in the farm improperly, he could be liable only for the sum in which the violent profits exceeded his ordinary rent; but that as the passing of his bill of suspension showed that he had at least a *probabilis causa litigandi*, the present action ought to be simply dismissed. No. 5.

Some of the Judges thought the pursuer was not entitled to double rent, because he had not, prior to Whitsunday 1795, put the defender on his guard, that it was to be exacted, in case he remained on the farm.

A great majority of the Court, however, were of opinion, that the clause was legal and expedient, and ought, in every case, to be literally enforced. But it was, at the same time, observed, that if a case should occur where a rent altogether exorbitant was stipulated, the Court might modify it.

The Lords refused this and a subsequent reclaiming petition, (21st Feb.) without answers.

Lord Ordinary, *Stonefield.* For Petitioner, *G. Fergusson.* Clerk, *Sinclair.*

R. D. *Fac. Coll. No. 59. p. 135.*

1799. *July* 9.

WILLIAM DRUMMOND *against* MARGARET MACPHERSON and DAVID TAYLOR.

No. 6.
A lease by which the tenant is taken bound to reside on the farm, and not to assign or subset, found to be forfeited by his being banished Scotland for life.

THOMAS TAYLOR possessed certain lands on a minute of lease granted by William Drummond, for nineteen years, or Taylor's lifetime, 'which 'either of the two should happen to be longest,' he being bound 'to live lo-'cally on the said possession with his family yearly, and not to assign or sub-'set the same.'

In 1792, he was indicted for sheep-stealing, and fugitated for non-appearance. The fugitation was recalled in 1797, and Taylor, on his own petition, with consent of the Advocate-Depute, was banished Scotland for life, by the Circuit-Court of Justiciary.

In 1796, Mr. Drummond brought an action of removing against Margaret Macpherson the tenant's wife, and David Taylor his eldest son. At this time, the lessee was still in the country, and in fact, continued to reside on the farm; but as he lay under a sentence of fugitation, he was not cited as a defender, on account of his not having a *persona standi*. The original ground of the action was, that as Taylor could not legally comply with the condition of residence under which the lease was granted, it was necessarily vacated.

The Sheriff decerned in the removing, nearly about the same time that Thomas Taylor was banished, as above mentioned.

The defenders brought a suspension of the Sheriff's judgment, and

Pleaded: The minute of lease is to be considered as creating a liferent provision for Thomas Taylor and his family. The obligation to residence is not

No. 6.

to be strictly interpreted. It is substantially fulfilled, if, without assigning or subsetting, the tenant allows his family to remain in possession. There has been no voluntary desertion on his part, and his family should not be implicated in his crime. Had he become insane, and been removed to a place of confinement, his family, during his life, would have remained in possession, and the present circumstances do not warrant a different judgment.

Observed on the Bench: An obligation by a tenant to reside on his farm, gives the landlord no power to remove him beyond what would arise from a simple exclusion of assignees and subtenants. But if, in opposition to either of these limitations, a tenant deserts his possession, or is banished Scotland, as he no longer fulfills the condition of his lease, it falls of course.

The Lord Ordinary found the letters orderly proceeded, and two reclaiming petitions against this judgment were refused without answers.

Lord Ordinary, *Armadale.* Act. *W. Erskine.* Alt. *Jo. Clerk, Hagart, Macfarlan.*

R. D. *Fac. Coll. (APPENDIX,) No. 7. p. 13.*

1801. *June* 16.

THE EARL of WEMYSS *against* JAMES and ALEXANDER WRIGHTS.

No. 7.

In a lease, which expired at Whitsunday as to the houses and grass, and at the separation of the crop from the ground as to the arable lands, and in which the tenant was obliged, 'during the currency of this lease, to consume upon the ground of the said lands the whole straw and fodder of every kind, except hay, produced by said lands, and to lay

JAMES and ALEXANDER WRIGHT had a lease of the farm of East Mains of Seton, in East-Lothian, which expired at Whitsunday 1799 as to the houses and grass, and at the separation of the crop from the ground as to the arable lands.

By the lease, the tenants were taken bound, 'during the currency of this 'lease, to consume upon the ground of said lands the whole straw and fodder 'of every kind, except hay, produced by said lands, and to lay the whole dung 'thereby produced on said grounds.' The farm consisted of 129 acres, of which 117 were under white crop, and 12 in pasture, the last year. From several of the fields this was the second, and in one of them the third white crop in succession.

The tenants had the whole dung produced since Martiumas 1798 still on hand at leaving the farm.

The Earl of Wemyss, who had recently purchased the lands at a judicial sale, gave the tenants a charge of horning to implement the terms of the lease, which was suspended.

His Lordship did not dispute their right to sell the crop 1799; and the only point in dispute between them related to the dung produced from the penult crop.

The tenants did not pretend right to carry it off the land, but maintained, that they were entitled to payment for it; because, according to the approved