same.

No 65.

*Stair, v. 1. p. 430.*

1669. February 16.

ALEXANDER HAMILTON against HARPER.

UMQUHILE John Hamilton apothecary, having purchased a tenement in Edinburgh, to himself in liferent, and his son Alexander in fee; thereafter he borrowed 1000 merks from Thomas Harper, and gave him a tack of a shop in the tenement for the annualrent of the money. After his death, Alexander his son used a warning by chalking of the doors by an officer in the ordinary form; and he being removed, Alexander pursues now for the mails and duties of the shop from his father's death till the defender's removal; who *alleged* absolutor, because he bruiked the tenement by virtue of his tack, et bona fide possessor facit fructus perceptos suos. It was *answered*, That the tack being but granted by a liferenter, could not defend after the liferenter's death, and could not be so much as a colourable title of his possession; *2dly*, That he could not pretend *bona fides*, because he was interrupted by the warning. It was *answered* by the defender, That the tack was not set to him by John Hamilton as liferenter, nor did he know but he was fiar, being commonly so reputed, neither could the warning put him *in mala fide*, because there was no intimation made thereof to him, either personally, or at his dwelling-house, but only a chalking of the shop-door.

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Warning by chalking the door, from a shop let in tack, not sustained at the instance of a singular successor.

THE LORDS sustained the defence and duply, and found him free of any mails or duties, till intimation or citation upon the pursuer's right. Here the pursuer did not allege that the warning by chalking of the shop-door came to the defender's knowledge, as done by the pursuer.

*Fal. Dic. v. 2. p. 336. Stair, v. 1. p. 606.*

\*\*\* Gosford reports this case :

IN a pursuit for mails and duties at the instance of Alexander Hamilton against Harper shoemaker in Edinburgh as possessor of a laigh house within the said burgh; it was *alleged* for the defender, That he bruiked by virtue of a tack set by the pursuer's father for the annualrent of the 1000 merks lent by the defender, for which he had retention of the annualrent during the tack. It being *replied* for the pursuer, That his father was only a liferenter, and so the tack could not defend for the years subsequent to his decease. THE LORDS found that the pursuer's infestment of fee being granted to him when he was a child, and *in familia*, and never any diligence done thereupon till four or five years after his father's decease, the defender was *in bona fide* to possess until he was lawfully warned and cited; and found, that albeit that the shop was a

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part of a tenement within burgh, that the chalking of the door by an officer was not a lawful warning or citation; which they declared they would only sustain to be lawful when it was done at the instance of the setter of the tack or house, but not at the instance of a singular successor.

Gosford, MS. p. 43.

No 67.

The act of Parliament relative to warnings, does not apply to tenants within burgh.

1671. November 21.

RIDDEL against ZINZAN.

JAMES RIDDEL having set a soap-work and dwelling-house to Mr Zinzan for certain years, his entry being the last of November, and the end of the year coming now to be the last of November next, he warned Zinzan at Lammas, and now pursues him to remove upon the last of November; who *alleged* absolvitor, *imo*, Because by special act of Parliament all warnings are appointed to be at Whitsunday; *2do*, He cannot be obliged to answer a summons of removing unwarrantably raised before the term was past, and ere he had done any wrong by sitting after his term. The pursuer *answered*, That the act of Parliament anent warnings, related not to *prædia urbana*, or tenements within burgh; for the reason of the law being, that Whitsunday was a convenient season for tenants to provide themselves new seats, and necessaries for their living; it hath never been observed as to towns; and the pursuer hath warrantably raised the summons before the term, the conclusion whereof is only that the defender remove at the term.

THE LORDS sustained both warning and summons, and decerned.

Fol. Dic. v. 2. p. 336. Stair, v. 2. p. 5.

\* \* \* Gosford reports this case :

In a removing pursued at the said James's instance against Zinzan, from a dwelling-house and the soap-works at Leith; it was *alleged*, No removing, because the defender was not warned 40 days before the term, conform to an express act of Parliament, Queen Mary, Parl. 6. act 39. It was *replied*, That that act was only made as to tenants *in prædiis rusticis sed non urbanis*, and the tenements from which he was craved to be removed being in Leith, and the tack thereof bearing to expire the last day of November, both because the tenement was within burgh, and *ex pacto* he ought to remove.

THE LORDS found, that that act of Parliament did not comprehend tenements within burgh, the tenants whereof may be removed at any term after expiring of the tack, by chalking of their doors, or warning them by an officer 40 days before any term.

Gosford, MS. p. 19A