No. 151. the tenant cannot be relieved from this irritancy at an easier rate than the tenant himself. Prior to the act of sederunt 1756, which introduced this irritancy, in the case of feu-rights, the creditors of the vassal, on adjudging his property, could only be saved from the casuality of forfeiture *ob non solutum canonem*, by paying the whole arrears due. Till then, the subject is not theirs, nor subject to their claims. The case of Baird was thought to have been wrong decided, and at all events it occurred under the bankrupt act 1772.

It was further observed on the Bench: It is a mistake to say, that the landlord must claim under the sequestration as a common creditor for the arrears. The trustee cannot take the benefit of the lease for his constituents, without paying the arrears, and purging the irritancy.

The Court refused the petition without answers.

Lord Ordinary, *Cullen.* For Petitioner, *Morison.*
Agent, *Robert Cameron.* Clerk, *Ferrier.*

F. *Fac. Coll. No.* 70. *p.* 160.

1804. *November* 21. RONALDSON *against* BALLANTINE.

No. 152.
A tenant is not entitled to prevent his landlord from hunting upon his farm.

John Ronaldson possessed the farm of Castlehill, the property of Patrick Ballantine, upon an improving lease for twenty-one years. The farm is situated within two miles of Ayr. The lands are inclosed; the tenant is bound to keep the fences in a state of repair, and to observe a rotation of crops. His landlord having hunted on horseback over the ploughed fields of his farm, Ronaldson presented a petition to the Sheriff, "to prohibit and discharge the said Patrick Ballantine, Esq; and all others, from hunting on the lands possessed by him, and thereby destroying the fences, hedges, and grounds, in all time coming, during the petitioner's tack."

The Sheriff assoilzied the defender, reserving to the pursuer an action against him for whatever damage he might be able to qualify. Upon this Ronaldson presented a bill of advocation, which was refused by the Lord Ordinary; but afterwards, in consequence of an application to the Court, the bill was passed. The pursuer

Pleaded: By granting a lease of a farm, the landlord relinquishes his right to the surface for a limited period, and transfers the possession to the tenant for a just equivalent. So far as relates to the use of the surface, and the enjoyment of the annual produce, the tenant, during the period of his lease, comes in the place of the proprietor. And as the landlord has unquestionably the right of preventing all persons from hunting upon his grounds; Marquis of Tweedale against Dalrymple, No. 3. p. 4992. *voce* GAME; Earl of Breadalbane against Livingston, No. 6. p. 4999. IBIDEM; in granting a lease for the purpose of agriculture, he must be held as conveying to his tenant this right, which is necessarily connected with the advancement of agricultural operations. It makes no difference to a tenant, whether this right of ranging over his fields is exercised by his landlord, or by

other persons; for the fundamental obligation of the *locator* in every case, Dig. Lib. 7. T. 1. L. 15. § 6. is to afford to the *conductor* free and undisturbed possession of the subject; and with regard to an estate which is let, the landlord is as much a stranger as any other person. He is in fact no more entitled to trespass upon the grounds let to his tenant, than the landlord of an urban tenement to enter a house which he has let, whenever he chooses. The only difference is in the extent of the injury, which is certainly much greater in the former case than in the latter. No. 152.

There is nothing in the amusement of hunting, to make it an exception to the ordinary rules which regulate the contract of location. It is true, a certain qualification is necessary, to entitle a person to this privilege; Kelly against Smith, 27th June, 1780, No. 4. p. 4995. But, although the right of hunting be a *jus nobilius*, intransmissible to unqualified persons, the privilege of debarring others is competent and transmissible; and the pursuer merely contends, that, by granting an unqualified and unconditional lease, the landlord has for a certain time divested himself of his right of hunting on the farm.

Further, the right here claimed by the landlord, is equally inconsistent with views of expediency as with strict principles of law. It is vague, indefinite, and may be communicated to any number of persons; so that the damage sustained by tenants may be excessive, especially in a clay country under tillage. Besides, the injury done by hunting over ploughed fields, though certainly very great, is not always susceptible of accurate appreciation; which distinguishes it from the case of mines and minerals, the right of working which is, no doubt, reserved to the landlord, upon indemnifying the tenant for the injury done to the surface. There is little risk of a tenant emulously refusing his landlord the privilege of hunting over his farm, while it is moderately and properly exercised; bnt if the right be sustained to the extent contended for in this case, it would be easy for a landlord, by a profuse communication of this privilege, to force a tenant to give up his lease.

An action of damages is an inadequate remedy. It is impossible that a tenant can keep such a constant watch over his farm, as to bring the injury, in every case, home to the person by whom it has been committed. Neither can he be supposed able to carry on a number of different actions of damages, more especially as the fund from which he derives his support, is materially injured by the evil of which he complains. The only adequate remedy, therefore, is an interdict, by which the injury may be prevented.

Answered: The right of a tenant is confined to the annual fruits of the farm. This is all which the landlord surrenders; and a variety of other rights are retained by himself. The right of killing game, is, by the law of Scotland, exclusively vested in landlords of a certain qualification; and every landlord so qualified, has an exclusive right of property in the game upon his estate. He cannot be held to convey this right to a tenant, who is not entitled to exercise it. Accordingly, the right of hunting has been immemorially enjoyed by all proprietors of estates, without any interruption from their tenants.

No. 152. There can be no doubt that a landlord, without any reservation in a lease, is entitled to cut trees,—to dig for coal, lime or marl,—to work mines,—and to fish in the rivers that run through his estate. Many of these rights must occasion much greater inconvenience to the tenant than a right of hunting for game; yet the landlord is entitled to exercise them, upon indemnifying the tenant for the injury done to the surface; and he is equally entitled to enjoy the amusement of hunting upon the same conditions.

An interdict is unnecessary, while a tenant has ample security for any damages he may sustain by retention of his rent. Neither is it at all difficult to ascertain the amount of such damage, by the inspection of impartial persons qualified to determine. The defender has all along been willing to pay any damage that may be competently instructed; aud as the sheriff has reserved all such claim, the present advocation was altogether unnecessary.

The Lord Ordinary pronounced to following interlocutor: Finds, that as to what may have happened in time past, the defender pointedly denies, that he, or any person by his permission, have occasioned damage of any sort by hunting on the said lands; and that the Sheriff has reserved action to the pursuer for any damage which he can shew that he has sustained; and as to what may happen in time to come, the Ordinary is of opinion, that the interdict craved is unnecessary, in respect the defender does not pretend that he himself, or others by his permission, have a right to destroy the fences, hedges, and grounds, by hunting thereon; and therefore repels the reasons of advocation, and remits the cause to the Sheriff *simpliciter*."

To which interlocutor, the Court unanimously adhered, upon advising a petition with answers.

Lord Ordinary, *Glenlee*. Act. *Maconochie*. Agent, *Jo. Taylor, W. S.*
Alt. *Cathcart*. Agent, *Jo. Hunter, W. S.* Clerk, *Home*.

J. *Fac. Coll. No.* 182. *p.* 407.

SECT. X.

Clauses respecting Assignees and Sub-Tenants.

1785. *January.* MAXWELL *against* ————.

No. 153. There was one Maxwell that warned a woman to flit and remove. Answered, That her umquhile husband had tacks for him and his heirs, and his assignee, and before his decease made her assignee, and there was terms to run. Answered,