

No. 50. ALEXANDER RANALDSON M'DONELL of Glengarry, Appellant.
 —*Shadwell—Keay.*
 WILLIAM CAMERON and Others, Respondents.—*Brougham—*
Stuart.

Landlord and Tenant.—Circumstances in which it was held (affirming the judgment of the Court of Session) That a tenant of a sheep farm, who had given up to the landlord a part of it intended for winter pasture, was entitled to keep possession of another farm for that purpose, of which he had obtained possession as a subtenant of a party who was removed.

June 13, 1827. CAMERON, an extensive sheep-farmer in the Highlands of
 1ST DIVISION. Scotland, was tacksman of the lands of Inverguseran, part of
 Lord Meadow- the estate of M'Donell of Glengarry, and of Torrery, part of
 bank. Scotos, belonging to Grant of Glenmorrison. Torrery was
 situated in the heart of the lands of Inverguseran, and was made
 use of for pasturing the sheep in winter, being in a more shel-
 tered position than Inverguseran. In 1809, Cameron took a
 renewed lease of Inverguseran, and of a wintering farm called
 Aultfern. On the part of Glengarry, it was stated, that at this
 time he contemplated purchasing Scotos, and was desirous that
 Cameron should not take a lease of Torrery from Mr Grant. In
 1814, and in reference to a proposal by Cameron, for a renewal
 of his lease of Inverguseran and Aultfern, Glengarry agreed to
 give a renewal, 'under the express stipulation of having no-
 ' thing to do with Torrery, while it continues the property of
 ' any other landlord.' The reason of this stipulation was the
 intention which Glengarry still entertained of purchasing the
 lands of Scotos. In 1818, Glengarry granted to Cameron a
 new lease for twelve years of Inverguseran and Aultfern, 'Tor-
 ' rery excepted, under the express stipulation of my last letter.'
 By Cameron, it was stated, that the agreement between them
 was, that in the event of Glengarry purchasing Scotos, then
 Cameron was to give up the wintering farm Aultfern, and re-
 ceive in place of it Torrery.

In 1819, Glengarry bought Scotos; at which time Torrery
 was under lease to another tenant till 1820. Glengarry there-
 upon raised an action of removing from Aultfern against Came-
 ron, in which he obtained decree in absence. Cameron then
 suspended, on the ground that it had been agreed that if he re-
 moved from Aultfern, he was to have right to Torrery. Came-
 ron, however, alleging that he was assured by a third party,
 authorized by Glengarry, that if he dropped the suspension, he
 would get Torrery at Whitsunday 1820, removed from Ault-

fern, ceded possession to Glengarry, and named a valuator (as June 13, 1827. had been agreed by lease) to fix the allowance of deduction of rent. A great deal of correspondence then took place on the subject; but on the removal of the tenant from Torrery, Glengarry let it for seven years, with a break at the end of two, to one M'Kinnon. In July 1821, Cameron took a subset of Torrery from M'Kinnon, which he said he found indispensable for his sheep. Glengarry, availing himself of the break, brought an action against M'Kinnon to remove from Torrery, and against Cameron, to remove from Inverguseran and Torrery. The sheriff pronounced decree of removing against M'Kinnon, assoilzied Cameron as to Inverguseran, but found that he had shown no title to continue in possession of Torrery, and decerned in that removing.

Cameron then advocated, and also raised a relative action of declarator, concluding that he was entitled to the possession of Torrery during the currency of the lease of Inverguseran, at such rent as might be fixed by men mutually chosen; and should he not succeed in having his right to Torrery enforced, then that the decret in absence of removing from Aultfern should be reduced, and possession ceded to him. The process of advocacy having been remitted to the declarator, and Cameron having died, and the action having been transferred against his representatives, the Lord Ordinary assoilzied Glengarry from the declarator, and remitted the advocacy simpliciter to the Sheriff. Cameron's representatives then reclaimed, and the Court advocated and conjoined, and in both processes altered, assoilzied from the action of removing, found 'that the petitioner's author, Alexander Cameron, having removed from the lands of Aultfern, is entitled to the possession of the lands of Torrery during the subsistence of his lease, at an adequate rent;' appointed mutual condescendences on the relative values of Aultfern and Torrery, as proper pendicles of the farm of Inverguseran; and found Glengarry liable in expenses; and thereafter the Court, on advising a petition for Glengarry on the 18th January 1825, adhered.*

Glengarry appealed.

