

1629. July 10.

GATHEART *against* BLACK.

No 96.

A TACK being set upon the 14th of July for a year, the setter warns the tenants before Whitsunday. The tenants *allege* they cannot remove, because they held a tack not out-run the time of warning, and till after the term of Whitsunday before which they were warned; which allegiance the LORDS repelled, and found the warning good to compel them to remove after the 14th July, at which time his tack expired.

Auchinleck, MS. p. 195.

1631. June 15.

RAMSAY *against* WEIR.

No 97.
Found again
in confor-
mity to
Foulis *against*
—, No
94. P. 13555.

In a removing from a yard, conform to a warning made 40 days preceding Candlemas last bypast, wherein the defender *alleging*, That no process ought to be granted upon this warning libelled, because the same is made 40 days preceding Candlemas, to remove at Candlemas, whereas warnings at such terms have no warrant, but are against the act of Parliament anent warning of tenants to remove, which appoints the same to be done before Whitsunday;—and the pursuer *answering*, That this warning being only made from a yard, to remove therefrom, may well and lawfully be made before Candlemas, which is the proper time of labouring of yards; and such warnings from yards before Candlemas are allowed, and process granted thereupon before all inferior courts within this kingdom;—the LORDS found no process upon this warning, and that the same ought not to be sustained, seeing it was not made before the ordinary term of Whitsunday, to remove at Whitsunday, as use is in other warnings and removings.

Fal. Dic. v. 2. p. 337. Durie, p. 590.

* * Spottiswood reports this case:

ONE being warned 40 days before Candlemas to remove at that term from a yard in the Potter-row, the LORDS would not sustain the warning, in respect of the act of Parliament anent warnings 1555 ordaining them to be made before Whitsunday allenarly.

Spottiswood, (REMOVING.) p. 288.

1765. February 14.

JOHN M'NAUGHTON *against* JAMES WILSON.

No 98.
Where a house
and enclosure
were let as
one subject,
and for a rent.

By tack, dated 15th May 1760, Wilson let to M'Naughton, at L. 14. of rent, a house and park, for three years from his entry; which was declared,

No 98.
in cumulo, but
 the entry to
 the field at
 Candlemas, to
 the house at
 Whitsunday,
 it was found,
 that the ten-
 ant must
 be warn-
 ed to remove
 40 days be-
 fore the Whit-
 sunday pre-
 ceding the
 Candlemas.

“ as to the grass park, to have been and begun at the term of Candlemas last ; and to the dwelling-house, factory, office-houses, and other pertinents, at the term of Whitsunday now instant.”

After the years of the tack, M'Naughton possessed a fourth year by tacit re- location. Wilson having brought an action of removing before the Judge-or- dinary, in terms of the act of sederunt 14th December 1756, § 2. he obtained a decree in absence, 21st December 1763, and ejected M'Naughton 21st May 1764.

M'Naughton brought a reduction of this decree, and *contended*, That, as both the commencement and termination of his tack, as to the park, was at Candlemas, the action ought to have been brought 40 days before the Whit- sunday preceding, viz. 1763.

Answered for Wilson ; By the first clause of the act of sederunt, a tenant, who has obliged himself to remove without a warning, may be charged with horning “ 40 days preceding the term of Whitsunday in the year in which the tack is to determine.” The second clause declares, that an action of removing before the Judge-ordinary being called, “ at least 40 days before the term of Whitsunday, shall be held as equal to a warning executed in terms of the act 1555.” The term of Whitsunday, in the last clause, must be the same with that described so particularly in the first, viz. the Whitsunday “ in the year in which the tack is to determine.” If so, it was sufficient, in the present case, to have brought the action 40 days before Whitsunday 1764, being that in which the tack was to determine ; whereas it was brought full five months be- fore that term. *2dly*, The removing is allowed to have been regular as to the houses. These, which were fitted up for an inn, were the principal subject in the lease. The park, which contains only four acres of ground, and part of it of very little value, could not be rated at above a third of the total rent. It could therefore be considered as an accessory only to the houses ; and, as M'Naughton has been regularly removed from these, he will not be allowed to keep possession of the park, which, as an accessory, must go along with its principal.

Replied for M'Naughton, to the *first* ; The act 1555 required a warning 40 days before Whitsunday, i. e. 40 days before the Whitsunday preceding the term of removal, if that term be not Whitsunday, according to the opinion of Lord Stair, Inst. B. 4. T. 24 ; M'Kenzie's Observ. upon the act 1555 ; and Lord Bank- ton, vol. 2. p. 109. 111. The act of sederunt 1756, did not alter these regu- lations, so far as they regard the present question. It only introduced a re- moving without a warning, but left that removing subject to the same rules with the warning. To the *second*, The park, when properly managed, yields 40 bolls of grain ; and therefore cannot, with any propriety, be considered as an accessory in a subject whereof the whole rent is but L. 14. The same plea was urged, but rejected, in a case precisely similar, 19th February 1740, Hay against Carse, No 80. p. 13837.

Nota. There was no proof with regard to the value of the park.

No 98.

THE LORDS found, "That, as by the tack, M'Naughton's entry to the possession of the park is declared to be at the term of Candlemas, and his entry to the house at the Whitsunday following, the process for removing him from the park at the term of Candlemas 1764, and at the term of Whitsunday, that year, from the houses, ought to have been brought 40 days preceding Whitsunday 1763; and, as it was not brought till the 21st. December 1763, found the removing could not proceed."

Reporter, *Auchinleck.*Act. *J. Dalrymple.*Alt. *James Ferguson, tertius.*Clerk, *Kirkpatrick.**A. R.**Fol. Dic. v. 4. p. 223. Fac. Col. No 8. p. 14.*

1783. February 25.

CHARLES GORDON against JOHN BURNET.

No 99.

THE season of fishing salmon commences at Andersmas, or the 30th of November yearly, which is therefore the usual term of entry to possessions of this kind.

A summons of removing from fishings must be executed 40 days before Whitsunday, though the term of entry is the 30th of November.

Mr Gordon, proprietor of certain fishings in the river Dee, executed a summons of removing against Burnet his tenant more than 40 days preceding this term.

Pleaded in defence; The same *inducia* are requisite in a summons of removing on the act of sederunt 1756, as in a precept of warning upon the statute 1555. And as this statute specially comprehends fishings, the execution in this instance ought to have taken place 40 days before the Whitsunday preceding the ish.

Answered; The objects of the enactment 1555 were labourers of the ground, and the purpose of it, that these might have a reasonable time to provide themselves in other farms, which were then uniformly let at Whitsunday each year. Hence, although the statute comprehends not only lands and fishings, but also all possessions whatsoever, it has in practice been limited to rural tenements alone; and, in collieries, salt-pans, houses possessed by artificers, or within burgh, and in mansion-houses and fortalices in the country when not connected with a farm, all that is necessary; is an intimation given a reasonable time before the term at which these tenements are usually let; *Stair, B. 2. Tit. 9. § 34.*; 18th December 1630, *Ramsay contra Lord Conheath*, No 64. p. 13826.; 19th November 1758, *Lundin contra Hamilton*, No 86. p. 13845.; 11th March 1756, *Duke of Queensberry contra Telfer*, No 85. p. 13843.; 15th December 1767, *Wauchope of Niddery contra Hope*, No 83. p. 13847.

The mention of fishings, therefore, among the subjects where warning is required, must have occurred *per incuriam*, or must be restricted to those which