

day 1763 was necessary in order to obtain a decret of removing at Candlemas and Whitsunday 1764.

No 109.

THE LORDS remitted to the Lord Ordinary to remit the cause to the Sheriff, with this instruction, That he assoilzie the defenders, in respect there was no proper action brought upon the act of sederunt 40 days preceeding Whitsunday 1763, for removing them at Candlemas and Whitsunday 1764.

Act. *Da. Grene.*Alt. *Armstrong.**Fol. Dic. v. 4. p. 224. Fac. Col. No 138. p. 320.*1780. *January 19.*CARRUTHERS *against* M'GARROCH.

FOUND, that although full payment of all arrears before decree is a good defence against a removing on the act of sederunt, yet the landlord is not bound to accept of partial payments.

No 110.

In the same case, found, that debts of the landlord, or even public burdens affecting the farm, paid by the tenant without authority, will not be brought *in computo* to diminish the year's rent due by this tenant. See APPENDIX. See No 114. p. 13873.

*Fol. Dic. v. 4. p. 225.*1780. *January 19.*LORD ELIBANK *against* MARGARET HAY.

At the time of the death of Patrick Lord Elibank, in the month of August 1778, Margaret Hay, lessee of certain lands belonging to his Lordship, had incurred an arrear of more than a year's rent, which devolved to his Lordship's executor.

No 111.

Whether an arrear of a year's rent due to the landlord's executor entitles his heir to pursue an action of removing?

In the month of September following, George Lord Elibank, heir to Lord Patrick, commenced an action before the Sheriff of the county, against Margaret Hay, upon the act of sederunt 1756; by which it is, *inter alia*, provided, "That where a tenant shall run in arrear of one year's rent, it shall be lawful to the heritor, or other setter of lands, to bring his action before the judge-ordinary, who is hereby empowered and required to ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following, or during the currency of the tack, if the tack is of shorter endurance, within a certain time, to be limited by the judge; and failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined, and the tenant had been legally warned in terms of the act 1555."

In support of this action,

The pursuer *pleaded*; In order to eject a tenant who had fallen in arrear, a landlord, before the year 1756, was obliged first to attach the whole stocking

No III. on the ground, and afterwards to pursue an action of removing against the tenant as being a bankrupt. During this procedure the farm was neglected, the landlord's security diminished, and both parties exposed to much litigation and inconveniency. To remove this was the object of this branch of the act of sederunt, by which the tenant's owing a year's rent is made equivalent to bankruptcy, and he obliged, in that event, either to find caution for the arrears, and for the rents of the five following crops, if the lease shall subsist so long, or to remove within a short time, to be limited by the judge-ordinary.

It cannot, therefore, be thought, that the landlord's death, and the consequent partition of interests between his heir and executor, should defeat this salutary and politic regulation. By the same rule, supposing a proprietor to dispose his estate to his son, or his rents to a stranger, or that the rents are attached by legal diligence, a bankrupt tenant might be allowed to retain his possession, and to neglect and deteriorate the lands.

Nor can it with propriety be said, that by virtue of his hypothec the landlord is sufficiently secured, if no rent is due to him, whatever may be the extent of the tenant's debts to others. The act of sederunt had in view, not merely the landlord's security, but also the cultivation of the ground, which a bankrupt tenant is incapable to accomplish. Debts due to third parties, not connected with the lease, are not considered; but when a landlord can subsume, that one year's arrear of rent has been incurred, both the words and spirit of the act of sederunt support him in the requisition therein prescribed.

Answered for the defender; Practice having indulged landlords with an hypothec on the fruits and the tenant's goods for a year's rent, they are effectually secured for that period, if the land be sufficiently stocked; and it is only when more than a year's rent is due to them, that the interposition of the judge is necessary to compel the tenant on this account to find caution, or to remove. Arrears of rent due to the landlord's executor, to his creditor, or to his assignee, the existence and extent of which can be legally ascertained only in a question where they are parties, can no more enter into this computation than extraneous debts. Indeed, if the lease be a beneficial one, nothing could be more repugnant to the interest of the other creditors, than to afford the landlord a mean of withdrawing from them perhaps the only fund out of which they can expect payment.

Upon these principles, the judge-ordinary is directed, by this act of sederunt, "to decern the tenant to find caution for the arrears, and also for payment of the rents of the five following crops;" which supposes, that the arrears are due to the same person who is entitled to caution for the rents of the following years. And, on the same idea, it has been found, in an action for declaring the irritancy of a feu-right, *propter non solutum canonem*, that a superior was not entitled to found upon the arrears of a feu-duty to a third party these having been incurred before he had purchased the superiority. See Jus TERTII.

The Judge-Ordinary had repelled the defences; but the defender having applied by bill of suspension to the Court of Session, upon advising memorials, 'THE LORDS suspended the letters.'

NO III.

Lord Reporter, *Kennet.*Act. *Salicitor-General Murray, Hay Campbell, Law.*Adv. *Blair, Hay.*Clerk, *Tait.*

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Fol. Dic. v. 4. p. 225. Fac. Col. No 101. p. 193.

1780. December 22.

WILLIAM INNES of Blackhills against POOR JOHN CLERK.

MR INNES set to Clerk, for 19 years, after Whitsunday 1770, certain lands at a stipulated rent. A tack was extended, and Clerk entered into possession; but, having fallen into arrear of rent, Innes, in January 1779, raised a process before the Sheriff, concluding for the arrears of rent, the sum of which was specially mentioned in the summons, which also contained a separate conclusion for removing Clerk from the lands.

Clerk did not appear before the Sheriff. He was held as confessed upon the sum libelled, due as arrears of rent; for which a decret was pronounced and extracted; and Innes afterwards insisted that Clerk should be ordained to find caution for the arrears, which amounted to more than one year's rent, or be decerned to remove from the lands, in terms of the act of sederunt 1756.

The Sheriff ordered Clerk to find caution between and a certain day, which being elapsed, and no caution found, he decerned in the removing, to take place at Whitsunday 1779.

After this, decret was pronounced; but, before Whitsunday 1779, Clerk paid up his arrears, and got a discharge; but Innes having extracted the decret of removing, and set the lands to another tenant, ejected Clerk at Whitsunday 1779.

Clerk brought a reduction of the decret of removing, containing a conclusion for damages, on account of being ejected; insisting, that as he possessed on a tack still current, and that the libel in the Sheriff-court concluding for removing, was laid neither upon the act of sederunt 1756, nor upon the tenant's being in arrear of rent, the action was irregular, and no decret of removing could be pronounced upon it.

THE LORD ORDINARY, before whom the action of reduction came, at first assoilzied Innes, but afterwards pronounced this interlocutor: "13th January 1780. In respect that the libel of removing before the inferior Court was not laid upon the act of sederunt, nor upon the tenant's being in arrear of rent, and that the whole proceedings before the inferior Court were in absence, and that the pursuer was in possession, in virtue of a tack still current, alters the former interlocutor, reduces the decret of removing, finds that the pursuer is entitled

NO III.

A decret of removing had been obtained in absence, without libelling on the act of sederunt, or that the tenant was in arrears. The tenant having afterward paid up all arrears, brought an action of reduction, in which he was successful.