

S E C T. VIII.

Removings may be decreed in during Vacation.

1744: July 3.

MOLLISON *against* STORMONT.

No 116.

A BILL of suspension of a decree of removing, on this ground that it was pronounced by the Sheriff of Forfar, on the 12th of April, in time of closs Feriat, was, upon report, refused.

The difficulty was, that by Queen Mary's statute in 1555; which is the only one we have concerning that matter, all inferior judges are ordained to sit in May (the words are, 'immediately after Trinity Sunday') to do justice in removing. Whence it was questioned, Whether that did not exclude them from judging in any other time of the vacation, other than fell within the time of dispensation; at least, if it did not shew that a special statute was necessary to enable the inferior judges to sit on removings in vacation time.

Nevertheless the LORDS found as above, in respect of the universal practice to sit on removings in vacation time, which was declared by several of the Lords to consist with their proper knowledge.

N. B. At the date of this statute, the Session sat in both March and April; whence it may be thought, that the intention of the statute was in general to authorise sitting in vacation time; and which may have given rise to the present practice, though as the statute is expressed, the practice has no support from it.

Kilkerran, (REMOVING .) No 5. p. 482.

S E C T. IX.

Effect of an obligation to remove without warning.

1586: November.

FREELAND *against* MONTEITH.

No 117.

IN an action pursued by George Freeland, tenant to the Earl of Marr, against William Monteith of the Gogar, the said George, pursuer, having got a

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Found, that where there was a specific obligation to remove at

No 117.
the expiry of
the lease, the
proprietor
might enter
to possession
without de-
clarator or
warning.

libel of ejection against the defender, *et in termino assignato* the witness being produced, the defender proponed a new exception, and made faith that the same was made, as newly come to his knowledge, and offered to prove the same by writ. It was *alleged*, That the defender ought not to be heard to propone the same *post litem contestatam et statutum terminum probatorium*. THE LORDS nevertheless, in respect the defender offered to prove the same by writ, *et non aliter aut alio modo*, found that they would admit the said exception.

In the same action there was an exception proponed, as said is, that the defender had committed no ejection, because it was expressed in the tack set by the Laird of ——— of the lands out of which the pursuer alleged him to be ejected, that after the issue of the tacks it should be leisome to the said Laird, upon the offer of L. 20 to George Freeland to whom the tack was set, without any precept of warning or removing, or other order of law, to enter to the ground, he taking his mains and the said lands, which was a portion of the same, into his own hands; and true it was, that, conform to the said clause expressed in the said tack, the said Laird made offer of the said L. 20, and, upon his refusal, and instruments taken, the Laird entered to his own lands, and thereafter disposed the same to the said William Monteith the defender. To which was *answered*, That notwithstanding the said clause in the tack, (if such was) the Laird could not enter, nor no other person substituted by him at his hand, but it behoved them to have sought *declaratoria juris*; and the form and order prescribed by the act of Parliament, in warning of tenants, ought to have been observed *quia quando statuitur forma ex dispositione legis ea specificè sequenda est*; and so, except it were alleged that either declarator or warning had passed, the said Laird could not have entered to the ground, or possessed any other person in the same. To this was *answered*, That there needed no declarator to have passed by reason of the clause contained in tack, *quæ fuit provisio hominis quæ cessare faciebat provisionem legis*, prout in L. 23. "*sed hæc ita*," D. De regulis juris; et in generalibus provisionibus, de quibus specialiter sit provisum, sive utraque provisio, vel sit legalis vel hominis, sive altera legalis altera hominis: Vide Bald. in titulo, Si certum petat. And so, notwithstanding of the provision contained in the act of Parliament, anent the warning of tenants forty days before the term, by reason of the said provision contained in the tack ex connectione legum accipiunt, there needed no other declarator, but the setter of the tack, after the ish of the years and terms expressed in the same, might, according to the condition therein expressed, enter to the real possession and occupation of the said ground. THE LORDS pronounced, that there needed no declarator or warning, and that the setter of tack, according to the condition therein expressed, ought to enter to the ground without any warning.