1764. *July* 4.

JOHN CARRUTHERS and Others *against* The Viscount of STORMONT and DAVID SCOT of Scotstarvit, His Commissioner.

No 109.
In a process of removing, originally founded on a warning, in which the act of sederunt was afterward pleaded on, in order to support the action, the defender was assoilzied, as the act of sederunt had not been libelled.

UPON the 29th of March 1763, a process of removing was called before the Sheriff of Dumfries, against the said John Carruthers, and others, at the instance of Lord Stormont and his Commissioner, founded upon a warning said to be executed on the 26th and 28th days of March 1762, charging them to remove from their arable lands at Candlemas, and their houses and grass at Whitsunday 1763.

In this process, no further procedure took place till the 14th of April 1763, when the pursuers' procurator restricted the conclusion of removal to the term of Candlemas then next as to the arable land, and Whitsunday thereafter as to the houses and grass; and craved decreet to take effect at these terms, in respect that, in virtue of the act of sederunt anent removings, a libelled summons called in Court 40 days before Whitsunday was equal to a warning in terms of the act of Parliament.

The tenants *pleaded* in defence, That, if the pursuers had brought an action upon the act of sederunt, they ought to have libelled thereon.

The Sheriff sustained the defence, and assoilzied.

The pursuers preferred a bill of advocation; which, being reported by the Lord Ordinary on the bills *ex parte*, the following interlocutor was pronounced: 'THE LORD ORDINARY, after advising with the Lords, refuses this bill; but remits the cause to the Sheriff, with this instruction, that he repel the whole defences offered for the defenders.'

The Tenants reclaimed; and in their petition *insisted*, That the process was brought upon the act of Parliament 1555, libelling upon warnings duly executed, and concluding for a removal at Candlemas and Whitsunday 1763; and, as it continued on that footing till the 14th of April 1763, when the pursuers, for the first time, betook themselves to the act of sederunt 1756, no decreet of removing could proceed upon it; for that, although it were competent to a pursuer, who lays his action first upon the statute, afterwards to recur to the act of sederunt, this change must be notified to the defender, at least 40 days before the term of Whitsunday.

Answered for the pursuer; It is not necessary, in order to found an action of removal upon the act of sederunt, to libel thereon, more than it is necessary, in an action of removal upon the act of Parliament, to libel upon that act. When an action is brought at the instance of a proprietor against his tenants to remove, they either know, or are presumed to know, that he may follow out that action either upon the statute, or the act of sederunt, as he shall think proper. This action, then, having been called in Court upon the 29th of March 1763, was a good foundation for a decreet of removing upon the act of sederunt, even supposing that a calling of the action 40 days before Whitsun-

day 1763 was necessary in order to obtain a decreet of removing at Candlemas and Whitsunday 1764. No 109.

'THE LORDS remitted to the Lord Ordinary to remit the cause to the Sheriff, with this instruction, That he assoilzie the defenders, in respect there was no proper action brought upon the act of sederunt 40 days preceeding Whitsunday 1763, for removing them at Candlemas and Whitsunday 1764.

Act. *Da. Greme.* Alt. *Armstrong.*
Fol. Dic. v. 4. *p.* 224. *Fac. Col. No* 138. *p.* 320.

1780. *January* 19. CARRUTHERS *against* M'GARROCH.

FOUND, that although full payment of all arrears before decree is a good defence against a removing on the act of sederunt, yet the landlord is not bound to accept of partial payments. No 110.

In the same case, found, that debts of the landlord, or even public burdens affecting the farm, paid by the tenant without authority, will not be brought *in computo* to diminish the year's rent due by this tenant. See APPENDIX. See No 114. p. 13873. *Fol. Dic. v.* 4. *p.* 225.

1780. *January* 19. Lord ELIBANK *against* MARGARET HAY.

No 111.
Whether an arrear of a year's rent due to the landlord's executor entitles his heir to pursue an action of removing?

AT the time of the death of Patrick Lord Elibank, in the month of August 1778, Margaret Hay, lessee of certain lands belonging to his Lordship, had incurred an arrear of more than a year's rent, which devolved to his Lordship's executor.

In the month of September following, George Lord Elibank, heir to Lord Patrick, commenced an action before the Sheriff of the county, against Margaret Hay, upon the act of sederunt 1756; by which it is, *inter alia*, provided, "That where a tenant shall run in arrear of one year's rent, it shall be lawful to the heritor, or other setter of lands, to bring his action before the judge-ordinary, who is hereby empowered and required to 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, 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 act 1555.'

In support of this action,

The pursuer *pleaded*; In order to eject a tenant who had fallen in arrear, a landlord, before the year 1756, was obliged first to attach the whole stocking