

No 37.

or Captain David Home, and the Earl Bothwell, and Lord Glamis. (See APPENDIX.)—In reduction of a service of terce, the Judge and Inquest need not to be summoned, if no reason be libelled, nor iniquity and punishment concluded against them. The apparent heir, pursuing reduction of writs, whereof some concern his predecessor, and are quarrelled, needs not to call any to represent his father, to whom he is heir apparent; because, he cannot pursue himself, and be both pursuer and defender.

Haddington, MS. No 3055.

No 38.

1625. *January 20.*ELPHINGSTON *against* GUTHRIE.

IN an action of removing, pursued by George Elphingston of Salines against Bethia Guthrie, his brother's relict, it was *excepted* by the defender, That the pursuer's sasine produced could not instruct the summons, it being given long after the warning, and after Whitsunday. *Replied*, That it was sufficient to give him action of removing, in respect it did depend upon a precept of *clare constat*, given by his superior to him, as heir to his brother, before the warning, and should be drawn back thereto. THE LORDS found, that a sasine, proceeding upon a precept of *clare constat*, could not be drawn back to the date of the precept; because it hath no other warrant but the naked assertion of the superior, which cannot prejudge any third party; it being otherwise in a sasine proceeding on a service, this being more public and authentic.

Fol. Dic. v. 2. p. 304. Spottiswood, (REMOVING.) p. 276.

* * * Durie reports this case :

IN an action of removing, pursued by Elphingston of Salines against Bethia Guthrie, the LORDS found the sasine produced by the pursuer, for his title, not to be a sufficient right, whereupon to seek removing upon that warning and title; because the sasine was given by virtue of a precept of *clare constat* of the superior's, which precept and sasine were both after the term, before the which the warning was made; so that he neither being seised before the term, nor obtaining the precept before the same, he had no right in his person to warn; and albeit the sasine was given to him, conform to the precept foresaid of *clare constat*, as heir to his brother, and so thereby, the pursuer *replied*, That the right which was in his brother's person, and whose sasine of the lands he produced, was transmitted in the person of the pursuer, as his heir of blood, and so that the same should be drawn back to the time of his brother's decease, this was not respected, but repelled; because the precept of *clare constat* which was the ground of the sasine, would never make the pursuer heir to his

brother, valuably to prove him heir to him *active*, albeit it was enough to prove against him *passive*; for albeit the sasine, by virtue of the precept of *clare constat* might be enough to maintain the person so infeft in possession of the lands, or to give him action against any who had right flowing from that author, yet the LORDS found, that such sasines will not furnish actions to them for any other thing, which they might seek *active*, as heirs thereby to their predecessors: But the LORDS find, that if this sasine had proceeded upon a retour, lawfully serving any person heir to their predecessor, albeit the sasine following thereupon be after the term of the warning, yet that the same ought to be drawn back, and would, in such cases, sustain pursuits of removing moved thereupon.

Clerk, *Gibson.**Durie, p. 157.*

No 38.

1625. July 12.

TROUP against LORD HERRIES.

IN an action betwixt Troup, one of the Musicians of the Chapel Royal, and the Lord Herries, the LORDS found, that an inhibition, raised upon a simple gift of the defender's liferent escheat, albeit there was neither sentence nor summons raised upon that gift, the time of the raising of the inhibition, and albeit that the inhibition was only raised upon the said naked gift, and not upon any sentence or dependence, yet that the same was a sufficient inhibition, and raised upon a sufficient ground, viz. the gift foresaid; and sustained an action of spuilzie of teinds, pursued thereupon, against the intromitters with the teinds of the rebel, he being tacksman thereof; and, consequently, the right of his tack pertained to the pursuer, as donatar to his liferent, seeing, after the inhibition, he had obtained a declarator and sentence against the rebel.

No 39.

Aet. *Nicolson.*Alt. *Belshes.*Clerk, *Scot.**Fol. Dic. v. 2. p. 306. Durie, p. 177.*

1626. July 20.

NASMITH against Posso.

A LICENCE, granted to Anna Nasmith, (John's daughter,) as executrix to her brother, quarrelled by Posso, because posterior to the date of the summons, and sustained by the LORDS, notwithstanding thereof.

No 40.

Fol. Dic. v. 2. p. 303. Spottiswood, (COMMISSARY.) p. 38.