

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.

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

1740. February 19.

HAY against KERSE.

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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.

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

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years of pupillarity. After Alexander the father's decease, the tutors, by a tack, of date the 27th January 1735; set the above-subjects to William Carse, for the space of three years from and after his entry thereto, which, by the tack, was declared to begin to the garden, park, and dovecote, at the date thereof, and to the mansion-house, office-houses, and slent in the haugh, at the term of Whitsunday thereafter. In consequence of the above tack, William Carse entered to possession, and, after the tack was expired, Alexander Hay, and his curator, warned William Carse, on the 22d of December 1740, to remove from the park, garden, and dovecote, at Candlemas then next, and from the mansion-house, offices, and slent in the haugh, at the term of Whitsunday next to come.

Amongst other objections; it was *pleaded*; That, by the act 1555, no tenant is obliged to remove from his possession, except he be warned 40 days preceding the term of Whitsunday before his removal; and, therefore, as the defender was not warned, in terms of the statute, 40 days before the term of Whitsunday 1739, he cannot be obliged to remove at this term of Candlemas. In support of this, it was observed, That there is no authority from the law or practice for executing a warning to remove 40 days before any term but that of Whitsunday, at whatever term thereafter the conventional term of entry or removal may be; as has been often determined; see 15th June 1631, Ramsay, *infra, h. t.*; 8th July 1626, Foulis, *infra, b. t.*; 16th December 1628, Inglis, *infra, b. t.*; and if the warning is void and null as to the removal from the garden, dovecote, and park, at Candlemas 1740, it must necessarily follow, that the warning 40 days before Whitsunday, (from the house,) to remove at the ensuing Whitsunday, cannot be available, by reason the whole is set in one tack for one and the same number of years, and for payment of a joint tack-duty of L. 24 Sterling yearly; for what should the defender do with the garden if he has no house? Where shall he lodge his cattle that should feed in the park, if the office-houses, which were set to him for that purpose, shall be taken away? It could never then be the meaning of parties, by setting this tack, that the tacksman should be removed first from the mansion-house and office-houses; on the contrary, this is the very intent of the anticipation of the term of removal from the garden and park, that the tenant who should come to the house might have an opportunity of setting these in order against the time that he should enter to the house. And, therefore, the defender cannot be lawfully warned to remove from the house until he shall be first legally warned to remove from the garden, dovecote, and park; and when that shall be done, no doubt he must remove from the house at the Whitsunday thereafter, more especially, that the land is the most considerable thing set, the estimate of the rent of them being L. 15 Sterling, viz. L. 12 for the park, L. 2 for the garden, and L. 1 for the dovecote, so that the house and slent in the haugh could only be L. 9.

*Pleaded* for the pursuers, That, in the present (circumstantiated) case, no argument can be founded on the statute, albeit no warning was used 40 days preceding Whitsunday 1739, in regard that the warning, upon which this removing is founded, is certainly 40 days before the term of Whitsunday 1740, and, of consequence, sufficiently supports the same with respect to the removing from the mansion-house, office-houses, and slent in the haugh, at that term; and, if that is so, the defender must of consequence remove from the park, garden, and dovecote immediately; because it is evident, from the whole clauses of the tack, that the house is what appears to be principally set, and the yard or park adjacent thereto, but as accessories to, or pertinents of the same. Here then is a set, not of a *prædium rusticum*, where the house was for the conveniency of labouring the ground, but of a *prædium urbanicum, habitandi causa*; and, therefore, since the warning from the house is unexceptionably good, the exception to it, with respect to the accessories, must go for nothing.

THE LORDS found, That this case fell under the act 1555, anent the warnings of tenants, and therefore sustained the objection to the warning.

*G. Home, No 146. p. 251.*

1742. *January 28.* EARL OF DARNLAY *against* CAMPBELL.

WHERE a tacksman of feu-duties had, after expiry of the tack, continued to possess by tacit relocation, it was found not necessary for the granter of the tack, intending to remove him, to use a formal warning, but that any intimation of the granter's will, to discontinue the tacit relocation, was sufficient.

*Fol. Dic. v. 4. p. 223. Kilkerran, (REMOVING.) No 3. p. 481.*

1743. *February 22.* HUGH EARL OF MARCHMONT *against* JOHN FLEEMING.

ANNO 1725, the late Earl of Marchmont let a tack of several mills, &c. to James Rae, and his heirs, secluding assignees, for the space of seven years, and, in the 1733, he renewed the lease in the same terms. On the 22d of August 1741, Rae renounced this lease, upon which Lord Marchmont granted a new lease to John Hunter of this possession, to commence *quoad* the mills at the Lammas preceding, and *quoad* the lands at the Martinmas thereafter.

When Hunter came to take possession, John Fleeming opposed it, as having a subset from Rae of the mill &c. of which he had been in possession many years. Whereupon the Earl lodged a complaint against Fleeming before his baron-bailie who decerned him to remove from the mill against the 28th of the said month

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It is not necessary to warn a sub-tenant who possesses under a tackman, whose lease excludes assignees; nor to summon him to remove on six days.