1829, be affirmed, and that those two interlocutors be reversed, and that the cause be remitted, with a declaration to the effect which has been stated, but without costs. June 29, 1831.

The House of Lords ———

Appellant's Authorities.—(1.) 2 Stair, 140. (3.) Campbell and Company, May 21, 1803; Brown's Synopsis, vol. i. p. 644; Fleshers and Candlemakers of Canongate, July 7, 1809; Wilson, Nov. 17, 1814; Falconer, March 4, 1815; Taylor, June 9, 1821.

Respondent's Authorities.—2 Erskine, 6, 29; Arbuthnot, Feb. 5, 1772; (Mor. 10,424); Walpole, Feb. 3, 1783; (Mor. 15,249); Morison, Feb. 3, 1787; (Mor. Dec. 10,425;) 3 Stair, 5, 17.

POWELL—M'CRAE,—Solicitors.

CHRISTIAN M'INTYRE, and others, Appellants.—*Lushington—Rutherford.* No. 24.

M'NAB'S TRUSTEES, Respondents.—*Lord Advocate (Jeffrey)—Russel.*

Landlord and Tenant—Removing.—Held (affirming the judgment of the Court of Session) that a tenant under a written lease must give notice forty days before Whitsunday of his intention to remove, otherwise he will be held to continue in possession by tacit relocation.

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2D DIVISION. Lord Pitmilly.

M'NAB, of M'Nab, disponed his estate in trust on the 12th of March 1812 to trustees, who were infeft, and allowed the estate to be managed by M'Nab. On the 28th of February 1813, he granted a missive of lease of the grounds of Portnellan to Duncan M'Intyre for seven years. M'Nab afterwards went abroad, and the estate was managed by Duncan M'Intyre, writer, in Callender, to whom the trustees granted a factory for levying the rents, but it contained no power relative to the removing of tenants. The lease was to terminate at Whitsunday 1820, and M'Intyre, the tenant, alleging that he had given notice of his intention to remove at that term, began to carry off part of his effects. The trustees denied that he had given any such notice, and proceeding on the footing that he had incurred a lia-

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bility for the rent of 1820-21, they presented a petition, on the 19th of May 1820, to the Sheriff of Perthshire, praying for sequestration in security of the rent, part due at Whitsunday, and also of the rent for the current year. M'Intyre paid the rent for crop 1820 prior to 26th May, and the sequestration was withdrawn in June thereafter. He then brought an action, concluding to have it found that he was not liable for the rent posterior to Whitsunday 1820, and for damages against the trustees in respect of the sequestration. In support of this he maintained, 1. That although a landlord is bound to give notice forty days before Whitsunday of his intention to remove a tenant, yet the latter is not bound to give any such notice of his intention to remove, or at least that only reasonable notice is requisite. 2. That he had in point of fact given notice orally to M'Intyre, the factor, more than forty days prior to Whitsunday, and on the 11th of April he had written to him to the same effect; and, as the rent was payable at Whitsunday old style, being the 26th of May, and this was the term for removing, sufficient notice had been given; besides, the trustees had, in the months of December 1819 and January 1820, advertised that the farm was to be let. On the other hand, the trustees stated, that the first notice which they received was on the 4th of May 1820; that their factor had no power to receive such notice; that, although the rent was not payable till the 26th of May, yet this was an indulgence to the tenant, and it was fixed by statute that the removing term was the 15th of May; that it was true that they had, in one advertisement embracing several of the farms on the estate, included that of Portnellan, but it was withdrawn on the faith that the tenant intended to remain in possession.

The Lord Ordinary, on the 11th of July 1823, pronounced this interlocutor:—"Finds, that the pursuer not having been "warned by his landlord to remove from the farm of Portnellan "as at Whitsunday 1820, when the lease was to expire, and the "advertisement by the landlord of this farm being to let, along "with several others, at the said term of Whitsunday, having "been discontinued in the month of January 1820, while the ad-"vertisement as to the other farms was continued, the pursuer "was bound to intimate in due time to his landlord, or others "authorised to act for the landlord, his intention to remove at

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"Whitsunday 1820; and finds, that if he failed to do so tacit "relocation must have taken place, and consequently the claim "of damages insisted in by the pursuer would not be well "founded; but in respect the pursuer offers to prove, in the "fourth article of his condescendence, that he actually made said "intimation in due time to Duncan M'Intyre, the late factor, "before the factory was recalled, or at least before the recal of "the factory was intimated to the pursuer; while these asser-"tions are denied, and the facts are differently stated and ex-"plained in the fourth article of the answers, Allows the pursuer, "before answer, a proof of the said fourth article of his conde-"scendence, and the defender a proof of the fourth article of his "answers, and also of the third article of the answers, with re-"gard to the time at which the pursuer's treaty with the Earl of "Breadalbane, or his Lordship's factors, for a renewal of the "lease of the farm of Benmore, broke off," &c. On advising the proof which was taken, his Lordship, on the 28th of November 1828, pronounced this judgment:—"Finds it not instructed "that such notice was given by the tenant in this case as to ex-"clude tacit relocation, and bind and entitle him to remove from "the farm, and deliver over his stock to the defenders, on valua-"tion, at the time alleged by the pursuers: therefore sustains "the defences, assoilzies the defenders, and decerns: Finds "neither party entitled to expences."

