

1630. *March 18.*LA. MAXWELL *against* Her TENANTS.

IN a removing Lady Maxwell *contra* Her Tenants, she being served, and upon a precept of the macers, before whom she was served, being kened to her terce, produced the instrument of kenning for her title; and the Mr of Yester's son, who, upon comprising from the heritor, was infeft by public infeftment in the land, and by virtue thereof divers years in possession, being *alleged* to be a necessary party, who was not warned nor summoned, as he ought to have been to this pursuit; and also it being *alleged*, that the kenning, without production of the service, could not be a title to the pursuer for this pursuit; the allegiances were repelled, and the kenning found enough to instruct this pursuit as a sasine, without necessity of the charter or warrant thereof; and that there was no necessity to produce the service, or to warn the compriser, albeit infeft and in possession, no more than there was necessity to warn the Earl of Nithsdale heritor, from whom the lands were comprised, who was the heir or apparent heir of her husband, by whose decease she hath right to her terce.

Act. *Douglas.*Alt. *Sharp.*Clerk, *Hay.**Fol. Dic. v. 1. p. 140. Durie, p. 507.*

No 96.

In a removing at the instance of a lady tercer kened, there was found no necessity to call a compriser from her defunct husband, tho' infeft and in possession of the rents.

1633. *February 14.*L. LOCHINVAR *against* GRAHAM.

IN a removing, Graham the defender *alleging*, that he is tenant to the apparent heir of one Graham, which — Graham was heritably infeft in the lands libelled, and by virtue thereof 30 years in possession of the saids lands libelled; at least the defender bruiked by the tolerance of the said apparent heir, and he is not warned; THE LORDS repelled this allegiance, except the tenant should allege, that the said umquhile — Graham was lawfully infeft, and that his infeftment was lawfully confirmed, seeing they were kirk-lands, which were controverted; and found that the tenant ought to allege this, otherwise that the allegiance should be repelled; and that he ought to condescend, by whom that Graham was infeft.

Act. *Gilmour.*

Alt. —.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 140. Durie, p. 672.*

No 97.

Found in conformity with No 90. p. 2226.

1634. *November 13.* MUDIE *against* LIGHTOUN and the TOWN of MONTROSE.

IN an action at Will. Mudie's instance, as infeft upon a comprising, for payment of the mails and duties of the land, which Lightoun the defender alleged that he possessed by a right flowing from Graham, who was heritably infeft in

No 98.

To found an action of mails and duties against

No 98.
tenants, it is
not necessary
to call the
master. In
removing 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 allegiance, 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.

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 infettment 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, 1st*, That they could not be obliged to dispute their master's right, but he ought to be called to dispute his own right. *2dly*, 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 infettment.

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

1664. December 15. INGLIS *against* KELLIE.

No 100.
The Lords found that a first compriiser 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