

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

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are let together with a rural tenement. Accordingly Lord Bankton, Book 2. Tit. 9. § 53. in express words excepts fishings from this act.

THE LORD ORDINARY sustained the defences; and the pursuer having reclaimed to the Court, the LORDS refused the petition without answers.

Lord Ordinary, *Justice-Clerk.*

Act. *George Fergusson.*

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Fol. Dic. v. 4. p. 223. Fac. Col. No 96. p. 150.

S E C T. V.

Upon what number of days.

1622. *January 11.*

L. FALLDOUNSIDE *against* BENNERSIDE.

No 100.

Where the tenant is out of the kingdom, if the warning at cross, pier and shore, be on 60 days; that on the ground and at the kirk may be on 40 days.

IN an action of removing, pursued by the L. of Falldounside against Bennerside, it was *alleged* by one of the defenders, That the warning was null, because at the time of the warning, and of before, the party warned was out of the country, and so ought to have been warned upon 60 days; and albeit, by a warrant of the Lords' letters, (as use is in such cases) he was warned at the market-cross of Edinburgh, and at the pier and shore of Leith upon 60 days, yet that could not be sufficient to sustain the warning, seeing the execution thereof made at the parish-kirk was only upon 40 days, as against a party within the country; whereas if it had been legally executed, it ought to have been also upon 60 days. THE LORDS repelled the allegiance, and found the warning sufficient, being executed at the market-cross, and shore of Leith upon 60 days, and at the parish-kirk upon 40 days; and found that it needed not to be executed at the parish-kirk upon 60 days, albeit he was out of the country, in respect he was warned at the market-cross upon 60 days, as said is.

Act. *Hopz & Bekher.*

Alt. *Stuart.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 337. Durie, p. 8.

* * A similar decision was pronounced, 17th July 1630, Lee against Porteous, No 12. p. 2182. *voce* CITATION.