In the meanwhile M'Intyre had died, and Christian M'Intyre and others were sisted in his place as his representatives. Both parties reclaimed; the pursuers on the merits, and the defenders as to expences.

The Court, on the 11th of December 1829, adhered on the merits, but altered and found the defenders entitled to expences.*

M'Intyre and others appealed, and repeated their statements, and the argument which had been maintained in the court below, in regard to notice not being requisite. They also contended that the sequestration was illegal and oppressive, seeing that the rent was not payable till the 26th of May. The respondents, on the other hand, contended that notice was requisite; that notice had not been given; that the factor had

* 8 Shaw and Dunlop, 237.

July 8, 1331. told the tenant that he, the factor, had no authority to receive notice; that tacit relocation had taken place; that although the rent was not payable till the 26th, it was due on the 15th of May; and that, at all events, as the tenant had begun to remove his effects, they were entitled to have them sequestered in security of the rent for the current year.

Lord Lyndhurst.—My Lords, in the case of an English tenancy, under a lease for a certain time, it is not necessary, either on the part of the landlord, or on the part of the tenant, that any notice should be given, for the purpose of effecting the termination of the interest at the period when it is to expire; but that is not the case in Scotland. As far as relates to the landlord, it is perfectly clear, that where there is a lease for a period of seven years, for instance, as in the present case, the interest of the tenant does not expire at the end of the seven years, unless the landlord gives forty days notice, previous to the expiration of the term, of his intention that the interest should cease; if he omit to give such notice, the interest goes on for another year. The same degree of certainty does not, undoubtedly, exist with respect to the necessity of a notice on the part of the tenant; and the main point in this case is, whether or not a similar and corresponding notice is necessary on the part of the tenant. In the Court below, the Judges state that they have never heard the matter doubted; that as forty days notice was necessary to be given by the landlord, for the purpose of terminating the interest of the tenant, so a corresponding notice was necessary to be given by the tenant, for the purpose of putting an end to his interest. My Lords, the authorities cited appear to me, upon the whole, to establish this proposition, that forty days notice is necessary on the part of the tenant. Lord Stair says, that "tacks cease "by the expiry of the terms thereof, and the letters warning, or "other deeds, to take off tacit relocation, or the tenant's renunci-"ation, the form whereof is — the tenant, forty days before Whit-"sunday, subscribes and delivers to his master a renunciation of his "tack and possession, consenting that he enters, brevi manu, without "hazard of ejection; whereupon there must be taken an instrument "of renunciation in the hands of a nottar, as a solemnity requisite, "which is sufficient to instruct the overgiving, as being the habile "way approved in law; albeit, in other cases not approved in law, "instruments of intent prove not the deed of the party. In this "case it avoideth the tack, and is provable by instrument, if the "tack be expired, but during the tack, the instrument will not prove "the acceptance of the renunciation." Lord Bankton says, "It

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"takes place from the tacit consent of the parties, when neither the "heritor warns, nor the tenant renounces in due time. If this is not "done forty days before the Whitsunday at which the tack expires, "both parties are fixed for the ensuing year." From these, and the other authorities which have been relied on, I have come to the conclusion, upon the whole matter, that where a lease is granted to a tenant for a certain term of years, the tenant cannot quit at the expiration of his term, unless he has given forty days notice, previous to the expiration of that term, of his intention to quit. If that be the law, then the question is, as to the application of that law to the facts of this case. A person of the name of Mac Intyre, who is a solicitor by profession, residing at Callender, was appointed, in consequence of the embarrassment of the lessor's affairs, factor, to receive and collect the rents. He was appointed, by an express and special authority for that purpose, to receive and collect the rents, and, in case of non-payment, to enforce payment. But he had not, by virtue of the power with which he was invested, any authority whatever to receive notices to quit. It appears to me, therefore, that any notice served upon him by the tenant, of his intention to quit, was not a sufficient notice to put an end to the term. In addition to this, Mac Intyre, the factor, states, that on some occasions when a vague communication was made to him by the tenant of his intention to quit, he, the factor, communicated to the tenant that he had no authority to receive the notice. It was necessary that the notice should be served on the landlord, and it does appear that notice was given; but I believe the earliest period to which that notice can be referred is the 27th of April — certainly it cannot be referred to a period so long as forty days before the expiration of the term. I think, therefore, upon this point, that the judgment of the Court below was right, and shall advise your Lordships to affirm it. I am of opinion that, the landlord not having received notice, the tenant had no right to quit at the expiration of the seven years, but that he was bound to continue his tenancy for the period of another year. My Lords, there is another point which is stated to have been insisted upon in the Court below. On reference to the report of the case, it does not appear to have been agitated at the Bar; but it is stated by Dr. Lushington, that, in point of fact, that point was argued, although the Court took no notice of it in their judgment. A sequestration was issued for the purpose of enforcing the payment of rent which was due at Whitsuntide, amounting to 55*l.*, and that sequestration was issued, not merely for the purpose of enforcing the payment of that sum, but for the purpose also of securing the rent for the current year, founded upon this circumstance, that as the tenant contended that he had a right to quit the premises, and

