

No. 1. Pledged in a reclaiming petition for George Carruthers: That by the clause in the heritable bond, the tenant was allowed to retain the annualrents out of the tack-duty; but he could not retain the superplus rent for payment of the principal sum, which was not due till the expiry of the tack: And as he could not plead compensation, or pretend to retain the rents for payment of his principal sum, it can as little be competent to the heritor or purchaser to plead it against him. Compensation must in all cases be mutual, and competent to both parties, or neither. The tenant was bound to pay the superplus of his rent upon demand, without compensating or retaining; and it would be unjust to make him pay interest for such sums, which he was bound to have ready on demand, or to impute them yearly in extinction of his heritable bond, which is equal to making him pay interest for the same.

Answered for James Campbell: That the clause allowing the tenant to retain his rent for payment of the annualrents, would have been implied, though not expressed, and cannot infer a passing from compensation *quoad ultra*: And in all cases where two debts concur, though one of them bears no interest, yet compensation operates *retro*, so as to stop the interest upon the other debt from the time of the concurrence.

“ The Lords found, That the superplus rents, after deduction of the annualrents due to the petitioner, can only apply in extinction of the debts in his person, as at the date of the decree of ranking.” See No. 8. p. 2551.

Act. Pringle, Lockhart.

Alt. Brown, Ferguson.

W. J.

Fac. Coll. No. 45. p. 73.

1776. December 19.

PROVOST WILLIAM GORDON *against* ALEXANDER and ISOBEL FORSYTHS.

No. 2.
What to be understood to amount to a renunciation of a tack.

PROVOST WILLIAM GORDON purchased the lands of Greishop from Lord Fife, who had bought them along with the estate of Brodie at a judicial sale of that estate. One particular inducement to the purchase was, that there was a part of the lands burdened with no lease, and very improveable. This farm had formerly been possessed by one William Forsyth upon a letter of tack from Mr. Brodie. This man had died in bad circumstances, and his eldest son Alexander granted a renunciation of the tack to Mr. Reid, Lord Fife's factor, conceived in the following terms: “ Since I saw you at Innes, I have considered the proposal then made of giving up my father's possession to my brother John, and now have altered my sentiments entirely in that respect, as I find, that he who has no stock is quite incapable of plenishing or labouring it, and by his contracting so much debt as he behoved to do to plenish it, he certainly would so insolve himself as to be a prey to some de-

“ signing persons who are proposing to be cautioners for him, but who are making a tool of him for their own purposes. As I have made a bargain with William Dunbar, writer in Forres, I hereby inform you, that I renounce in his favours the possession after Whitsunday next, and if you please, you may settle with him accordingly, as I will take no further concern of the possession after that term. I understand my brother John will be at you on Monday first. But after what I have written above, I suppose you will not be inclined to treat with him, as it will probably ruin him if you do.”

Upon this letter a formal action of removing was commenced by Mr. Reid, in Lord Fife's name, against Alexander Forsyth and his mother; and no opposition being made, decree of removing passed. This decree was delivered up to Mr. Gordon by Mr. Dunbar, sometime after he purchased the lands. Forsyth and his mother having refused to remove, Mr. Gordon threatened to eject them. A bill of suspension was presented for them, on which they obtained a sist, and the cause was reported by Lord Gardenstone Ordinary to the whole Lords.

For the Charger it was argued. Tacks were originally no more than mere personal obligations, having effect only against the granter and his heirs, and not available against singular successors in the lands. The hardships and oppression to which tenants were thus liable was first remedied by the act 1449, Cap. 19. securing tenants against singular successors. But in order to give tenants the benefit of this act, two circumstances have always been held to be essentially necessary; 1st, That the tenant should be possessed of a written tack; and, 2dly, That he should be actually in possession by virtue of that tack. For even though possessed of a tack, if he have not apprehended possession upon it before the date of the purchaser's infestment, it has been decided that he can derive no benefit from it; 22d January 1611, Fraser against Pitsligo, No. 93. p. 15227. In the present case there is not, in a legal sense, either a tack having terms to run, or possession. The renunciation has the same effect as if the tack did not exist; and the decree of removing following upon it has put an end to the possession. Both being made known to the charger, he was *in bona fide* to contract with the proprietor of the lands about a purchase, in the same manner as if the tack had been expired by mere lapse of time.

It has been objected by the suspenders, that the letter of renunciation was not a simple one, renouncing all right to the tack whatsoever, but imported only a renunciation in favour of William Dunbar personally, and for proof they referred to a letter of Mr. Dunbar, stating such to be the fact; but in the first place, this letter could not be received in evidence, being clearly drawn for the purpose of being transmitted to the suspenders, and used by them in this process, and bearing date above a month after the bill of suspension had been presented;—nor could any extrajudicial declaration, though ever so explicit, be received as evidence in this cause. And, 2dly, Mr. Gordon,

No. 2. who was a *bona fide* purchaser, could not be affected by any private latent transaction between Forsyth and Dunbar.

Pleaded for the suspenders, Tacks may no doubt be renounced in particular cases by the implied consent of the parties, as where a tenant accepts of and uses a posterior tack, in which a variation is made in the provisions or conditions of the former lease, or if he shall acquire the real right to the subject let. But then if this second tack, or heritable right, shall not be effectual, the tenant's former tack will remain in force. Stair, B. 2. Tit. 9. § 36. Erskine, B. 2. Tit. 6. § 44. In like manner, in the present case, Forsyth gave up his lease in favour of Mr. Dunbar, upon condition of his performing certain obligations. But as Mr. Dunbar failed in performing his part of this agreement, the suspender could not be bound by the conditional obligation he came under.

As to the argument that Provost Gordon purchased *bona fide*, believing that this farm was out of lease,—there is nothing in it to the purpose. If the charger was improperly made to believe, that the suspenders had no tack, and on that account gave, as he alleges, a high price, he may have recourse upon the seller, either to be free of the bargain, or to obtain a deduction of the price: But it is impossible that this circumstance can in any way affect the suspenders, who were not parties to nor concerned in that transaction.

The Court, (19th December 1776,) remitted to the Lord Ordinary, “to pass the bill of suspension.”

Lord Reporter, *Gardenstone.*

Act. *Crosbie.*

Alt. *Elphinstone.*

J. W.

1777. *February 7.*

ALEXANDER BRODIE of Windyhill, *against* WILLIAM MURDOCH.

No. 3.

When a tenant enters to grass land at Whitsunday, which were afterward plowed by the master's consent, can he be removed at the term of Whitsunday, or is he entitled to the outgoing crop?

IN 1772, Mr. Brodie, by verbal agreement, let to William Murdoch, an arable farm of 40 or 50 acres, and also a meadow of four acres, for which, being quite detached from the arable farm, he was to pay £14 Scots of money. By the custom of the County of Elgin, where the lands are situated, Murdoch's entry to the houses and grass was at Whitsunday 1772, and to the arable lands at the separation of the crop from the ground thereafter. Murdoch having at a small expense drained the meadow, which was subject to be overflowed with water, obtained the landlord's leave for plowing it, and accordingly had it in crop for the years 1773, and 1774. At Whitsunday 1775, Murdoch being removed from these lands, a question arose how far he was entitled to the outgoing crop of that meadow, as it had been plowed previous to the execution of the summons of removing.