Appellant.—M'Kinnon had no right to assign or subset Torrery. Even if he had, Cameron's right of subset expired at the

* 3 Shaw and Dunlop, No. 245.

June 13, 1827. break, in favour of Glengarry, and he was bound to remove. He cannot be permitted, having got in as subtenant, to continue possession on another pretended title. The case is the same as if Cameron had entered *brevi manu*, and attempted to remain on some imagined legal title. But if he had a title, that must undergo discussion in a competent Court, and, *ante omnia*, Glengarry must be restored to possession. There is no evidence that Glengarry bound himself to give Torrery on Cameron ceding Aultfern. On the contrary, the evidence is the other way, and is corroborated by the conduct of Cameron himself.

Respondents.—It is quite evident that Torrery was only excepted while the property of another landlord—upon being acquired, then it entered the lease; and that such was the intention and arrangement of parties, is plain from the ceding of Aultfern. This is proved by the whole facts and written evidence in the case. In point of fact, Inverguseran was rendered useless without a wintering farm, which both Aultfern and Torrery were. Even had the written evidence been imperfect, the respondents were, in the circumstances of the present case, entitled to resort to *parole* testimony; but the Court of Session were satisfied with the evidence before it. Cameron was constrained to enter into the arrangement with M'Kinnon, otherwise Cameron's stock would have perished from want of wintering. He entered on a legal title; and the agreement as to the exchange of Torrery for Aultfern, barred Glengarry from challenging that possession.

Master of the Rolls.—There is a difficulty here—whether, not having a better legal title, but a better equitable title than Glengarry, could Cameron enter into possession against the will of the owner?—If Cameron had a title to enter without the consent of the owner, then he might have continued possession. But suppose Torrery had been vacant, could Cameron, without Glengarry's consent, have entered and retained possession against Glengarry's ejection?—Would his admission that it had been agreed that the farms were to be exchanged, have afforded a good defence to this action of removing?—Cameron's antecedent title was not complete—the proposed valuation had not been made—the rent was not settled—no valuation could be made by Glengarry; he had in view to purchase Scotos, but could not tell the seller that. Now, could Cameron have claimed Torrery until the rent was fixed?

Stuart.—I think he could; and was entitled to resist Glengarry's ejection. Cameron could have proceeded with the valuation, although Glengarry might not. It being admitted that there was an agreement for exchange, Cameron, having entered, would be protected in the possession by the agreement. The condition had become purified, and the event had happened which entitled him to Torrerly. June 13, 1827.

The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with L.150 costs.*

Appellant's Authorities.—Ersk. Inst. 4. 1. 15.

Respondents' Authorities.—M'Rory, 18th December, 1810. (F. C.) Murdoch, 18th June, 1812. (F. C.)

FRASER,—M'DOUGALL and CALLENDER,—*Solicitors.*

ALEXANDER RANALDSON M'DONELL of Glengarry, Appellant. No. 51.

—*Shadwell—Keay.*

WILLIAM CAMERON and OTHERS, Respondents.—*Brougham—Stuart.*

Landlord and Tenant—Process—Advocation.—A landlord having raised a process of sequestration against a tenant, and the Sheriff having found a certain sum of rent due, for which he decerned, and another for which, if not paid, warrant of sale would be issued; but no final judgment having been pronounced, and the tenant having brought a process of advocation ob contingentiam of a declarator which he had raised but not executed; and the Court of Session having advocated the cause, 'sustained the reasons of advocation, and assoilzied from the conclusions of the process;' and the landlord having contended in the House of Lords, that, as the only 'reason of advocation' was the alleged contingency with the declarator, and as no such action had then been in Court, the advocation ought to be dismissed:—The House of Lords affirmed the judgment of the Court of Session, in so far as it advocated the cause, sustained the reasons of advocation, and assoilzied from the conclusions of the process; but remitted, with instructions to remit to the Sheriff, to proceed in terms of his interlocutor.

* The Master of the Rolls gave his reasons for the judgment in a side room; and the reporters understand that his Lordship would have had much difficulty as to the title on which Cameron got into possession, being a good defence to a removing, if the advocation had not been conjoined with the declarator.