July 8, 1831. was preparing to quit and carry his stock off the farm, though, in other respects, he might be a solvent and substantial man, the landlord had a right, by a distress upon the premises, to secure the rent which was accruing. With respect to the first object for which the sequestration was issued, I think some doubt may be entertained. It does not appear when the factor's authority to receive that rent ceased. It is stated that that authority ceased about the middle of the month of May; but it appears that, in the course of the month of May, a further order to receive this rent was made to the factor; and if he was at that time authorized to receive it, or if he had been previously authorized to receive the rent, and no communication of the ceasing of his authority had been given to the tenant, it appears to me that the tender to the factor of the rent then due would have been such a proceeding as would have barred the right of the landlord to issue a sequestration for that rent. But, my Lords, I have stated that the sequestration issued was not merely for the purpose of securing that rent, but the sequestration was also for another purpose — that of securing the rent of the current year. Now, it is stated at the Bar, that the current year had not commenced. I am of opinion that the current year had commenced. I am of opinion that, by the law of Scotland, the current year commenced upon the 15th of May, and that it was not postponed to the 26th. Whitsunday is fixed, by a positive Act of Parliament — an Act of the Scottish Parliament, for the purpose of getting rid of the inconvenience of moveable feasts — at a precise day, namely, the 15th of May. I am of opinion, therefore, that the rent of the previous year was payable on the 15th of May, and that the new year commenced at that period. I think, under the circumstances of this case — the tenant insisting upon his right to quit the farm, and he being about to move his stock from the farm, in the exercise of the right claimed by him — the landlord had a right to issue a sequestration by way of security for the rent due for the current year, as it is stated in the very instrument of sequestration, not insisting on any right at that time to have a warrant for the purpose of selling the stock, but merely for the purpose of enforcing his security under the circumstances in which this party was placed. I think, therefore, that, the tenancy commencing at Whitsunday, and Whitsunday being, by the law of Scotland, the period for commencing the current year, the sequestration was regular, for the purpose of enabling the landlord to enforce his security for the rent of the current year, It does not appear to me that the tenant has sustained any injury, even if he should be right in saying that the landlord had no right to issue the sequestration solely for the rent supposed to be in arrear for the preceding half year. Under these circumstances, I should recom-

mend to your Lordships, on both these points, to affirm the decision of the Court below. July 8, 1831.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellants' Authorities.—2 Ersk. 6, 45; Stat. 1555, c. 39; Bell on Leases, p. 497; Gordon, 13th January 1803 (13,854).

Respondents' Authorities.—2 Stair, 9, 34; 2 Bankton, 9, 32; 2 Ersk. 6, 35; Bell on Leases, p. 497; Bryson, 28th July 1744, Kilk.; Earl of Haddington, 24th February 1693, 1 Fount. 565; Duke of Athol, 15th March 1819 (F. C.); Gordon, ut supra.

SPOTTISWOODE and ROBERTSON, — JOHN M'QUEEN, — Solicitors.

ROBERT GRAY and JOHN WOODROP, Appellants.—*Campbell—Spankie.* No. 25.

JAMES M'NAIR, Respondent.—*Lushington—Kaye.*

Arbitration.—Held, (affirming the judgment of the Court of Session,) that although interim decreets arbitral had been subscribed, given to the clerk, and copies sent to the parties, yet as the submission was terminated without any final judgment and the decrees had never been delivered or recorded, they were null.

GRAY and Woodrop were proprietors or tenants of a field of coal in the lands of Westmuir, and Gray was proprietor of the adjacent coal situated in the lands of Greenfield. The coal of Greenfield stands upon a higher level than that of Westmuir, and the descent of the water from the one field to the other was prevented by a barrier which had been allowed by tacit consent to remain between the two fields. M'Nair conceiving that he was not bound to refrain from working this barrier, commenced operations upon it, whereupon a dispute took place, and the parties agreed to submit it to the decision of James Farie and Colin Dunlop. A regular deed of submission was in consequence executed in October 1823, with power to the arbiters "to "pronounce decree or decrees partial or total," "to do every

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2D DIVISION.
Ld. Mackenzie.