the sentence of removing was obtained, had removed himself, and his family, from the lands decerned, except that he had also really delivered to the obtainer of the sentence *vacuum possessionem*; for the party decerned, his own removing, and colluding with another, who entered to the land, at the instant time of his removing, was not effectual obedience, but elusory; neither was it necessary, that the obtainer of the sentence should be put to seek action of intrusion or succeeding in the *vice* against him who entered to the land at the removing of the other, seeing the LORDS found, That the party decerned ought to deliver the possession of the said houses, void of any occupier and possessor thereof. No 127.

Act. *Cunningham.* Alt. *Nicolson.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 339. *Durie, p.* 103.

1630. *December* 15. LORD YESTER *against* MURRAY.

No 128.
In conformity with the above.

MY Lord Yester, by virtue of a gift of Drummelzier's liferent, warns the tenants of the west side of the Mains of Drummelzier, before Whitsunday 1629, and obtained decreet in October 1630. David Murray of Halmyre alleging him to be infeft in the said lands, makes warning to the said tenants before Whitsunday 1630, and, in January 1630, the said tenants remove, and David Murray enters to his possession. My Lord Yester, by virtue of the said gift of Drummelzier's liferent escheat, had been in possession, by uplifting the mails and duties of the said lands diverse years before the warning, and pursues David Murray, as succeeding in the place of James Chisholm the tenant. He defends himself by his alleged infeftment and warning, and entered to the possession left void by the tenant. THE LORDS repelled the exception, by reason the tenant could not enter another man in his possession but the master, to whom he had been in use to pay duty before the warning.

Auchinleck, MS. p. 196.

1674. *July* 16. EARL of ARGYLE *against* M'NAUGHTON.

No 129.
A man being decerned to remove himself, cottars, &c. was found liable in violent profits for not removing his sub-tenants.

THE Earl of Argyle having obtained decreet of removing against the Laird of M'Naughton to remove from the Forest of Kenbowie, pursues for violent profits since the warning. The defender *alleged*, Absolvitor, because that albeit violent profits be due after warning by tenants, when they violently refuse to render the possession that they have received, to their master, yet when a warning is used by one that is not in possession, albeit he obtain his right declared thereafter, or by reduction remove the defender's title, he will not ob-

No 129. tain violent profits from the warning; and, in this case, the defender having excepted upon prescription founded upon a sasine granted to one of his predecessors, which the LORDS did not sustain as a title of prescription, because there were not alleged sasines following one another for 40 years, or at least that one person had bruiked by one sasine by the space of 40 years, as the act of prescription requires; yet that being a dubious point, never before decided, had just reason to detain the possession, and so should be free from violent profits, which being penal, should not have effect, *ubi est justa causa litigandi; 2do*, As to the profits after sentence, the defender removed himself; and albeit he removed not his tenants, it was the pursuer's fault, who warned them not. It was *answered*, That the defender was not found to have either right or title for prescription; and his pretence upon the act of prescription was found groundless, it requiring not only 40 years possession, but either a charter or precept of *clare constat*, or at least sasines one or more, standing together 40 years; neither was the pursuer obliged to know or warn the defenders, sub-tenants, or cottars; but he oppones the decreet of removing, bearing, the defender to remove himself, sub-tenants, and cottars, &c.; neither did the defender make void the possession, or offer it to the pursuer.

THE LORDS repelled both the defences; but declared, that at the modification of the violent profits, they would take to consideration, what probable ground the defender had to defend, in so far as concerned the profits as violent, above the ordinary profit; and, in respect of the tenor of the decreet of removing, found the defender also liable for the violent profits after the decreet of removing, but prejudice to the defender to have recourse against his sub-tenants, if any did possess.

Stair, v. 2. p. 278.

1713. *July* 21.

JAMES BUDGE of Toftingal, and his TUTOR, *against* Sir JAMES SINCLAIR of Dunbeath.

No 130.

Not relevant to assoilzie the defender in a removing, that he had removed himself and sub-tenants from the lands, unless the possession were void, or offered to the pursuer when void.

IN a process of removing from the lands of Benalisky, at the instance of James Budge and his Tutor, against Sir James Sinclair, who had indeed removed, but clandestinely, without offering the possession to the pursuer, and connived at others intruding immediately into the possession; the LORDS found it not relevant to assoilzie the defender, That he had removed himself and his sub-tenants from these lands, unless he had left the possession rid and void, or offered the same to the pursuer when void; for otherwise they thought him liable *tanquam possessor*, when another entered in his *vice*, and disappointed the effect of the warning; but the LORDS, in the reasoning, made a distinction betwixt possession occupied by an intruder suddenly after the