

THE LORDS found, that the suspender having subscribed a right of Smeaton's debt to the charger, and he having accepted thereof by his missive letter, there was no *locus poenitentiae*, and found the letters orderly proceeded only for the balance of L. 57 : 10s. ; the suspender always proving by the notary and instrumentary witnesses, that the charger had acknowledged by his answer to the suspender's protest, that the offer of Captain Richardson's papers, and a right thereto, was made *debito tempore*.

Forbes, p. 449.

No 38.

1724. July 23.

The YORK-BUILDINGS COMPANY *against* MR. JAMES BAILLIE, Writer to the Signet, and ANDREW THOMSON.

MR WALKER of Santfoord, and the two defenders, made a proposal to take a lease of certain lands from the Company, which was agreed to by Mr Streachy their manager, who was to set the lands to these three gentlemen equally among them, their heirs or assignees; and they were to become bound conjunctly and severally for the tack duty.

After the terms were thus settled, but before the tacks were extended or signed, Mr Walker went to take a farther view of the lands, and to enquire into the condition of the tenants; and in his absence three duplicates of the tack were wrote out, and signed by Messrs Baillie and Thomson, together with Mr Streachy, but were left in the hands of Mr Campbell, who was writer and doer for the Company, till such time as Mr Walker should likewise sign.

The view which Mr Walker had taken of the estate, so far possessed him with a dislike of the bargain, that upon his return he refused to sign the tacks, which Mr Streachy formally required him to do; upon which Messrs Baillie and Thomson protested that they might be free.

The Company brought an action against Baillie and Thomson for implement of the tack; for whom it was *pleaded* in defence, That they had *locus poenitentiae*, since all the parties who were designed to be concerned had not signed the tacks; that, as the bargain was entered into upon the prospect of Mr Walker's being joint partner, and who, upon account of his knowledge in such matters, was to have managed for them, so the contract was not complete till such time as he should sign; for which end, the copies were left in the writer's hands, and not exchanged, and since Mr Walker declined to hold the bargain, they ought to be free, in the same manner as the Company would be, should they claim it, because the set was made upon the faith of having three tacksmen bound to them, and no less security could bind them; which appeared to have been Mr Streachy's sentiments of the matter, from his having required Mr Walker, under form of instrument, to accede to the tack.

No 39.
Three parties proposed to take a lease, and the terms were settled. In the absence of one of them, two signed the lease. The other refused. The two now wished to re-sile. Found, that the deed being incomplete, there was *locus poenitentiae*.

No 39.

It was *answered* for the Company, *imo*, That the tacks were completed as to the defenders by their subscriptions and Mr Streachy's, by which they and the Company became mutually obliged without the intervention of Mr Walker, as the Lords had found in a parallell case, 14th February 1632, Lamington against Foulis, No 17. p. 8407. ; *2do*, That mutual contracts needed no delivery, but were completed by the subscription of the parties contractors, as my Lord Stair observes, B. 1. T. 7. § 14. and was decided 30th July 1625, Crawford against Vallance, *voce* PROOF; *3tio*, That the tacks in question must be presumed to have been delivered, since they were in the hands of the Company's writer and doer; and the requiring of Mr Walker to sign could not alter the case, since that was equally agreeable to all parties.

Replied for the defenders, That the tacks being conceived to three tacksmen equally among them, could not have effect against two of them, if the third should refuse to accede; for the two who signed had only a right each to a third of the lands, and therefore could not be liable for the whole rent, nor could they be obliged to accept of a bargain different from what was stipulated, namely, to be conjunct tacksmen with a third person, whose skill and assistance had been the chief inducement to the proposal on their parts, and upon whose credit the Company had so readily gone in to it. From the whole of the circumstances it was plain, that as the tacks were not delivered, so the bargain was not completed till Walker should sign; and, therefore, neither the defenders nor the Company were bound.

July 4. 1724.—THE LORDS found, That the tacks having remained in the writer's hands, and there being an instrument taken against Walker by the York-Buildings Company, requiring him to sign the tacks, that there was *locus poenitentiae* in the defenders.

July 23. 1724.—Upon advising a reclaiming petition and answers, the LORDS explained their interlocutor, and found, That the three duplicates of the tack having remained in the writer's hands, and not signed by one of the intended tacksmen, that the deed was incomplete, and that none of the parties were bound thereby.

November 20. 1724.—The Company gave in a petition, craving that the Lords would find it relevant for them to prove, that the tacks pursued on were mutually interchanged by Streachy, Baillie, and Thomson, upon which the LORDS granted a proof before answer; but when the proof was advised, they found the delivery not proved, and assoilzied the defenders.

Act. Ro. Dundas Advocatus & Ro. Craigie. Alt. Ja. Boswell & Dun. Forbes.
Clerk, Dalrymple.

Fol. Dic. v. 3. p. 394. Edgar, p. 103.