to the Ordinary to consider how far the division can proceed as to lesser parcels;" altering Lord Elliock's interlocutor.

Act. W. Nairne. *Alt.* Ilay Campbell.

1779. *December* 9, and 1780, *January* 18. George, Lord Elibank, *against* Margaret Hay, an Infant.

REMOVING.

Whether an arrear of a year's rent, due to the landlord's executor, entitles his heir to pursue an action of removing?

[*Fac. Coll. VIII.* 193; *Dict.* 13,869.]

Covington. Lord Elibank cannot avail himself of the debts due to another. The bill did not defeat the right of hypothec: the rent is still due until payment of the bill. [This relates to a part of the cause, in which there was difference of opinion.]

Monboddo. The rent is divided by the succession dividing. This is just the same thing as if the sum had been assigned, which would not have put this case without the act of sederunt.

Braxfield. In considering whether an action of removing is well founded, we must consider the state of things when the action was brought; and we must consider the state of things when the decreet is pronounced. The landlord is not bound to accept of a partial payment; but if he does accept of it, and so reduces the rent within a year's rent, he cannot have action of removing. When this action was brought, the tenant owed nothing to the landlord. It is not enough to say that the tenant owes more than he can clear. Insolvency is not the purpose: the landlord must say that the tenant owes more than a year's rent. The executor cannot bring an action of removing: he must take payment as he best can: if the heritor assigns, (the case put by Lord Monboddo,) he can no longer have the power of removing.

Covington. This doctrine is *new*, and it is dangerous.

Kennet. The tenant was in arrears, and the action was properly brought. If Patrick, Lord Elibank, had been alive, there could have been no defence; and the accident of his death cannot vary the case.

Elliock. The Act of Sederunt gives right to an heritor to insist in a removing, on account of rent due to himself, but not on account of debts due to another.

On the 9th December 1779, "The Lords passed the bill."

Act. A. Murray. *Alt.* Charles Hay.

Reporter, Kennet.

Diss. Covington, Stonefield, Kennet, Monboddo.

1780. *Jan.* 18.—Braxfield. An executor cannot bring an action of removing. He must recover the arrears due to him by a common action for payment. Indeed, an executor could have no interest to insist for removing, by which he could have no benefit: when this action was brought there was not a shilling due to the heir. An action of removing, on the Act of Sederunt, is a benefit to the heritor, and a penalty on the tenant. How can the heritor say, "Remove, because you owe rent to another man?" Here the tenant has not broken faith with the heritor. If the pursuer were both heritor and executor, he might have brought the action as the defunct might have done. The tenant is entitled to know whether Lord Elibank is heir and executor: he is entitled to inquire into the right of the person exacting rent from him. The landlord is not bound to take partial payments; but when the bygones belong to another person, that person may take full payment or partial payments, and the heir cannot quarrel him. What sort of a right of action is that which a third party may defeat whenever he pleases? Is it not extraordinary to say that the heir can, on the debt due to the executor, remove the tenant, to the loss of the executor himself, whose only chance of recovering payment of bygones is by continuing the tenant in possession. Insolvency is not sufficient to found an action of removing on the Act of Sederunt.

Monboddo. There was more than a year's rent due at the time of the decreet; and, if that be the case, it matters not whether it be due to the heir or to the executor, or to the *hæreditas jacens* of the last heritor. All that the Act of Sederunt requires, is, that more than a year's rent be due. The executor has no interest or title to remove the tenant; but the heir has. The end of this action is not only, or principally, for security of the rents; it is for security of the interest of the proprietor of the land, to prevent deterioration by tenants in labouring circumstances. Such was the opinion of the Court in old decisions, even before the Act of Sederunt: that act rather mitigates the rigour of the decisions; besides, it is the interest of the executor to have caution in order to force payment.

Covington. The tenant is in labouring circumstances; and no wonder that Lord Elibank should wish to have such a tenant removed. The question does not depend on the Act of Sederunt. Could the heritor have pursued on an irritancy *ob non solutum canonem*, for an arrear due to a third party? This action for bygones is incompetent at the instance of the heir, who has no right; or at the instance of the executor, who, not being confirmed, has no title to pursue.

Kaimes. This case is not within the *words* of the Act of Sederunt: and I doubt whether it was in the view of the Court when the act was made. The Act of Sederunt was meant to supply that defect in the common law which allowed a tenant to possess until he became actually bankrupt. This case falls within the *spirit* of the act: for when the succession divides, were it not for such a remedy, the heir might be a sufferer. *Here* the very *ratio* of the act takes place: for the tenant is *vergens ad inopiam*, and the master runs a risk of losing a year's rent.

Gardenston. The Act of Sederunt is sufficiently severe. In the north of Scotland, rents are paid once a-year, and never at the legal term: a strict observance of the Act of Sederunt would dispossess almost all the tenants; for not one of them pays at the legal term, and not one in a hundred can find

caution for five years' rent. In just construction, the Act of Sederunt cannot apply to arrears that are due to some one else than the master: for the tenant must find security for arrears *incurred*,—that is, incurred by the person who pursues.

JUSTICE-CLERK. The Act of Sederunt, in the hands of wise and virtuous masters, will not be abused. The state of the tenant, with respect to extraneous creditors, was not under the eye of the Court in framing the act. The difficulties of the tenant are not less, when he owes money to the one man or to another. Whenever the arrear is separated from the person of the heir, it matters not to whom the arrear or debt is owing. If the executor's claim is sufficient to found a removing, so may the claim of another creditor.

PRESIDENT. Justified the Act of Sederunt, (unnecessarily attacked by Lord Gardenston.) Said that it was calculated to prevent quibbling objections to warnings, and that it was beneficial to tenants, as not forcing the master to use his right of hypothec, and yet securing him. What right had the heritor to insist in a removing when he was secure and could not qualify any damage? And what interest has the heir to insist against a tenant who does not owe *him* a farthing, whatever he may be owing to other persons?

On the 18th January 1780, "The Lords suspended the letters *simpliciter*," without a vote.

Act. A. Murray, Ilay Campbell. *Alt.* Ch. Hay, R. Blair.

Reporter, Kennet.

Diss. Monboddo, Stonefield. *Non liquet*, Kaimes.

1780. *January* 20. JAMES HERIOT *against* JOHN WIGHT.

WRIT.

Devolution to an oversman in a submission, must be according to the Statute 1681.

[*Faculty Collection, VIII.* 195; *Dictionary*, 661.]

JUSTICE-CLERK. The deed is signed by both parties: Will not this be sufficient evidence of the fact?

PRESIDENT. The prorogation cannot be supported: the naming an oversman is, in effect, a new submission, and it is certain that a submission must be in the form prescribed by the Act 1681.

BRAXFIELD. There is a necessity of adhering to the Act 1681.

On the 20th January 1780, "The Lords sustained the reasons of reduction."

Act. J. M'Laurin. *Alt.* Ch. W. Little.

Reporter, Alva.