

1632. July 21. MR. NICOL BANNATINE *against* JOHN SCOT.

No. 156.

In conformity
with the
above.

Mr. Nicol Bannatine being heritably infeft in the lands of Newhall, redeemable upon 2,000 merks, set a back-tack to the Laird of Braid, disponer, for payment of 200 merks yearly. After Braid had disponed the same lands to John Scot, Mr. Nicol raised summons against John Scot, and the tenants and possessors of Newhall, to hear them decerned to make payment to him of the by-gone back-tack duties, and to find caution in time coming for payment thereof, or otherwise to remove. Alleged, They could not be convened for payment of the back-tack duties, *personali exceptione*, but only Braid, to whom it was set, and his heirs. Replied, That ought to be repelled, in respect they are possessors of the ground, which is affected with the back-tack duty; so that whosoever is heritor or possessor must be liable thereto. The Lords repelled the exception.

Spottiswood, p. 328.

1664. February 13. HODGE *against* BROWN.

No. 157.

Compensation upon a debt due by the tacksman to his sub-tenant, was found competent to be proponed against the master, compensation being payment in law.

Fol. Dic. v. 2. p. 424. Gilmour.

* * * This case is No. 118. p. 2651. *voce* COMPENSATION.

1665. January 31. ANDERSON *against* TOWN of EDINBURGH.

No. 158.

The setter is preferable for his tack-duty, to every creditor of the principal tacksman, arresting in the sub-tenant's hands, and has direct action against the sub-tenant, unless where payment is made *bona fide* before. This was found in the case of a sub-tenant of the customs of Edinburgh, and obtains *multo magis* in the case of lands, where there is a tacit hypothec.

Fol. Dic. v. 2. p. 424. Newbyth. Gilmour. Stair.

* * * This case is No. 39. p. 6235. *voce* HYPOTHEC.

1674. November 24. PATON *against* COUSTOUN.

No. 159.

In conformity
with Turn-
bull *against*
Scot, *supra*.

James Gibb having set a tack of his coal to William Brown, the said William Brown assigned the said tack to William Couston. There is a sub-tack granted by

William Brown, with consent of Coustoun his assignee to Cruickstoun, for a duty payable to the assignee. Gib the heritor having granted right to John Paton for some years of the tack-duty, who finding both Brown the tacksman, and Cruickstoun the sub-tacksman insolvent, pursues Coustoun assignee to the tack, for payment of the tack-duty, as he who was tenant in place of the principal tacksman, and who possessed by the sub-tacksman, having consented to his sub-tack, bearing, "the duty payable to the assignee," whereupon there is a decret of the Sheriff of the Shire, finding him liable upon that ground; which being now under reduction, it was alleged for Coustoun, assignee to the tack, that the accepting an assignation to a tack, could not oblige the assignee for the tack-duty, unless it contained an obligation to pay the same, or relieve the tacksman; albeit if the assignee had possessed or intromitted, he be liable for the rent *de jure communi*, as meddling with the fruits, yet not as assignee, for he might forbear to possess by the assignation, or might quit the possession when he pleased, as any other tenant without a tack; and albeit he consented to a sub-tack, bearing the duty payable to himself, yet he had gotten no payment, nor had any intromission.

No. 159.

The Lords sustained the decret, and found that the assignee did possess by the sub-tacksman, who was in natural possession, and was obliged to pay the duty to the assignee.

Fol. Dic. v. 2. p. 424. Stair, v. 2. p. 283.

1680. November 16.

DRUMMOND and The ARCHBISHOP of ST. ANDREW'S *against* DALRYMPLE.

In anno 1609, the Archbishop of St Andrew's set a tack of the teinds of Kirkliston to John Dundas of New-Liston, and to his heirs-male, entering and succeeding, during his life, and to the next heirs-male entering and succeeding, and to his heirs and assignees, for the space of three nineteen years after the decease of the second heir-male. This tack being adjudged, and the adjudication adjudged, and assigned to Sir John Dalrymple in his contract of marriage with Dame Elizabeth Dundas, heir of line to the said John Dundas, who having sub-set the teinds of Carlowrie to George Young, he having pursued thereupon, and Carlowrie, with concurrence of the Archbishop, raised a reduction of this tack, having obtained a new tack of his teinds, upon this reason, that New-Liston's tack was only granted to his two first heirs-male, entering, but not to their assignees;—*ita est*, The first heir-male entered, but not the second; so that he not entering, had no right, and consequently an adjudication against him could give no right. It was answered, *1mo*, That the entering to a tack requires no service or retour, but the propinquity of blood alone establishes the right. *2do*, The second heir-male being charged to enter heir, the act of Parliament anent charges to enter heir, doth declare, That sicklike process shall sustain against the heir charged, as if he were actually entered; so that the adjudication against him being charged to enter heir, is alike as if

No. 160.

A tack of teinds granted to an heritor and his first two heirs entering, was carried by adjudication against the second heir, though it bore no assignees.