

To which it was ANSWERED, *Non relevat*, unless the defender will say he stands infest, and, by virtue thereof, in possession, by uplifting the maills and duties; in regard an apprising and charge against the superior is not sufficient interest to pursue a real action. Neither can it be sustained, by way of defence, to impede a removing, at the pursuer's instance, against his own tenants, who stand infest; especially the superior having suspended the charge, and Mr Roger having used no diligence for discussing thereof.

In this interlocutor the Lords were divided, and thought it disputable, whether a comprising, with a charge against the superior, and seven years' possession, were sufficient to maintain the tenant, in a removing, against one that stands infest; and, therefore, it was not decided: but recommended to the Lord President to agree the parties.

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1665. January 5. THOMAS PAMPIN against JAMES and WILLIAM MELVILLE.

THOMAS Pampin, Englishman, pursues James and William Melville for £500 sterling, conform to an English bond.

It was ALLEGED Absolvitor, because they did make the pursuer assignee to their proceedings of their adventures in the Barbadoes and Geneva, towards payment of the sums pursued for. Conform thereto, the pursuer has intromitted with as much as will satisfy the sum acclaimed; at least the major part thereof; and therefore the pursuer ought to count and reckon.

To which it was ANSWERED, Ought to be repelled, in respect the pursuer's bond is clear and simple; and the allegiance is only relevant *scripto vel juramento partis*.

The Lords found the allegiance relevant, founded upon the assignation, probable by the pursuer's oath; and ordained them to give in a special charge of the particulars assigned; at which time the Lords would determine the manner of probation of quantities and prices intromitted with by the pursuer: for it was then alleged, that, as the assignation was probable by the pursuer's oath, so [is] his intromission with the quantities and prices, and not by witnesses; albeit the bond was an English bond, and granted in England.

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1665. January 7. The EARL of ROXBURGH against WILLIAM MOOR.

IN a removing, pursued by the Earl of Roxburgh against Mr William Moor, from some kirklands in Moorbottle,—

It was ALLEGED for the defender, That he had a disposition of the several lands from the vicar, by virtue whereof he has bruiked and been in possession these forty years bygone; which must defend him *in possessorio*, and is equivalent as if he had a tack of the lands.

The Lords repelled the allegiance founded on the disposition, charter, and forty years' possession, in regard there was no seaisine produced: and found the

disposition was not equivalent to a tack ; nor sufficient to defend him against a third party, who was infeft, but only to pursue the granter for implement.

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1665. *January 25.* ALEXANDER BRODIE *against* The TENANTS of NEW-GALLOWAY.

ALEXANDER Brodie, being infeft in the barony of Kenmuir, whereof the lands of New-Galloway are a part, pursues a removing against the tenants of New-Galloway.

It was ALLEGED for the tenants' not removing,—Because the town is erected in a burgh royal, and the pursuer produces no infeftment of the houses and tenements held in burgage.

The Lords repelled the allegiance, unless the tenants would allege that New-Galloway was dismembered from Kenmuir, and that the town of New-Galloway was infeft, holden of the King in burgage, upon the Viscount of Kenmuir's resignation.

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1665. *January 26.* JAMES LOGAN of ———— *against* ELIZABETH GALBRAITH.

THERE is a tenement of land in Leith, called the Catchpail, whereof umquhile William Logan, skipper there, was heritor ; and, by his contract of marriage with Elizabeth Galbraith, he was bound to infeft her in an annualrent of 300 merks forth thereof; whereupon she is infeft, holden of the superior. The said William Logan, her husband, being deceased; and, not being excluded by her contract of marriage, she is likewise kened to a third of the said tenement, after the decease of the said William, her father's brother's son. James Logan of Consone is heir served to him ; and he disposes the said tenement to Richard Logan, his second son ; who pursues removing against the said Elizabeth, she being tenant for the time, after the decease of her husband: and Mary Cave, relict of umquhile John Logan, elder brother to the said Robert, did defend thereupon. Decreet is given *parte comparante*, but nothing proponed for the said Elizabeth ; who, being now charged to remove, suspends, upon this reason, That she is kened to a terce of the said tenement, and so cannot be removed till it be divided ; that she has greater interest in the tenement than the charger, because she is provided to the annualrent of 300 merks forth thereof, long before the charger's right ; for the byruns whereof, she has adjudged the property, and thereupon stands infeft.

To the *first* it is ANSWERED, *1mo.* Competent and omitted, in the foresaid decreet. *2do.* The said tenement being within burgh, there can be no terce of the same. Neither can she allege that she bruiks the two parts *pro indiviso*, the said exception being only in case of lands and tenements, containing several dwelling-houses, which are of their own nature divisible ; which this tenement is not : and to the two parts thereof the pursuer has unquestionable right, and so ought to