

1796. June 30. MARK PRINGLE *against* Major GEORGE LEWIS MACMURDO.

MAJOR MACMURDO obtained from Mark Pringle a lease of the farm of Fairnilee in Selkirkshire, for eleven years and a half, by which, besides obliging himself to pay a suitable rent, he became bound to lay down a considerable part of the lands with barley, clover, and rye grass, 'two years previous to the issue of the tack, and to leave the same in grass at that period; the land to be properly manured with lime or dung with the barley crop.'

Major Macmurdo at first resided on this farm, but he afterwards took another in Dumfries-shire, to which he removed, leaving Fairnilee to be managed by servants.

In autumn 1795, Major Macmurdo advertised a sale of the growing crop upon it; reserving as much as was necessary for the maintenance of the servants and horses employed on the farm.

Mr Pringle applied to the Sheriff to prohibit the sale.

The Sheriff ordered Major Macmurdo to give in a condescence, from which it appeared, that the farm consisted of 63 acres, of which 23 were under crop; that there had been 17 bolls of oats sown on it; and, that it had been chiefly laboured by two horses.

The Sheriff afterwards appointed certain farmers 'to visit and inspect the corns upon the farm of Fairnilee, and to set off as much thereof as should be sufficient for the maintenance of two horses, from the time the corn should be reaped until Whitsunday next; appointed the defender to consume the same upon the farm, with such beasts as he should think proper for that purpose; and granted warrant to sell and dispose of the remainder of the crop, he always finding caution to the pursuer for the current year's rent.'

The sale accordingly took place; but two days after, Mr Pringle applied for an advocacy of the process, and an interdict, to prevent the corns from being carried off the grounds.

The interdict was at first granted; and afterwards the Lord Ordinary on the bills passed the bill, but, 'in respect that part of the crop was sold in terms of the Sheriff's interlocutor, before the bill was presented, removed the interdict, without prejudice to any claim of damages competent to the complainer, on account of part of the crop being sold.'

In the advocacy, the pursuer *contended*, *imo*, That it necessarily followed, from the clause in the lease obliging the defender to leave part of the farm properly manured, that he was to consume the whole fodder upon it. *2do*, That, at any rate, this was an implied obligation on every lessee of lands; February 1665, Murray against Balcanqual, *voce* TACK.; 1776, Macmurray against Sir William Maxwell; 1785, Duke of Roxburgh against Archibald*.

* The two last not reported.

No 24.

A tenant found not to be entitled to dispose of any part of the fodder raised on his farm, except his hay, and the straw of his outgoing crop, though there was no clause in the lease expressly prohibiting him from selling it.

No 24.

THE LORD ORDINARY found, ' That though there was no express clause in the contract of lease granted by the pursuer, Mr Pringle, to the defender, Major Macmurdo, which ties him down from carrying off, or otherwise disposing upon, the whole fodder or straw that may be produced on the farm of Fairnilee, yet that he is not at liberty so to do, in opposition to the will of the landlord ; as, were such conduct to be tolerated, it would be attended with ruinous consequences to the ground, as well as repugnant to the general mode of cultivation in the country ; and therefore prohibited and discharged the defender from selling off in future, either by public roup or private bargain, the fodder on said farm of Fairnilee, and ordered him to consume the same thereon during the remainder of his lease.'

And his Lordship, on rehearing the cause, found the defender ' was entitled to sell his hay, and the straw of his outgoing crop, but *quoad ultra* adhered to the former interlocutor.'

In a reclaiming petition, the defender stated, in point of fact, that he had made great improvements on the farm since his entry to it ; that he proposed to manure it with compost dunghills annually ; and that it was the practice in Selkirkshire for tenants to sell corns on the foot without challenge.

In point of law, he *pleaded* ; The lease in question contains no stipulation which infers a prohibition on the tenant to dispose of the fodder produced on the grounds, and no such limitation arises from the nature of the contract. A tenant is absolute proprietor of the fruits, and as such, may dispose of them as he thinks proper. The landlord can require nothing more than that he shall labour the ground *salva rei substantia*, and restore it, at the end of the lease, in as good condition as he found it ; Erskine, B. 2. T. 6. § 39. Besides, the prohibition contended for would prevent the inhabitants of towns, and tenants of grass-farms from providing themselves with straw for feeding and littering their cattle, and other purposes.

Observed on the Bench ; A tenant cannot sell fodder off his lands, unless he either bargain with the purchaser for the dung produced from it, or purchase as much for the use of his farm.

THE LORDS unanimously ' refused the petition,' without answers.

Lord Ordinary, *Craig*. For the Petitioner, *Hay*. Clerk, *Menzies*.
R. D. *Fac. Col. No 227. p. 528.*

No 25.

A creditor of a person who has obtained a *cessio bonorum*, suing him for a debt which had been previously contracted, must

1798. May 16. JAMES LAMB and Others *against* JAMES DUNCAN.

JAMES DUNCAN, in 1788, obtained a *cessio bonorum*, and in compliance with the act of sederunt 8th February 1688, granted to his creditors a disposition of his whole effects, consisting chiefly of a number of small outstanding debts. The creditors, however, never acted under it.