

1670. *January 7.* JEAN KER *against* DOWNIE.

No 62.

A house let,
allowed to be
given up
within 48
hours.
See No 67.
infra.

JEAN KER having set a house in Edinburgh to Downie for L. 9 : 10s. Sterling, she obtains decret against him therefor. He suspends on this reason, that within 48 hours after he took the house, he did by instrument give it over, which is the ordinary custom of burghs, where there is no writ, to quit the bargain within a short space, unless some offer intervene, *medio tempore*, by which the party is damnified.—The charger *answered*, That this house having been taken but 14 days before the term, there is neither law nor custom to allowing either party to give over or resile, there being no competent time to set again; for albeit houses sometimes are given over when they are taken, and quit before warning time, when the ordinary occasion of setting to others may occur, yet that cannot be drawn to this case; and the instrument of over-giving was only done by Downie's wife, who showed no warrant.—The suspender *answered*, That there was no difference whether the house was taken before warning time or after, seeing the law gives *locum poenitentiae*, or some small time, which must take place in either case; *2dly*, Albeit the charger had not been obliged to accept the over-giving, yet *de facto*, she has accepted it, because it is offered to be proved, that she set the house to another, and took earnest thereupon, which did import that she quit the first bargain, seeing at once she could not set it to two; *3dly*, Albeit offer was made of the keys at the term, yet it is offered to be proved, that the house was not void, but that the former tenant's goods remained therein.

THE LORDS repelled the first reason of suspension, upon the over-giving; but found that member relevant, that the house being given over, the same was set to another, and earnest taken thereupon; but found that point, that the tenant's goods, who possessed formerly, were not removed, not relevant, in respect of the custom in Edinburgh, not to remove peremptorily at the term.

Stair, v. 1. p. 658.

1676. *January 12.* CAMPBELL *against* DOUGLAS.

No 63.

Locus poenitentiae competent in a bargain agreed to be reduced into writ, before the writ was subscribed.

ROBERT CAMPBELL and Robert Douglas having bought the rests of debts due to a soap-work at Leith, the assignation was taken in Robert Douglas's name, and he granted back-bond, 'declaring the half to belong to Robert Campbell;' but thereafter they made a bargain, 'That Robert Campbell should have 500 'merks of free profit to quit his interest;' but within a few days after, Robert Douglas resiled from the bargain, whereupon Campbell pursues him before the Bailies of Edinburgh; in which process Douglas deponed, That there was a bargain as is libelled, but that it was to be redacted in writ, and that before the contract was perfected he did resile. The Bailies having found, That this