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 allegeance of offering the keys was found relevant *prout de jure*; and for the allegeance 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 negociate.

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 decreet; which Grosset suspended, on this reason, that by the act 39th Parlia-

ment 6th, Queen Mary, which behooved to be the rule in this case, he was not bound to renounce his possession sooner than 40 days before Whitsunday. No 104.

Answered for the charger, 1*mo*, The act speaks not one word how tenants should give over their possessions; 2*do*, It ascertains the order of warning of tenants as to *prædia rustica*; but, as to the *prædia urbana*, that matter is left to be regulated by the custom of the several burghs, which, although different among themselves, there is still a custom in each, which is the rule for that burgh. And this is obvious from the following words of the act, directing, 'That tenants should be warned to remove from their lands, mills, fishings, and possessions, 40 days before Whitsunday, personally, or at their dwelling-places, and at the ground of the lands;' words which would have been very improper, if tenements within burghs were designed to be comprehended; as there is usually no other ground belonging to them but what is occupied by the houses. And Stair, B. 2. T. 9. §. 40, says, 'The statute reaches not warnings from tenements within burgh, which are regulated by the custom of the burgh.' And, in support thereof, he refers to two decisions, 18th July 1634, Hart, No 138. p. 3783.; 21st November 1671, Riddel, No 67. p. 13828.

Replied for the suspender; to the *first*, The words of the law are general, 'That warnings of all tenants and others shall be by lawful warning, made 40 days before Whitsunday;' and if so, the master was not bound to warn the tenant till 40 days before Whitsunday; of consequence the tenant was not obliged to renounce his possession sooner.

To the *second*, It is a mistake to say the act does not extend to tenements within burgh; seeing, as the words are general, these must always be the rule, except where it is derogated from by a posterior universal custom, which can take its rise only from the reason of the law ceasing in certain circumstances; *e. g.* The act requires publication at the parish church, which is not introduced so much in favour of the tenant, who may be sufficiently certiorated by the copy left at his house, and upon the ground of the lands, as in favour of sub-tenants and cottars, who are thus warned edictally, because the other may not reach them; and which therefore is plainly not necessary within burgh, as was found in the decision first referred to. But in other points the statute is in observance within burghs; thus an execution, by chalking the door of a house within burgh, is, in effect, a copy left at the dwelling-house, and also upon the ground of the lands; for they are one and the same thing; which is the meaning of the passage quoted from Lord Stair; not that the statute does not concern burgage tenements, but only that it does not extend to them in all its branches.

As to the decision in the case of Riddel, it is not only single, but very singular; for, if the act has made a warning 40 days before Whitsunday necessary, only because it was the usual term of entry, then warning 40 days before Martinmas would be sufficient in corn-roums, and 40 days before St An-

No 104. drew's day for fishings, these being the known terms of entry in such cases; but, the law being general, a warning before Whitsunday is necessary, whatever be the term of entry.

The Lords sustained the reason of suspension. See No 107.

C. Home, No 31. p. 61.

1766. *July* 23.

Andrew Tait Organist in Aberdeen *against* John Sligo Merchant in Aberdeen.

No 105.
Not necessary to raise an action of removing, or use formal warning forty days before the term of removing, from tenements within burgh.

Sligo possessed a shop in the town of Aberdeen, the property of Tait, who, on the 13th May 1766, presented a petition to the Magistrates, setting forth, that, in December preceding, he had informed Sligo, that the shop was set to another, and praying that Sligo might be decerned to remove from said shop.

To this petition Sligo gave in answers, and *objected* to the competency, as not being brought 40 days before the term, nor any formal warning executed, which he contended was necessary, in order to remove him.

Tait, in reply, *insisted*, That having told Sligo, in December preceding, that he must remove, that was sufficient warning, as no regular action of removing or formal warning was necessary in removings from urban tenements, and craved Sligo might be examined as to the fact of his being told, in December, that he must remove from his shop, and his agreeing to do so.

The Magistrates examined Sligo, who acknowledged that Tait had told him, in December, that the shop was let to another; but denied that ever he agreed to remove, or promised to remove. Tait *insisted* for a proof, to shew that Sligo had taken another shop, and given reason to believe that he would remove; which proof the Magistrates allowed, before answer. Sligo objected to the proof as incompetent and irrelevant, as no regular action of removing had been brought, or warning executed, 40 days before the term; and applied to this Court by advocation.

In the mean time, the proof was taken, and advised by the Magistrates, who ordained Sligo to remove; but a sist on the advocation being obtained, prevented the interlocutor of the Magistrates from being carried into execution; and afterwards, on advising the advocation with answers, &c. June 24, 1766, the Lord Gardenston Ordinary refused the bill.

Pleaded, in a reclaiming petition, Though in removing from tenements within burgh, warnings, with all the solemnities required by the act 1555, are not necessary; yet, to prevent every removing from becoming an arbitrary question, there are certain established forms necessary in removings from urban tenements; such as having the door chalked by a burgh-officer, or an action brought against the tenant 40 days before the term. And, in support of this plea, the following authorities were referred to; Sir Thomas Craig, Lib. 2. Dieg. 9. § 9.; Lord Stair, B. 2. Tit. 9. § 40.; Lord Bankton, B. 2. Tit. 9. § 52.;