

1712. *December 2.*JOHN STIRLING, brother to Sir Mungo Stirling of Glorat, *against* Mr WILLIAM GORDON of Balcomy, Advocate.

No 77.

A precept of warning, held to be duly executed, though the publication thereof, at the parish church door, was some days before the execution against the tenant.

In a removing, at the instance of John Stirling against Mr William Gordon, the defender *alleged*, That the execution of the precept of warning was null and informal, in so far as the execution against the defender preceded the publication at the parish church, which was several days after, and act 39. Par. 6. Q. M. requires the precept to be executed against the tenant, and thereafter to be read at the parish church-door; which dilatory defence the Lords repelled, and sustained process, thinking it sufficient that both execution and publication were 40 days before Whitsunday.

Fol. Dic. v. 2. p. 337. Forbes, p. 639.

1715. *February 8.*THE DUTCHESS OF BUCCLEUGH *against* JOHN DAVIDSON and Others.

No 78.

Found in conformity with the above.

THE Dutchess of Buccleugh having raised a process of removing against Davidson and Others, out of some of her lands, it was *alleged* for the defenders, That they were not duly warned, because, *1mo*, The warning was only on the fifth of April, which is not 40 free days before Whitsunday; *2do*, That the warning was executed at the kirk-door, before it was executed against the defenders; *3tio*, That the execution did not bear on what day the copies were left on the ground.

Answered for the pursuer, *1mo*, That there were 40 free days betwixt the execution and the term, counting the day of execution; *2do*, That the warning was executed personally at the kirk-door, and on the ground, which are all the solemnities required by law; and no matter whether the execution was first at the kirk-door, or to the party; *3tio*, That the execution bearing the copy, to be left on the ground, and that the tenants were warned the 5th of April, that date respects both the warning the tenants personally, and on the ground.

THE LORDS repelled the defences, and decerned in the removing.

Act. —.

Alt. *Boswel.*Clerk, *Sir James Justice.*

Fol. Dic. v. 2. p. 337. Bruce, v. 1. No 59. p. 73.

1732. *February.*ROBERTSON *against* CALDER.

No 79.

A SUMMONS of reduction of a tack of fishing, containing this conclusion, "that the defender should be decerned to cede possession," raised and executed 40

days preceding Whitsunday, was found sufficient, without necessity of a formal warning, and therefore the defender was decerned to remove from the fishing.
See APPENDIX.

No 79.

Fol. Dic. v. 2. p. 338.

1740. February 19.

HAY against KERSE.

WILLIAM KERSE having a tack of Hay's house at Inveresk, with the garden, pigeon-house, and park adjacent thereto, by which his entry to the garden, park, and dovecote, was at Candlemas, and to the house at Whitsunday, and his removal to be at the same respective terms; the years of the tack being expired, he was, upon the 22d December 1739, which was 40 days before Candlemas 1740, warned to remove at the said Candlemas from the garden, dovecote, and park, and from the house at Whitsunday thereafter.

No 80.
How the 40 days are computed, when there are different terms of removal from different parts of the premises.

In an advocacy by Kerse of a process of removing upon this warning, the LORDS were of opinion, that this tack, though of the above several particulars was *quid individuum*, and that the warning from the house could not be sustained unless the same was also good as to the park, &c. *et vice versa*; and sustained the objection to the warning from the park, dovecote, and garden, that the same had not been used 40 days before Whitsunday 1739.

It occurred to be argued among the Lords, how, in such a case as this, a warning should be used. The difficulty was, by the act of Parliament, the warning must be 40 days before Whitsunday, but it must be also within the year of the term of removal; so says the act "Warning being made at any time within the year, 40 days before the feast of Whitsunday." Now if the warning had been 40 days before Whitsunday 1739, it might have been good as to the park, &c. but it would not have been good as to the house, as not being within the year of Whitsunday 1740, the term of removal from the house.

As to which, no doubt, the difficulty will be avoided, by using two warnings; but as it was thought the legislature could never intend to require any more than one warning, it was the opinion of the Court, that in such cases, the terms of the act of Parliament are complied with, when the warning is within the year of the first term of removal.

Kilkerran, (REMOVING.) No 2. p. 480.

* * * C. Home reports this case :

THE deceased Alexander Hay, portioner of Inveresk, disposed his house park, garden, pigeon-house, offices, and slent in the haugh, &c. lying in the town of Inveresk, to Alexander Hay his son; and, by a deed of the same date, he nominated certain persons to be tutors to him, he being then within the