No. 2.

2*dly*, That where a farm is let for a single year, a formal warning is not required. And, *lastly*, That, supposing a formal warning to be necessary, Russel was put *in mala fide* to plead its omission, by his written offer in January 1799, for a new lease to commence at the very term at which the respondent was now endeavouring to remove him.

The Lord Ordinary took the question to report on the bill, answers, and replies.

The Court, on the whole circumstances of the case, thought that the Duke was entitled to remove Russel without a formal warning.

The Lords, almost unanimously, remitted to the Lord Ordinary to refuse the bill of suspension.

Lord Ordinary, *Justice-Clerk Eskgrove.* Alt. *Arch. Campbell*, junior.

R. D. *Fac. Coll. (APPENDIX,) No. 8. p.* 14.

1800. *November* 18. LORD STONEFIELD *against* JOHN MACARTHUR.

No. 3.

A tenant whose lease excluded assignees and subtenants, and by which it was declared under pain of nullity that he should possess the farm with his own stocking, having become insolvent, his stocking was sold by his creditors, and re-purchased by his relations for behoof of his eldest son, to whom also the father assigned the lease. The tenant, subsequent to his bankruptcy, had found caution for the rent of the next five years. Under

JOHN MACARTHUR was a tenant of Lord Stonefield, on a grass farm in Argyleshire. The lease secluded assignees and subtenants, and it was provided by a special clause, that the tenant should be "bound and obliged to possess the same with his own stock allenarly;" and that "not only in the event of "one year's tack duty running into the second unpaid, but also upon the said "John Macarthur, and his foresaids, their failure in performance of any of the "conditions above mentioned, then, and in that case, this present tack shall be-"come *ipso facto* void and null; and it shall be lawful to the landlord and his "foresaids, to set, use, and dispose thereof as if this present tack and agree-"ment had never been entered into, and that without any declarator or process "at law whatever."

In the beginning of 1797, Macarthur having become insolvent, a sequestration of his estate was awarded; and on the 16th March of that year, the trustee on his sequestrated estate gave written intimation to Lord Stonefield's factor, that Macarthur's creditors were about to dispose of the stocking on the farm, of which they were not to keep possession after Whitsunday.

The stocking was accordingly sold by the creditors; but, through the medium of some friends of the tenant, it was purchased for behoof of Macarthur's third son, and allowed to remain on the farm.

The tenant was at this time more than a year's rent in arrear; and both on on this account, and in consequence of the above notification of Macarthur's bankruptcy, Lord Stonefield gave instructions to his factor to take the necessary steps for getting him removed from the farm. The factor not having the tack in his custody, and being ignorant of the clause by which he was taken bound to possess the farm with his own stock, brought an action, in his name, and founded

No 3.
these circumstances, he was assoilzied from a declarator of irritancy of the lease, brought by the landlord on the ground of his not possessing the farm with his own stocking.

solely on the 5th section of the act of sederunt 14th December 1756, which provides, that where a tenant falls a full year's rent in arrear, he shall be removed, unless he shall find caution for the same, and for the rent of the five following crops.

Macarthur having found caution in terms of the act of surderunt, was assoilzied.

Upon this, Lord Stonefield brought a declarator of irritancy of the lease before this Court, on the ground, that Macarthur had forfeited his right to it, by not possessing the lands with his own stocking.

While this action was in dependence, Macarthur assigned the lease to his eldest son, and at the same time the third son executed in favour of the eldest a conveyance to the stocking.

In defence against the declarator, Macarthur

Pleaded: 1*st*, A lease being a *bonâ fide* contract, its clauses ought to receive that construction which it is to be presumed the parties themselves had in view. In this case, the object of the clause on which the action is founded, was merely to prevent the tenant from taking in the cattle of third parties to graze, by which the landlord's security for payment of his rent might be evacuated. But here the landlord has already got undoubted caution for the rent of the next five years, and therefore he cannot insist on a literal fulfilment of the clause, as its object has otherwise been amply attained; 28th June 1758, Crawfurd, No. 190. p. 15307; 30th June 1791, Laird, No. 172. p. 15294.

