

No. 92.

Circumstances pleaded by a landlord as equivalent to a warning not sustained.

1803. January 13. GORDON against BRYDEN.

ROBERT BRYDEN possessed the farm of Upper Braid, upon mutual missives between him and Charles Gordon, Esq; the proprietor, for the space of 19 years after the separation of crop 1783. These missives were never extended into the form of a regular lease; but Bryden obtained possession of the farm, and continued in it for the time stipulated.

During the course of the year 1801, which was the last year of the agreement, Gordon had various communings with Bryden about a renewal of the lease, upon payment of an additional rent, without being able to agree upon the terms. The farm was publicly advertised in the newspapers; and Gordon, after making repeated offers to allow Bryden to retain it at a lower rent than any other person, at length granted a lease to William Davidson, and intimated this transaction in a letter to Bryden, (May 6. 1802), to which no answer was returned.

Soon after, Bryden showed the farm to Davidson, as the future tenant; sold a considerable part of the stock at a public sale, and dismissed a number of his servants. Still, however, no formal warning was given by the landlord, nor did the tenant in an express manner signify his inclination to dispense with the solemnity. And in the month of August, he informed his landlord, that not having been regularly warned to remove, he conceived himself entitled to possess the lands for another year by tacit relocation.

Upon this, Gordon brought an action of removing, and the LORD ORDINARY, (14th December), "Having considered the condescence for Charles Gordon, pursuer, with the answers thereto for Robert Bryden, defender, replies to these answers, duplies, and whole process, finds nothing condescended on in this case that can be held equivalent to a warning; and therefore sustains the defences, assoilzies the defender from the conclusions of the action, and decerns."

Gordon presented a petition to the Court, and

*Pleaded*; The defender, *rebus et factis*, declared, by his train of conduct, his determination to remove, without legal procedure. His intention to dispense with the regular solemnities, was as clearly evinced by his conduct, as if he had given an express declaration to that purpose. The pursuer, trusting to this assurance, let the farm to another; and such a change of circumstances ensued, that matters were no longer entire between the parties. The defender cannot, therefore, consistently with good faith, attempt to resile. For the pursuer has the plea of *res non sunt integræ*, and the defender is met with the *exceptio doli*.

But the Court thought these circumstances insufficient to supply the place of regular warning, and refused the petition without answers.

Lord Ordinary, *Craig*. Act. *Ross, Reddie*. Agent, *Ja. Robertson, W. S.*

Alt. *Hume*. Agent, *John Syme, W. S.* Clerk, *Colquhoun*.

7.

*Fac. Col. No 72. p. 164.*