

- No. 4. ground in the meadow, which he had ploughed, over and above what had been in potatoes, as due by an express stipulation in the missive.

Lord Reporter, *Westhall.* Act. *Ilay Campbell.* Alt. *G. Wallace.*

D. C.

1798. February 1.

ÆNEAS MACKINTOSH against CAPTAIN ALEXANDER MACDONELL.

No. 5.

A clause enforced, which stipulated double rent for every year which a tenant should remain in possession after the expiration of his lease.

CAPTAIN ALEXANDER MACDONELL held a lease of the lands of Keppoch, under Mr. Mackintosh of Mackintosh, which expired at Whitsunday 1795.

Captain Macdonell thereby 'obliged him, at the expiry of his tack, to flit and remove from the lands hereby set, without any warning, or process of removing, for that effect, wherein if he fails, he shall be liable in double the said yearly rent, for each year he continues thereafter.'

Mr. Mackintosh recorded the lease in the burgh court-books of Inverness, in terms of the clause of registration, contained in it; and on the 14th Feb. 1795, executed a charge against Captain Macdonell, at the pier and shore of Leith; and on the 16th May 1795, Mr. Mackintosh's factor wrote the Captain's agent in Edinburgh, mentioning, that the farm had been let to a new tenant, and desiring that he might be allowed to enter to it on the 26th of that month.

On this, a bill of suspension was presented for Captain Macdonell, in which it was contended, that the tack being recorded in the court-books of a burgh, the extract did not warrant a charge at the pier and shore of Leith, 1685, C. 38; and consequently, that letters of ejection could not proceed on it.

The bill having been passed, in order that the point might be deliberately considered, Mr. Mackintosh, in place of proceeding in the suspension, brought an action against Captain Macdonell, narrating the clause in the lease above inserted, and concluding for double rent, from Whitsunday 1795 to Whitsunday 1796, and that the defender should be ordained to remove at the last of these terms.

The Lord Ordinary, of consent, 'decerned in the removing;' and afterward his Lordship 'decerned for the rents and interest, as libelled, in respect that the stipulation in the tack libelled, obliging the tenant to remove at the ish thereof, without warning or process of removing, wherein if he fails, he shall be liable in double the yearly rent, for each year he continues thereafter, is not a penal clause.'

In a petition against this interlocutor, the defender contended, That the double rent pursued for was of the nature of a penalty, and consequently subject to the modification of the Court: That, therefore, even if he had remained

in the farm improperly, he could be liable only for the sum in which the violent profits exceeded his ordinary rent; but that as the passing of his bill of suspension showed that he had at least a *probabilis causa litigandi*, the present action ought to be simply dismissed.

Some of the Judges thought the pursuer was not entitled to double rent, because he had not, prior to Whitsunday 1795, put the defender on his guard, that it was to be exacted, in case he remained on the farm.

A great majority of the Court, however, were of opinion, that the clause was legal and expedient, and ought, in every case, to be literally enforced. But it was, at the same time, observed, that if a case should occur where a rent altogether exorbitant was stipulated, the Court might modify it.

The Lords refused this and a subsequent reclaiming petition, (21st Feb.) without answers.

Lord Ordinary, *Stonefield*.

For Petitioner, *G. Fergusson*.

Clerk, *Sinclair*.

R. D.

Fac. Coll. No. 59. p. 135.

1799. July 9.

WILLIAM DRUMMOND *against* MARGARET MACPHERSON and DAVID TAYLOR.

THOMAS TAYLOR possessed certain lands on a minute of lease granted by William Drummond, for nineteen years, or Taylor's lifetime, 'which either of the two should happen to be longest,' he being bound 'to live locally on the said possession with his family yearly, and not to assign or subset the same.'

In 1792, he was indicted for sheep-stealing, and fugitated for non-appearance. The fugitation was recalled in 1797, and Taylor, on his own petition, with consent of the Advocate-Depute, was banished Scotland for life, by the Circuit-Court of Justiciary.

In 1796, Mr. Drummond brought an action of removing against Margaret Macpherson the tenant's wife, and David Taylor his eldest son. At this time, the lessee was still in the country, and in fact, continued to reside on the farm; but as he lay under a sentence of fugitation, he was not cited as a defender, on account of his not having a *persona standi*. The original ground of the action was, that as Taylor could not legally comply with the condition of residence under which the lease was granted, it was necessarily vacated.

The Sheriff decerned in the removing, nearly about the same time that Thomas Taylor was banished, as above mentioned.

The defenders brought a suspension of the Sheriff's judgment, and

Pleaded: The minute of lease is to be considered as creating a liferent provision for Thomas Taylor and his family. The obligation to residence is not

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No. 5.

No. 6.

A lease by which the tenant is taken bound to reside on the farm, and not to assign or subset, found to be forfeited by his being banished Scotland for life.