But, 2*dly*, An irritancy, whether legal or conventional, may be purged before declarator; Stair, B. 4. Tit. 18. § 3.; B. 1. Tit. 13. § 14. Now, although the lease in question excludes assignees, this does not prevent the lessee from assigning to the heir *alioqui successurus*. The defender has accordingly assigned the lease to his eldest son, and the stocking being also in his person, the security arising from the right of hypothec is equally available to the landlord, as if both had remained in the person of the defender.

Answered: 1*st*, The pursuer is entitled to have the conditions of the lease strictly complied with; and, at all events, the obligation by a cautioner for payment of the rents, is not equivalent to the security of the hypothec; 4th December 1780, Ross Mackye, No. 16. p. 6214.

2*dly*, The defender admits, that he possessed the farm some time with stocking which was not his own, and a conventional irritancy cannot be purged; Erskine, B. 2. Tit. 5. § 27.; 30th June 1761, Finlayson, No. 69. p. 7239. Besides, it is far from being a settled point, that a lease excluding assignees, can be assigned by the tenant during his own lifetime, even to his eldest son.

The Lord Ordinary found, 'That by the tack in question, John Macarthur 'was taken bound and obliged to possess the farm with his own stock alle-'narly; and that upon the said John Macarthur failing in performance of any 'of the conditions contained in the said tack, then and in that case, the tack 'should become *ipso facto* void and null; and it should be lawful to the landlord 'to set, use and dispose thereof, as if the said tack and agreement had never

No. 3. 'been entered into, and that without any declarator or process at law whatever; and in respect it is not denied, that the said John Macarthur having become bankrupt, did surrender not only his other effects, but the whole stocking upon his said farm to a trustee for his creditors, who has accordingly disposed thereof for their behoof, and that the said John Macarthur has now no stocking of his own upon the said farm; therefore, decerns and declares in terms of the pursuer's summons of declarator *.'

On advising a reclaiming petition for the defender, with answers, many of the Judges were for adhering to the judgment. The irritancy (it was observed) had been incurred, and the attempt now made, *pendente lite*, to vest both the lease and stocking in the defender's eldest son, was a subterfuge which ought not to be countenanced.

But the Court, by the narrowest majority, and on the grounds stated for the defender, altered the judgment of the Lord Ordinary, and assoilzied the defender.

Lord Ordinary, *Cullen.* Act. *Arch. Campbell*, jun. Alt. *H. Erskine, Baird.*
Clerk, *Colquhoun.*

R. D. *Fac. Coll. No.* 196. *p.* 451.

1805. *March* 9. MACHARG, Petitioner.

No 4. Formal warning is not necessary from grass-inclosures let from year to year.

JAMES MACHARG occupied two parks belonging to the estate of Ardmilland, for several years previous to Martinmas 1803, by written sets, from year to year. Of this date, (13th October 1803), he made a written offer to take the same parks for another year. The offer was accepted, and the parks specially let from Martinmas 1803 to Martinmas 1804.

The parks, at this last date, having been let to another tenant, he, on 3d December 1804, was refused peaceable possession by Macharg, who had just sold off his fat cattle, and put a lean stock on the ground, and defended his conduct, upon the plea, that he had not received any legal warning to remove, and was therefore entitled to the use of the parks for another year, by tacit relocation.

A summary application was presented to the Sheriff of Ayr, (6th December 1804), to ordain his immediate removal.

The Sheriff sustained the defences, (21st December), reserving to the petitioner to bring a proper action of removing.

A bill of advocation was presented. The Lord Ordinary refused the bill, and remitted to the Sheriff to decern in the removing.

The Court refused a petition reclaiming against this judgment, (5th March 1805); but, at the same time, reserved all questions of damage which might arise among the parties.

* The assignation of the lease by the father to his eldest son was not executed till after the date of this interlocutor.