

No 128.

sustained against the charger upon the said tack-duty, in respect Hugh Muir was not heritor of the lands set, but only factor, and the constituent could uplift and discharge the tack-duty, albeit payable by the tack to his factor.

*Forbes, p. 567.*

1733. December 19.

ANNUITANTS OF YORK BUILDINGS COMPANY *against* BUCHAN.

No 129.

Found that a tenant, a creditor of his master, could not retain bygone rents, still *in medio*, in prejudice of a prior infetment of annualrent.

IN a process of mails and duties, at the instance of an annualrenter against the tacksman, the defence, as to the rents falling due before citation, was compensation by an equivalent sum that his master owed him by bond. It was agreed that the tacksman would have been safe had he paid up these rents before citation; and from thence it was *argued* for him, that compensation operates *retro*, which brings the case to the same with actual payment. It was *answered*, That compensation operates not till it be proponed; and, though it might have been proponed against the master, it cannot now be proponed against the annualrenter, after citation in the process of mails and duties; the annualrenter having a real right in the ground, as much as a singular successor in the property.—THE LORDS found, compensation cannot be sustained against a prior infetment for bygone rents, the same being *in medio*. See APPENDIX.

*Fol. Dic. v. 1. p. 166.*

1752. July 30.

JOHN LESLY of Lumquhat *against* WILLIAM HUNTER, Bleacher at Leven.

No 130.

A piece of cloth sent by a weaver to a bleachfield with his name and mark upon it, being the property of a third party, found retainable only for the price of bleaching that piece, and not for the whole cloth sent by the weaver, the proprietor proving that the cloth belonged to him and not to the weaver.

GEORGE and ARCHIBALD ARNOTS, weavers, in spring 1749, sent a parcel of cloth to William Hunter to be whitened; and, when this parcel was whitened, they brought a second parcel of cloth to be whitened also, marked with their names and usual marks; and they promised to pay the prices for whitening both parcels when they got away the second. Upon the faith of this, William Hunter delivered to them the first parcel. Soon after this the Arnotts failed in their circumstances, and left the country. John Lesly of Lumquhat claimed two pieces of the second parcel of cloth; and as Hunter refused to deliver them unless he received payment for bleaching both parcels, Mr Lesly brought a process against him before the Justices of Peace for delivery; and, having proved the property of the said two pieces, the Justices 'decerned the defender to deliver to the pursuer the two pieces of cloth, on payment of the price of bleaching the same.'

William Hunter suspended, and *insisted*, That, as the said two pieces were delivered to him as the property of the Arnotts, and marked with their name,

and usual marks, he was entitled to retain the same till he was paid the account for bleaching of both parcels of cloth; for it was on account of the second parcel's being impignorated for the price of bleaching both that he delivered up the first parcel; and as possession of moveables presumes property, he was bound to inquire no further, but might reasonably rely on the security of the second parcel; and there was here no *furtum*, or *vitium reale*, in virtue of which Mr Lesly could pretend to seize the cloth from one who held it for so onerous a cause.

*Answered* for Mr Lesly, That the presumption of the cloth's belonging to the Arnots must yield to the truth, Mr Lesly having proved it to be his property; and it was not in the power of the Arnots to take the property of his cloth from him, or lay a burden thereon without his consent. The Arnots put their names in his cloth without his knowledge; and if they have thereby deceived the suspender, and induced him to give up the first parcel, each piece of which he might have retained till payment of the bleaching thereof, he has himself to blame for trusting them, but that cannot prejudice a third party.

THE LORDS found the letters orderly proceeded.

Act. *Dav. Gram.*

Alt. *Ja. Erskine.*

Clerk, *Murray.*

B.

*Fol. Dic. v. 3. p. 150. Fac. Col. No 33. p. 53.*

1754. July 11.

MRS BURROUGHS and her Sisters, *against* SIR ARCHIBALD GRANT.

CAPTAIN BURROUGHS of London married Mary Cartwright, second daughter of Henry Cartwright of the same place. By the marriage-articles it was agreed, that the Lady's fortune, which was L. 1500, with a like sum of the Captain's, making together L. 3000, should be settled in trust; the produce to the husband for life; and, in case the wife should survive him, to her for life; and, in case of no issue, the property of the whole to the survivor.

There having been many dealings between Sir Archibald Grant of Monymusk in Scotland, and Captain Burroughs, in the year 1733 they fitted an account, upon which there appeared a balance of L. 3810:9s. due to Captain Burroughs; in satisfaction of which, the Captain agreed to accept of a bond for L. 2000; and thereupon the parties discharged each other.

Of even date with this discharge, Sir Archibald executed, at London, an heritable bond in the Scots form, for the said sum of L. 2000, upon his estate in Scotland.

Soon thereafter Captain Burroughs executed, at London, an assignment in the Scots form; wherein he acknowledged, that the said Henry Cartwright had made payment to him of certain sums of money; and therefore assigned him the said heritable bond for L. 2000; and thereupon Mr Cartwright was infest;

No 130.

No 131.  
Retention found incompetent against an administrator in England, pursuing in Scotland, for a debt due to the deceased, on account of counter-claims against the deceased.