

Upon advising a reclaiming petition, with answers, the Court were of opinion, that to found a removing, under the act of sederunt, the year's rent must be due likewise when the decree is pronounced, Campbell against Robertson, No 108. p. 13867. ; but it was at the same time observed, that the landlord is not obliged to accept of partial payments.

THE LORDS (11th March 1796), assoilzied the defender; and to this judgment, upon considering a second petition, with answers, they almost unanimously "adhered."

Lord Ordinary, *Eshgrove.*

Act. *John Clerk, Ar. Campbell, jun.*  
Clerk, *Gordon.*

Alt. *Baird.*

*Fac. Col. No 229. p. 532.*

1804. June 30.

CAMERON against MACDONALD.

MR CAMERON of Lochiel presented a bill for leave to raise summonses of removing against several tenants upon one diet of six days. It was granted as a matter of course.

A summons of removing was in consequence executed against Alexander Macdonald, tenant of Auchincroft, who objected to the competency of the action, as proceeding on the act of sederunt 1756, which authorises removings, in terms of it to be brought before the Judge Ordinary of the bounds, and not before the Supreme Court. In support of this objection it was

*Pleaded,* There are various actions which pass under the name of actions of removing, extremely different both in the conclusions, and the *media concludendi*. Every possessor of land may be summoned to remove; in support of which, there may be as many grounds for removing as there are titles on which to acquire, or pretences on which to retain property. But a removing, under the act 1756, must be brought at the instance of a landlord for the removing of his tenant, previously in possession by a tack, and seeking to retain possession, because the right acknowledged once to have belonged to him is not extinguished. It is to this species of removing alone that this act refers. If, again, one heritable proprietor succeeding another by a singular or universal title, by purchase, for instance, or as heir, desires to remove from the lands, the seller, or the connections of the deceased, he may bring his action before the Court, upon the common law, without resorting to the act of sederunt. In the same manner, when a tenant for life dies, his heir, and all belonging to him, may be removed by an ordinary action. But in the case of removing a tenant, it is incompetent to adopt any other method than that prescribed in the statute 1555, or the act of sederunt 1756, which has been alternatively substituted in place of the former. Now, one of the requisites of the act of sederunt is, that the action shall be called before the Judge Ordinary at least forty days before Whit-

No 114.

No 115.

An action of removing, upon the act of sederunt 1756, not competent in the first instance before the Supreme Court.

No 115. sunday. It does not merely say, that it shall be lawful to the landlord to bring his action before the Judge Ordinary, when it might have been argued that this did not deprive him of the right of bringing it before the Supreme Court. But the indispensable condition on which it is made competent to omit the solemnities of the statute 1555, is expressly prescribed, that the action shall be called before the Judge Ordinary, at least forty days before the term of Whitsunday.

*Answered,* The practice has become universal, of raising summonses of removing before the Court, upon bills limiting the *induciæ* to one diet of six days; and it is scarce possible to conceive that such a practice should exist in a Court which is not competent to entertain such actions. In making the act of sederunt, which dispenses with the requisites of the statute 1555, all that the Court possibly could do, without claiming legislative powers, was to extend to the Judge Ordinary that jurisdiction which formerly resided in itself. The Court must have had that jurisdiction before it could confer it upon another; and, as it is not expressly excluded, its jurisdiction is still cumulative with that of the Judge Ordinary. Could any doubt remain upon this point, it is removed by the act itself, which declares, "that in all removings, whether originally brought before this Court, or by advocacy or suspension," &c. Now, after an easy process was introduced, in lieu of the troublesome procedure prescribed by 1555, this last never would be again resorted to; so that the Court must have understood the action to be competent before themselves in the first instance.

The statute 1555, which introduced the necessity of a precept of warning, also enacted, that when this was used, the heritor might summon the tenant upon six days warning, either before the Court or the Judge Ordinary. When the act of sederunt dispensed with the precept of warning, and enacted, that the summons of removing should be sufficient, it followed, of course, that the summons should be continued just as it had been in use to the date of the act of sederunt, particularly as the Court did not make any alteration with regard to the *induciæ*.

The Court considered, that as the summons of removing was founded on the act of sederunt, the directions given therein must be followed out; and as it does not authorise this process to be brought in the Supreme Court, nor upon one diet of six days, there were sufficient reasons of expediency for limiting it to the jurisdiction of the Judge Ordinary.

THE COURT dismissed the action.

Lord Ordinary, *Cullen.*  
Alt. *M'Farlan.*

Act. *Wolfe Murray.*  
Agent, *J. Brunton.*

Agent, *D. Cameron, W. S.*  
Clerk, *Pringle.*

*F.*

*Fac. Col. No 170. p. 386.*