

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 bruike 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 decret 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 decret of removing, found the defender also liable for the violent profits after the decret 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

party removed, and intrusion after the possession had been long void, or so long as the heritor might have easily known that it was so. No 130.

*Fo. Dic. v. 2. p. 339. Forbes, p. 705.*

1803. November 19. MACEWAN against PATERSON.

No 131.

ANDREW WAUCHOPE of Cakemuir granted to Robert Paterson a lease of the lands of Easter Cakemuir and Blackcastle, for nineteen years. The lease commenced, as to the houses, yards, and grass, at Whitsunday 1770, and as to the arable lands, at the separation of that year's crop from the ground. In the year 1789, a renewal of the lease was granted to Paterson, for thirteen years, from the expiration of the original term. After the expiration of this second term, Paterson was allowed to remain in possession, upon tacit relocation, until Wednesday 1803; prior to which, he received a summons of removing, at the instance of William Macewan, writer in Edinburgh, factor *loco tutoris* to Neil Wauchope of Cakemuir, the proprietor of the farm.

An out-going tenant must remove from the barns at Martinmas.

No objection being made by the tenant, a decret of removing was pronounced, and a charge was given accordingly. Paterson quitted possession of all the houses of the farm at Whitsunday 1803, except the barns, of which he contended he was entitled to keep possession until the crop on the ground was threshed out and disposed of; and accordingly he presented a bill of suspension, pleading, that such was the established usage of the country in similar cases.

THE LORD ORDINARY on the bills, (July 6, 1803.) "being of opinion, that the complainer has no right to retain possession of the barns in question, after the term of Martinmas next; appoints the bill to be answered within fourteen days as to the complainer possessing the barns till that time, and sists execution." And upon advising the bill, with answers and replies, the Lord Ordinary refused the bill.

And a petition against this interlocutor was refused, without answers.

Lord Ordinary, *Polkemmet.*

For the Petitioner, *Thomson.*

Agent, *Geo. Tod.*

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*Fac. Col. No 120. p. 267.*