

## No 102.

In a removing there was found no process, all parties having interest not being called, viz. the defender's wife, in respect he possessed but by his *jus mariti* in her right.

1665. July 15. JOHNSTON of Scheens *against* ALEXANDER BROWN. |

JOHNSTON being pursued to remove from certain lands, it was *alleged*, no process; because all parties having interest were not called, viz. the defender's wife, in respect he possest, but by her right *jure mariti*, and she was not warned.

Which the LORDS found relevant.

*Fol. Dic. v. 1. p. 140. Stair, v. 1. p. 299.*

## No 103.

In a process of removing, it was sustained as absolvitor to the tenants, that the liferenter, whose tenants they were, had not been warned or called, she being alive at the time of the warning, though dying before the term.

1669. June 30. AGNEW *against* TENANTS OF DRONLAW.

AGNEW having apprised the lands of Dronlaw from Mr Robert Hay, advocate, as cautioner for the Earl of Buchan, to the behoof of the Earl of Kinghorn, pursues the tenants for removing, who alleged absolvitor, because the tenants were tenants by payment of mail and duty to the liferenter, Mr Robert Hay's mother, and she is not warned nor called. The pursuer *answered*, That the liferenter died before the term, and that he was content that the tenants should be decerned to remove but at the next term of Whitsunday.

Yet the LORDS sustained the defence, seeing the liferenter was living the time of the warning.

*Fol. Dic. v. 1. p. 140. Stair, v. 1. p. 628.*

1702. January 28. HALIBURTON *against* TENANTS OF CARSE.

## No 104.

Found in conformity with No 98. and No 101.

JEAN HALIBURTON, relict of Thomas Menzies of Carse, being infeft in a life-rent out of these lands, upon her contract of marriage, pursues the tenants for mails and duties. Compearance is made for the tenants, who *alleged*, That they had been in use of payment of their rents to Menzies of Weem, their master, for more than seven years bygone, and so he had the right of a possessory judgment, and ought to be called to this process, and they were not obliged to answer till he were cited. *Replied*, That she is insisting against the tenants of her own lands, and was obliged to notice none but the natural possessors; and it was *jus tertii* in the tenants to found on another's right; but that party, if he pleased, might compear, and producing his interest, would be admitted to compete. *Answered*, If her husband had died in possession of the lands, she might have just cause to plead the continuance of the same; but they offered to prove, that seven years before her husband's decease, Weem was in possession, and so must necessarily be called, else heritors rights might be inverted by their tenants colluding with a third party; and in poindings of the ground, not only the possessor, but the master, debtor in the annualrent, must be cited. THE LORDS considered, that in petitory actions, as removings, it is a

good defence for tenants, that their master is not called; but in the possessory actions for mails and duties, they did not see the necessity, seeing the master may compear and defend. Some of the Lords were for allowing her to cite Weem *incidenter* in this process; but the plurality repelled the tenant's objection, and decerned in the relict's action; yet superseded extract for a time, that Weem's tutors (he being minor) may search for his papers, and on production debate for his interest, which would be shorter than for the tenants to suspend again upon double poinding and distress.

No 104.

*Fountainball, v. 2. p. 141.*

See REMOVING.

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S E C T. XXII.

Citation in Processes of Abstracted Multures.

1610. December 1. FENTON *against* The TENANTS of MATHERTIE.

HE who is denuded of his heritable right, by resignation thereof made in favour of him who is infest, holden of the King, cannot use that infestment as a title of his pursuit; neither can the concurrence of him who is infest sustain the pursuit; because they are not compatible, and the exception is merely *exclusivum juris agentis*.

No 105.

A man may pursue the possessor of lands for abstracting of his corns from the pursuer's mill, albeit he call not the heritor, because the tenant is called *super facto proprio*; but that decret given against the tenant, will not prejudice the master of his defence or right.

*Fol. Dic. v. 1. p. 140. Haddington, MS. No 2029. & No 2030.*

1628. March 19. ADAMSON *against* TENANTS of Strathlaw.

AN instrument of sasine, being only the assertion of a notar, is not sufficient to verify a thirlage; nor will it furnish a man interest to pursue for abstracted multures, except the charter containing thirlage be produced, which will be sustained to be proven in process.

No 106.

No process was found against any tenants for abstracted multures, where their master the heritor was not summoned; although it was alleged that they were in continual use of bringing their corns to the pursuer's mill, as thirled thereto,

March 20.—No process against the tenant for abstracting the multures, if the master, who is heritor, be not summoned; albeit it be *alleged*, that they were in continual use of bringing their corns to the pursuer's mill, as thirled thereto, and of paying the accustomed dues of thirlage past the memory of man.