

1656. February 20.

M'BRAIR *against* SIR ROBERT CRICHTON *alias* MURRAY.

DAVID M'BRAIR pursues a removing against Sir Robert Crichton, who *alleged* absolvitor, because the warning was null, in so far as he being notourly out of the country, the warning proceeded on 40 days, not only at the ground and parish-kirk, but also at his dwelling-house, whereas it ought to have been on letters of supplement on 60 days, at the market-cross of Edinburgh, pier and shore of Leith. It was *answered*, That the act of Parliament anent warning was only on 40 days without distinction, being out of the country, or in the country; and it was sufficient that the summons of removing upon the warning was upon 60 days, because the warning at the house was rather an intimation than a citation, which was sufficient, seeing the defender had been but short while out of the country, not *animo remanendi*, and so had still a domicile where he was cited.

THE LORDS sustained the warning; but, in respect the defender had *probabilem causam dubitandi*, they superseded the execution till next Whitsunday, without any violent profits.

Fol. Dic. v. 2. p. 337. Stair, v. 1. p. 360.

No 101.
Removing sustained on a warning of 40 days, altho' the party was out of the country.

1715. February 8.

Dutchess of BUCCLEUGH *against* DAVIDSON.

THE LORDS decerned in a removing, though the warning was given on the 5th of April, and so not 40 free days before the term, without counting the day of execution.

Fol. Dic. v. 2. p. 337. Bruce.

No 102.

* * This case is No 78. p. 13836.

S E C T. VI.

Tenements within Burgh.

1678. July 24.

INGLIS *against* The CHILDREN of Bailie LERMONT.

MR JOHN INGLIS pursues the Children of Bailie Lermont for the mail of an house, wherefrom the Bailie being warned, did not remove at the term of Whitsunday, or within 40 days thereafter, which, by the custom of Edinburgh,

No 103.
Removing from houses in Edinburgh must be within 40 days after Whitsunday.

No 103.

is allowed for flitting. The defenders *alleged* absolvitor, because the defunct removed upon the 42d day, the 41st being Sunday, and his wife being then lying in, was transported within 20 days after her delivery, so that being but one day more than the 40, and such a singular occasion of delay, *de minimis non curat lex*. The LORDS repelled this defence, unless the defunct had removed upon, or within the 40 days. The defenders further *alleged*, That the pursuer's wife had given allowance to the defunct, who was to remove on the 40th day, being Saturday, and that accordingly himself, his wife, family, and goods were removed, and the keys delivered, although some small part of his goods remained, and the key of one door kept, and though a servant going to see what was left, an instrument was taken against him that all then was not removed.

Yet the LORDS sustained the defence, and also this defence, that all being removed on the Monday, as said is, the keys were delivered to the pursuer in his own hand, to be proved by witnesses, or that they were accepted by him, otherways, to be proved by his oath.

Stair, v. 2. p. 640.

. Fountainhall reports this case :

THE LORDS found the bairns liable for the hail year's mail, because they did not remove within 40 days after Whitsunday, though the last fell on a Sunday, for then they should have flitted on Saturday, and the time of removing must be observed, though she was but 20 days in child-bed. The allegiance of offering the keys was found relevant *prout de jure*; and for the allegiance that the pursuer's wife permitted them to sit a day or two longer, before answer, ordains her to be examined, reserving to themselves to consider how far wives have power in such affairs wherein they use to negotiate.

Fountainhall, MS.

No 104.

Found that where a tenant overgave his house within a burgh of barony, forty days preceding Whitsunday, this was sufficient, although the universal custom of the burgh was to give houses up upon the first Monday of the year.

1736. July 16.

WILLIAM NICOL *against* WALTER GROSSET.

MR GROSSET having possessed a house in Alloa for some years, intimated to Mr Nicol the proprietor, above 40 days preceding Whitsunday 1733, that he intended to remove at that term; which accordingly he did; but, the house having stood waste for the year after his removal, Nicol brought a process against him before the Sheriff of Clackmannan for payment of the year's rent, upon this ground, That through Grosset's default to overgive his possession upon the first Monday in the year, conform to the immemorial custom of the inhabitants in the burgh, he had lost the opportunity of setting his house to another tenant. And, upon Nicol's proving the custom, he obtained a decret; which Grosset suspended, on this reason, that by the act 39th Parlia-