No. 124. sufficient against the son, his right depending on his father's, the principal tenant.

THE LORDS remitted to the Lord Ordinary to take the defenders' oaths.

Fol. Dic. v. 4. *p.* 225. *C. Home, No* 274. *p.* 444.

*** Kilkerran's report of this case is No 237. p. 12415. *voce* PROOF.

1771. *January* 24.

The Earl of EGLINTON *against* JANET FULTON, Tenant in Dreghorn.

No 125.
Warning held to be necessary, where the tack contained a clause to remove without it.

JANET FULTON possessed the lands of Dreghorn by a lease for 19 years from her entry; which to the arable lands was at Martinmas 1750, and to the grass at Beltan, or May-day, 1751. By this tack it was agreed, "that she and her foresaids shall flit and remove themselves forth and from their said possessions at the ish and expiration of this tack, without any warning or decreet of removing to be obtained against her for that effect."

Upon the 12th of April 1770, the Earl of Eglinton gave her a charge to remove from the arable lands immediately, and from the grass at May-day first to come. This was within little more than *thirty* days of the term of Whitsunday 1770; within eighteen days of May-day, when the tack expired as to the grass, and *five* months after Martinmas 1769, the term of removal from the arable lands. Janet Fulton suspended; and the LORD ORDINARY "having considered the debate, with the clause in the tack charged on, repelled the reasons of suspension."

The suspender, in a reclaiming petition, *pleaded*;

1*mo*, The charge, in the present instance, was irregular; and notwithstanding the clause in the tack, she was not bound to remove. It was the express opinion of Lord Stair, B. 2. T. 9. § 38. that a clause, binding tenants to remove without warning, could not be put in execution after the term was elapsed, and the tenant allowed to possess by tacit relocation. A clause to remove without warning had no other effect than to supersede the intricate solemnities of a regular removing; but an intimation forty days before Whitsunday was still indispensable, whenever the tenant had been allowed to possess beyond the precise day of removal stipulated in the tack; 2d December 1742, Bartlet *contra* Stewart, No 123. p. 13882.

2*do*, Though, in the present case, there were two terms of removal, yet Whitsunday was that always regarded; and when two terms were specified, it was the first in date by which the time of warning or any other species of removal was regulated. Lord Bankton, B. 2. T. 9. § 56.; 15th June 1631, Ramsay *contra* Weir, No 97. p. 13857.; 19th February 1740, Hay *contra* Kerse, No 80. p. 13837. Hence, as the charge made no intimation forty days before

Whitsunday 1769, nor till 12th April 1770, she was then possessing by tacit relocation, and could not be removed till warned in common form.

No 125.

3tio, The necessity of a warning in all cases was supported by what appeared from statute 1546, c. 3. passed only nine years before the act as to removings; and it appeared also from Craig, L. 2. Dieg. 9. that the intention of that statute, viz. 1555, was to prevent the tumults and disturbances which took place in the execution of removings. Prior even to the act of sederunt 1756 such was the law; and though instances had occurred where heritors had taken an undue advantage of clauses thrown into tacks, obliging tenants to remove without warning; yet since that act, it did not appear that the point could be drawn into dispute; for when that act said that it should be lawful for the heritor to charge the tenant forty days before the term, the only construction it could bear was, that he could not charge with effect at a later period.

Answered; 1mo, In all the different periods of the law, one of the cases excepted from the necessity, either of warning or decreet, was where, by the express agreement of parties, the tenant was bound to remove at a precise day. "Provisio hominis tollit provisionem legis." There was nothing immoral in such a paction, "ut unicuique licet renunciare jure pro se introducto." Though the statute 1555 had therefore furnished one general rule in removings, that they should be executed forty days before the term of Whitsunday in that year wherein the removing was to take place, yet these *induciæ* might either be prolonged or curtailed by consent of parties; and upon the same principle the necessity of warning might be totally dispensed with; Craig, Lib. 2. Dieg. 9. § 11.; Lord Stair, Lib. 2. T. 9. § 38.; November 1586, Freeland *contra* Monteith, No 117. p. 13877.; February 16. 1610, Lord Craighall *contra* Kinninmound, No 118. p. 13879.; 19th December 1661, Dewar *contra* Countess of Moray, No 121. p. 13879. The case, 2d December 1742, Bartlet *contra* Stewart was not in point; for the Court did not think the neglect of warning sufficient *per se* to frustrate the clause in the tack obliging to remove without warning, but conjoined therewith the Company's not having appointed any person to uplift the rents, as furnishing real evidence of an implied consent or tacit relocation for that year.

2do, The act of sederunt made directly against the suspender's argument. The object of that act was to facilitate removings, but not supersede the positive agreement of parties. As a warning was, before that act, requisite in all cases where it was not pactioned to be dispensed with, it was just and proper, when that act was to introduce a more expedient form of process, that the *induciæ* of forty days should be the same in the one case as in the other. The species of diligence thereby introduced was authorised with the obvious view, that any question arising might receive a determination before the time of actual removing; which could not be done by the former practice; but where, by the agreement of parties, a warning was dispensed with, the proceedings upon the act of sederunt were in like manner unnecessary.

No 125.

Though the judgment of the Court in this case went in a great measure upon the special circumstances, it was observed by very high authority from the Bench, that Lord Stair's opinion of a notification of forty days being necessary, even where a tenant was bound to remove without warning, was right, and in the abstract case should be followed.

The following judgment was pronounced, January 24. 1771, "Find the notification insufficient for removing the petitioner at Martinmas 1769 from the arable land, and at Beltan or May-day 1770 from the houses and grass; but find it sufficient to oblige her to remove at Martinmas last, and Beltan or May-day next; and therefore, in respect the said term of Martinmas is elapsed, decern and ordain her instantly to remove from the arable lands, and from the houses and grass at Beltan or May-day next."

Lord Ordinary, *Pitfour*, For the Earl of Eglinton, *Lockhart*,
For Fulton, *Geo. Fergusson.* Clerk, *Ross.*

R. H. *Fac. Col.* No 69. *p.* 205.

SECT. X.

State in which the person who removes is bound to leave the property.

1554. *December* 19. BARCLAY of Cullernie *against* BARCLAY.

No 126.

GIF ony man be chargit to deliver ony tour, fortalice, or place, he aught and sould deliver the samin, with barnis, byris, stablis, and all uther necessare housis pertenand to the samin, as pertinentis thairof.

Fol. Dic. v. 2. *p.* 338. *Balfour*, (PERTINENTS of LANDS.) *No* 1. *p.* 175.

No 127.
The person decerned to remove, must deliver up the possession void of any occupier.

1624. *January* 30. GREENLAW *against* ADAMSON.

IN an action of suspension of a decreet of removing betwixt Greenlaw and Adamson, the LORDS found, That the decreet of removing was not satisfied and fulfilled by any instrument of obedience, bearing, that the party against whom