

1626. December 14.

CALDERWOOD against SMITH.

No 41.

A removing not sustained at the instance of an apparent heir, in respect not only his sasine but his retour was subsequent to the warning.

IN a removing at the instance of one Calderwood, who was seised in the lands libelled, as heir to his father served and retoured, against James Smith, the LORDS found no process by virtue of that sasine, albeit the same proceeded upon a retour as heir to his father, because both the sasine, and also the retour, was after the warning; for, albeit the sasine had been after the warning, yet if the retour had been before the same, it would have been sufficient; but the retour being also after the warning, the LORDS found the pursuit upon that warning could not be instructed to seek the tenant to be decerned to remove, and so to make him subject to violent profits since the warning; for the LORDS found, That it could not be drawn back to the time of the pursuer's father's decease; as if that he being his heir at the very time of his decease, he was not made heir by the retour only from the date of the retour, but from the time of his father's decease he was heir, and the retour cognosced him to be heir to that man; so that the pursuer *alleged*, That he being cognosced heir by the retour, he had right to the lands from the time *foresaid* of his father's decease; which was repelled in this judgment of removing, where violent profits might be thereafter acclaimed; but if this sasine had been used to instruct a pursuit against the tenants for the duties of the land, which were in use to be paid to the defunct before his decease, I think *eo casu* the same would have been sustained *ad hunc effectum*, albeit not to seek removing thereupon. Craig, Lib. 2. Diog. 9. dicit, quod hæreditas semper continuatur eum morte defuncti, et ad eam retrahitur.

Fol. Dic. v. 2. p. 304. Durie, p. 246.

No 42.

1627. June 26. ELSPIT TENNANT against WILLIAM AUCHINLECK.

IN a removing pursued by Elspit Tennant against William Auchinleck, *excepted*, No process upon her sasine, ~~because long~~ after the warning. *Replied*, That it proceeded upon a retour, which was before the warning, and so should be drawn back. THE LORDS found the exception relevant, in respect that the sasine was not till the February after the warning; whereas if it had been shortly after Whitsunday (or any time before Martinmas) they use commonly to draw it back to the retour and sustain it.

Fol. Dic. v. 2. p. 304. Spottiswood, (REMOVING.) p. 281.

* * * Auchinleck reports this case :

1627. June 27.—IN an action of removing pursued upon a warning made before Whitsunday 1626, it is not to be sustained, by reason sasine is not taken