

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. I. p. 251.*

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

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 infestment, 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 allegiance does not delay the pursuer.

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

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

1783. *November 21.*

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

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.

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

No 135. The LORD ORDINARY repelled the defence; and, on advising a reclaiming petition, with answers,

THE LORDS adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Kennet.* Act. *Honyman.* Alt. *Craig.* Clerk, *Campbell.*

S. *Fol. Dic. v. 4. p. 226. Fac. Col. No 123. p. 202.*

## SECT. XII.

Whether Executorial of Ejection may proceed without a Charge?

No 136.

No previous charge necessary before ejection.

1675. *June 30.* LADY STAINHILL *against* Captain BURD.

CAPTAIN BURD having obtained decret of removing against the Lady Stainhill from a house in Edinburgh, before the Sheriff, the Sheriff-officer was thereupon proceeding to ejection. The Lady gave in a bill desiring suspension, and a present warrant to stop the ejection, because there was no charge given, or expired upon the decret, which ought to have been done by the act of Parliament the 16th day of November 1669, which, though it mention only poinding not to be without the expiring of a previous charge, yet *ex paritate rationis* the same should be observed in other executions, the reason though not expressed being, that parties may have that respite, either to satisfy or suspend.

THE LORDS found the act to extend only to poindings.

*Fol. Dic. v. 2. p. 339. Stair, v. 2. p. 338.*

No 137.

The executorial upon decrees of removing may proceed without a charge, or even extracting the decret.

1739. *July 13.* PRINGLE *against* The EARL of HOME.

THE Earl of Home pursued in a riot and for damages, for having ejected Gilbert Pringle upon a decret of removing, obtained before the Sheriff of Berwick, without a previous charge upon the decret of removing, and even before the decret was extracted, was assoilzied.

Our old lawyers, Balfour and Hope, seem to agree, that by the practice in their time, a charge upon the decret of removing must have preceded the precept of ejection; but as Sir George M'Kenzie observes, a charge is now necessary only upon decrees of removing pronounced by the Lords, but not upon decrees of removing before inferior courts, which also are in use to issue their precepts without putting the party to extract. How this change in the prac-