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.

Carmichael having sued Peter for the stipulated rent, Peter insisted for a proportional deduction, unless the pursuer could establish the obligation on Cundel, as set forth in the assignation. At the same time, Peter brought an action against Cundel, that Carmichael might have an opportunity of establishing his bargain with him; but no proceedings were had in this action. No. 87.

Answered for Carmichael: The assignation is only warranted from fact and deed; and therefore, unless the defender shall shew, that, by the fact or deed of the pursuer, the sum in dispute has been with-held from him, he cannot prevail in his present claim. If the defender should prove, that the agreement with Cundel was as Cundel alleges, then he would be entitled to a proportional deduction; because then it would appear, that, by the fact or deed of the pursuer, part of the subject had been evicted.

Replied for Peter: It is essential to the contract *Locati*, that if the subject let do perish or fail, otherwise than by the fault of the lessee, then the lessee is no longer bound to pay the tack-duty, L. 15. pr. et. § 1. L. 33. D. Locati. Dict. v. PERICULUM. This is the case, though no warrandice at all be expressed. The pursuer is not only to be regarded in the light of cedent, but as lessor. The assignation to the agreement with Cundel, was really a lease of the profits arising from that agreement; for which he took the defender bound to pay a higher rent. By the contract, even the assignation to the written tack with Cundel, is warranted from fact and deed only; but, suppose the shops were burnt or become ruinous, could it be maintained that the defender was notwithstanding liable for the rent, because this did not happen by the fact or deed of the pursuer?

The Court was of opinion, That the pursuer was bound to make good his own averment; and therefore "found the defender entitled to retain the 10 *per cent.* in regard the pursuer had not proved his alleged agreement with James Cundel."

Act. *M'Queen.* Alt. *Rae.* Clerk, *Ross.*

Fac. Coll. No. 23. p. 38.

1769. *December* 19.

ALEXANDER HILL, *against* JAMES YEAMAN and WILLIAM HOGG.

No. 88.
In an action of damages upon warrandice, for the eviction of an heritable subject, when is the eviction understood to have taken place? and at

In the year 1756, Yeaman sold to Hogg a tenement of lands, shops, and brew seat in Dundee, binding himself to deliver a valid and proper disposition to the subjects. Hogg made over the purchase to Hill upon the same terms and conditions, who entered to possession, and meliorated the subject by necessary repairs. Yeaman's title to the shops and brew-seat had, it seems, been a bad one; for in 1759 Elizabeth Reid brought a challenge of the adjudication, the ground of that title, as having been deduced against a wrong person as heir. Appearance was made, both for the pursuer and defenders, in the action at Elizabeth Reid's instance; the expence of which the defenders defrayed.