

No 45. 1629. February 20. BLACKBURN against GIBSON.

IN an action of removing upon a comprising from the debtor, of the right which he had to some lands *jure mariti*, by reason that his wife was liferentrix thereof, it was sustained at the compriser's instance, the husband being dead, who was the debtor at the time of the discussing of the removing, he being dead only after the term, against which he was warned to remove, and so being on life at that term, seeing thereby he might have attained possession of the land; and it was not respected which was alleged, that that ought not to be admitted against the woman who was liferentrix, and who was not debtor, and who by the entry would be prejudged if she were forced to remove.

{ Act. M'Gill.

Alt. Mowat.

Clerk, Hay.

Durie, p. 428.

\* \* \* Auchinleck reports this case:

1629. March 10.—PETER BLACKBURN comprises the liferent of some lands pertaining to the wife of Walter Balware *jure mariti*, and being infest, pursues the tenants upon a warning made before Whitsunday 1627. The action depends till February 1628; after many allegiances discussed, they propone at last that the husband is dead, and so no process can be granted against his tenant. THE LORDS repelled the allegiance, except he would allege, that he died before the term immediately subsequent to the warning, otherwise the pursuer would not be prejudged of his violent profits, and the same repelled.

Auchinleck, MS. p. 194.

1632. March 6. LA. LAWRISTON against Her TENANTS.

No 46.  
In opposition  
to No 40. See  
No 48.

IN a removing, the defender alleging, that he was sub-tenant to ———, who was tacksman of the lands, and whose tack, albeit it was expired the time of the warning, yet he bruiking still *per tacitam relocationem*, it must defend this defender his sub-tenant, ay and while the tacksman were warned; this exception was repelled, and found there was no necessity to warn the tacksman, whose right was expired before the warning, seeing *tacita relocatio* was found could avail to none, but to the actual possessor, and he not being naturally in possession of the land, albeit he alleges, he bruiked by his sub-tenant, whose possession he alleged to be his possession, seeing *is possidet cujus nomine possidetur*, which was repelled by the LORDS; but the defender, who was warned, being only natural possessor, and having also paid of before duty for the lands to the pursuer, the LORDS found, there was no necessity to aknowledge

any tacit relocation in the person of the tacksman, whose right was expired, and he not in possession, and so that he needed not to be warned.

No 46.

Act. Nicolson.

Alt. Stuart.

Clerk, Gibson.

Fol. Dic. v. 2. p. 338. Durie, p. 627.

1637. March 16. Lo. JOHNSTON against E. NITHSDALE.

THE Lo. Johnston pursuing removing from the lands of Knock against the E. of Nithsdale, who alleging, that no process ought to be granted in that removing against him, or any others of the defenders; because he neither was warned, nor the Lo. Cranston his author, nor any to represent him, albeit his said author was heritably infest in the lands libelled, by a public infestment holden of the King, proceeding upon the forfaultry of the umquhile Lo. Maxwell his brother, and that the excipient stands sicklike infest in the same lands, and by virtue of their infestments they have been these 27 years in possession of these lands libelled, by receiving of duty therefor yearly from the tenants, possessors of the ground; and being *replied*, That he hath summoned by his summons of removing the E. of Nithsdale, so that there was no necessity to warn him, and so much the rather because he was not infest the time of his warning, which was executed *in anno* 1621; neither was there necessity to warn any to represent his author the Lord Cranston, because he needed not to take notice of him, nor of no other, having to do with his own tenants; likewise he offered to prove, that these tenants defenders were ever tenants to him, and to his father, and to his father's author, past memory of man; neither can the defender be ever able to shew, that ever any of the Lord Maxwell's predecessors were infest in these lands, so that the Lord Cranston's infestment upon the Lord Maxwell's forefaultry ought not to be respected; and if it could be respected, yet he had no necessity to warn him, because before the warning he was denuded of his right in favours of the Earl of Nithsdale the defender, wherethrough he needed never to know him, especially seeing the most and longest possession which he could allege to have, by virtue of this right of the Lord Cranston, which was *in anno* 1610, and whereof by contract he was denuded *in anno* 1617, is thereby only for the space of seven years, which is not of that sufficiency, that it laid any necessity on him to warn the Lord Cranston's heir; and the Earl of Nithsdale was not infest upon that contract made in his favours, while after his warning, viz. *in anno* 1621, so that he could not warn him; and whatever possession he had since the warning and intenting of this cause, it cannot be reputed to have the force of a possessory judgment, but must be esteemed vicious and violent; notwithstanding of the which reply, the LORDS found the exception upon the not warning relevant, albeit the Lord Cranston's possession before the warning was only for the space of seven years; and albeit

No 47.  
Who must be  
warned in the  
case of for-  
feiture &