APPENDIX.

PART I.

REMOVING.

1800. *November* 10. DAVID HUNTER *against* WILLIAM BADENOCH.

No. 1.
A tenant, against whom a decree of removing has been pronounced by the Judge-Ordinary, and extracted for not finding caution in terms of the act of sederunt 1756, C. 5. cannot purge the irritancy, by finding caution before the Supreme Court in a suspension.

WILLIAM BADENOCH possessed two farms belonging to David Hunter. The rent was payable at Whitsunday yearly.

Badenoch having failed to pay the year's rent, which became due at Whitsunday 1799, the landlord brought an action against him before the Sheriff, concluding for payment of arrears; and further, that he should find caution for the five following crops, or otherwise that he should be summarily removed.

This action was founded on the 5th section of the act of sederunt 14th December 1756, which provides, That "where a tenant shall run in arrear of "one full year's rent, or shall desert his possession, and leave it unlaboured at "the usual times of labouring; in these, or either of these cases, it shall be "lawful to the heritor, or other setter of the lands, to bring his action against "the tenant before the Judge-Ordinary, who is hereby empowered and requir-"ed to decern and 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 than five years, 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 "foresaid act 1555."

In defence, Badenoch alleged, that he had some small claims of compensation against the landlord; but these were wholly illiquid; and the chief view of the defender in bringing them forward, appearing to be to gain time, the Sheriff, on the 16th July 1799, assigned the 7th August for his finding caution

No. 1. in terms of the conclusions of the libel; and he having failed to do so, the Sheriff, on the 15th August, "decerned against the defender in the removing "as libelled, but reserved to him action as accords for damages."

The pursuer extracted a decree of removing; and on the 15th September following, in virtue of a sequestration of the crop, and a warrant to sell it, he recovered full payment of the rent due at Whitsunday 1799, and also about one-half of the rent of the current year.

While matters stood thus, the defender obtained a suspension of the decree of removing, in which he found sufficient security for the five following crops. He at the same time stated, that his neglect to find caution in the Sheriff-court, had arisen from distress in his family.

When the suspension came to be discussed, the landlord contended, That the defender could not be allowed to purge the irritancy after extract; 6th March 1759, Sir James Clerk against Bennet and Myles, No. 68. p.7237.

Answered for the defender: When the Court passed the act of sederunt, allowing the irritancy in question to be declared by the Judge-Ordinary, they did not mean to exclude their own jurisdiction as a Court of Review. The act no where says so, and it would be unjust by implication to subject the tenant to so heavy a penalty; 16th January 1777, Campbell against Macalister, APPENDIX, PART I. *voce* IRRITANCY, No. 1.

The Lord Ordinary pronounced the following judgment: "In respect that "the year's rent libelled was not paid, nor caution found by the suspender in "terms of the act of sederunt, before the decreet of removing was not only "pronounced, but extracted; and that the Lord Ordinary does not consider "himself as empowered to deprive the charger, without his consent, of his *jus* "*quæsitum*, under the sanction of the said act, and the Sheriff's extracted de-"cree thereupon, on account either of the extent of the proceeds of the sub-"sequent roup of the sequestrated crops, or of the caution ultimately found on "the passing of the bill of suspension; therefore repels the reasons of suspen-"sion, and finds the letters orderly proceeded."

A reclaiming petition against this interlocutor was refused, without answers, 17th May 1800, but a second petition was appointed to be answered; and when the cause came to be advised, the Bench were a good deal divided.

Several of the Judges were of opinion, that the kindly relation which subsists between a master and his tenant, ought to preclude any harsh measures, or undue advantage, being taken by the one to the prejudice of the other: That prior to the act of sederunt, the jurisdiction of the Supreme Court was privative in declaring irritancies of this nature; that it still subsists, to the extent of entitling the Court to review the sentences of the Judge-Ordinary, either by advocation or suspension; and that, therefore, as they had the power, so they were in this case strongly called upon, by equitable considerations, to exert it, by still receiving the caution offered, and suspending the decree of removing.

No. 1.

But a majority of the Court were of the same opinion with the Lord Ordinary. The opposite doctrine, it was observed, would encourage tenants to take the chance of defending themselves before the inferior court on captious and frivolous grounds, because, although they should fail, they would have it still in reserve to frustrate the decree of the Sheriff, by offering to purge the irritancy before the Supreme Court.

The Lords "adhered."

Afterwards, the decree having been irregularly extracted, some proceedings took place against the tenant, which gave occasion to a summary petition and complaint at his instance against the landlord; and the matter was then settled by a submission.

Lord Ordinary, *Justice-Clerk Eskgrove.* For the Charger, *Solicitor-General Blair, J. Clerk.*
Alt. *H. Erskine, H. D. Inglis* Clerk, *Colquhoun.*

R. D. *Fac. Coll. No.* 195. *p.* 448.

1799. *December* 7. THE DUKE of ARGYLE *against* ROBERT RUSSEL.

No. 2.
The tenant of an arable farm for one year, found, in the circumstances of this case, to be removeable without a formal warning.

THE Duke of Argyle let an arable farm to James Guild, for ten years from Martinmas 1788, at the rent of £73.

Guild having become infirm during the currency of the lease, the landlord allowed the lands to be managed by Robert Russel, the tenant's son-in-law.

Prior to Whitsunday 1798, Guild was regularly warned to remove at the ensuing Martinmas; but a negotiation having been opened between the Duke's factor and Russel, for a new lease, they, in June 1798, entered into mutual missives, by which it was agreed, that Russel should remain in possession of the farm from Martinmas 1798 to Martinmas 1799, for payment of £100 for that year.

In January 1799, Russel made an offer of £110 of yearly rent, for a lease of the farm for nineteen years from Martinmas 1799, which was rejected.

Prior to Whitsunday 1799, Guild was again regularly warned to remove at Martinmas 1799, but no warning was used against Russel, who was apparently the lessee under the missives executed in June 1798.

Russel having understood that the Duke of Argyle was to endeavour to remove him on the warning used against Guild, presented a bill of suspension of the threatened decree of removing, in which he contended, that as no warning had been used against himself, he was entitled to remain in possession for another year.

To this it was answered for the landlord, 1*st*, That although the missives of 1798 were in Russel's name, it was fully understood, that he was to possess the lands from Martinmas 1798 to Martinmas 1799, for behoof of Guild.