1749. *January* 4. The CREDITORS of SUTHERLAND *against* ROSE.

No. 85.
From what time payments of an annuity are to be considered as an eviction? From the time of payment, or from the time of liquidating the price of the victual in which the payments were made?

Sir James Calder of Muirtoun's affairs going into disorder, he disponed the barony of Muirtoun in 1707 to Rose of Kilravock, Sutherland of Kinstery, Brodie of Gotfield, and Dunbar of May, in relief of their engagements for him; and the three last conveyed their parts to Kilravock with absolute warrandice: But after applying the price, and Sir James' other funds, they were losers in about £30,000 Scots, as their proportion of which each undertook particular debts, and in so far became bound to relieve the others.

Kilravock having been obliged to pay certain of these debts, which Kinstery had undertaken, led an adjudication thereon, which he now produces in the ranking of Kinstery's creditors, who having opponed compensation to extinguish those debts, Kilravock replied on recompensation on the following ground:

The barony of Muirtoun had been disponed to him by Kinstery and the other two, with absolute warrandice in 1707; but in the year 1718, the Lady Muirtoun's liferent of eight chalder of victual, payable out of it, took place, and continued till 1739.

That Kilravock was creditor for the victual itself, paid yearly to the Lady, was admitted; but the point disputed was, *a quo tempore* it could be pleaded as recompensation, whether yearly? or, as the creditors insisted, only from the time the prices of the victual were liquidated? which was but lately done in this process.

The Ordinary approved the accomptant's report, applying the payments yearly, and making them bear annual-rent from the Candlemas yearly, one year after the crop.

The creditors reclaimed, and contended, That as Kinstery's grounds of compensation were liquid, and the victual illiquid, there could be no recompensation admitted on the payment thereof sooner than the prices of the victual were liquidated, and that it could not operate *retro*.

But the Lords took the matter in a different view, namely, That as the Lady's annuity was a contravention of the warrandice, therefore the payments made thereof behoved to be considered as an eviction from the time they were made, and to bear interest; as in all cases, where warrandice is incurred, interest is allowed from the eviction, as damage.

Kilkerran, No. 2. p. 593

1751. *June* 28. JOHN RUSSEL *against* HARROWERS.

No. 86.
A part of a feu being evicted, an abatement was given of a proportional part of the feu duty.

It having been determined, as observed No. 93. p. 16026. that the lands of Shanwell, part of the barony of Burleigh, were not astricted to Milnathort, the mill thereof, William and Andrew Harrowers of Milnathort, raised a suspension of their feu-duty payable for the said mill; which had been granted to their authors, with the astricted multures of these lands.

No. 86. Pleaded for John Russel, factor on the sequestrated estate of Burleigh: Mrs. Margaret Balfour the proprietrix, whose creditors are now in possession, does not represent the granter of the feu, who alone can be liable in warrandice, but is a singular successor.

Pleaded for the suspenders: They are insisting in no action on the warrandice of their charter; but have suspended the feu-duty for a subject which has been evicted from them, *Voet, ad tit. D. Si ager vectigalis.*

For the charger: By the feudal law the causalties of superiority are not divisible, respecting the several parts of the feu; but are simply prestable for every part as for the whole: Thus a ward tenant must serve for the half of his feu, if the other half should perish; only, if it becomes burthensome, he may renounce the whole: By the civil law, no deduction is competent for an inconsiderable eviction, § 3. Inst. De loc. et. cond. L. 1. C. De jure emphyteutico. This is the case here; and the subject feued renders at present greater profit to the vassal than at the time of the grant.

For the suspenders: A feu-right is a perpetual tack; and the duty is capable of division and diminution, unlike the simple prestations, which are not mensurable by quantity, in more proper fees.

The Lords, 12th February, found that the suspenders were entitled to an abatement of such a proportion of the feu-duty as the subjects evicted bore to the whole feu, and no more: And, on bill and answers, adhered.

Act. *R. Craigie et Bruce.* Alt. *Boswel.* Reporter, *Minto.* Clerk, *Forbes.*

D. Falconer, No. 214. p. 258.

1765. *July* 10. CARMICHAEL *against* PETER.

No. 87. Warrandice from fact and deed.

Carmichael let two shops in Edinburgh to James Cundel, for 13 years, after Whitsunday 1753, at £12. a-year; but, having afterwards made considerable improvements, Cundel engaged, verbally, to pay a certain additional rent.

In March 1761, Carmichael entered into a contract with Peter, by which, along with a contiguous cellar, he let the shops to Peter; the tack of the shops to commence at the issue of the lease to Cundel. At the same time, Carmichael assigned to Peter Cundel's tack; and upon the narrative that Cundel had engaged to pay of additional tack-duty, at the rate of 10 *per cent.* of the expense of the whole repairs, and that these had amounted to £133. 15*s.* he also assigned the "foresaid additional rent, with all action and execution competent therefor." The assignation to the tack, and agreement with Cundel, were warranted from fact and deed only.

Peter having demanded payment from Cundel, Cundel alleged, that his agreement with Carmichael was only to pay 8 *per cent.* of £50, without any regard to the amount of the expense.