SECT. XI.

Violent Profits.

No 132.
In ordinary removings, the defender is bound to find caution for violent profits, but not in extraordinary removings, unless so stipulated.

1628. *February* 28. DOUGLAS *against* IDINGTON.

IN a suspension, Douglas *contra* Idington, of charges upon a decreet, finding a back-tack contained in a contract of wadset of the lands of Clettie to be expired, and that Idington had good right to enter to the possession of the lands, whereupon Douglas being charged to remove, he suspends upon obedience, that he has already removed, and is content that the charger enter without danger of ejection, or any other action; and the charger *alleging*, That he ought to find caution to desist under a pain, as is usual in ordinary actions of removing;—the LORDS found no necessity to find caution, and that the suspender could not be compelled thereto, seeing this was not an ordinary action of removing, but proceeded upon a contract, which the party had satisfied, by this offer of obedience, without danger to the charger to enter, and that in the contract he had not taken the party obliged to find caution for his removing.

Clerk, *Hay*.

Fol. Dic. v. 2. *p.* 339. *Durie, p.* 351.

No 133.

1683. *December* 18. JOHNSTON *against* DOUGLAS.

FOUND, That if a tenant within burgh duly warned to remove, sit above forty days after Whitsunday, he is liable for the rent; although it was *alleged*, That the landlord had not got the house set to another, and so had no real prejudice by the tenant's sitting beyond the ordinary time, and the tenant was willing to satisfy him for the time he possessed after the legal term of removal. In this process, it appeared, that by the custom of burghs, tenants of brew-houses, &c. kilns and barns relative thereto, should remove within twenty-four or forty-eight hours after the term.

Harcarse, (REMOVING.) *No* 838. *p.* 240.

*** Fountainhall reports this case:

1683. *December* 18.—ROBERT DOUGLAS in Leith, having obtained a decreet of removing against Patrick Johnston, he suspended, alleging he had obeyed, in so far as he had removed within twenty days after Whitsunday last. *Answered*, Though that latitude may be received in houses, yet this being a brew-

house, it cannot excuse him; because by the constant custom of Edinburgh and Leith, persons remove from them the very next day after the term; and there is this good reason for it, because such houses, breweries, ovens, &c. have a daily and weekly profit resulting and arising from the use of them, which is not in other habitations, (what if they set out chambers?) and whereof he to whom they are set is deprived, and therefore this damage should be repaired. "THE LORDS, on Forret's report, found him liable for the mail till Whitsunday next, in regard he did not remove immediately after the term, but kept it twenty days. No 133.

Fountainhall, *v.* 1. *p.* 251.

1687. *June.* Sir GEORGE ST CLARE *against* JOHN GRANT.

No 134.
Caution must be found, unless the defence be instantly verified.

A DEFENCE upon seven years possession being proponed in a process of removing;

The pursuer *alleged*, That the defender could not be heard to propone defences, till once he find caution for the violent profits.

Answered for the defender; The act 39th, Parl. 6th, Queen Mary, appoints the defender in a removing to find caution where he impugns the executions of the warning without producing any right in his own person. But here the defender produces his infeftment, and the possession is *facti*, which must abide probation.

THE LORDS found the defender ought to find caution where the defence is not instantly verified, unless the pursuer have something to prove, when the defender's taking the same term to prove his allegeance does not delay the pursuer.

Harcarse, (REMOVING.) *No* 845. *p.* 241.

1783. *November* 21.

MORTON & Co. *against* JAMES COLQUHOUN and GEORGE MACFARLANE.

No 135.
Caution for violent profits comprehends reparation of damage done to the subjects let.

COLQUHOUN and Macfarlane having become cautioners to Morton and Company "for the violent profits" for which a tacksman might be found liable in consequence of his refusal to remove, were sued for reparation of the damage done to certain subjects of the tack; in opposition to which claim, they *contended*, That though by the above-mentioned terms of their obligation, they were indeed bound to the extent of the highest profits which could arise out of the subjects set, yet their obligation did not include the repairing of such damage.