

1709. February 25. LORD BOWHILL *against* JACKSON.

No 61.

An assignee to a tack pursuing for the rent, the tenant pleaded, that he had become cautioner for his master in a bond, upon the faith of retaining his tack-duty for his relief. The Lords found that this did not operate against an assignee.

LORD BOWHILL being constitute assignee by Sir James Scott of Gallowshiels, to the tack-duty of a tack set by him to Thomas Jackson, one of his tenants, and likewise being donatar to his escheat, he pursues Jackson for his rent, who *alleges* on compensation; *imo*, Because my master Gallowshiels owes me L. 1,000 Scots by bond; *2do*, I am cautioner for him in a 2,000 merks bond to the Laird of Horsburgh, and in the hopes of retaining my tack-duty, towards my own payment, I engaged. *Answered*, As to all rents owing by you for years preceding the intimation of my assignation, there was indeed a *concursum debiti et crediti*, and so compensation may take place; but for rents owing for terms subsequent to the intimation, there can be no retention, your master being denuded, and your tack being simple, without any clause empowering you to retain, or apply it to your debt. *Replied*, Compensations are not personal exceptions like *vis metus et dolus*, but are real, and *perimunt debitum* even against an assignee; and from the date of subscribing the tack, the obligation for the rent commences, *dies cessit quamvis nondum venit*; so that in obligations *ad diem* compensation takes place even from the date of the tack, though the term of payment be not come. *Duplied*, The obligation in a tack to pay such a rent is more a conditional obligation than *obligatio ad diem*, like a clause to pay an annuity, which would never afford compensation, except for by-gones. THE LORDS found the intimation of the assignation interrupted the compensation for the subsequent years that fell due after the intimation.

Fol. Dic. v. 1. p. 162. Fountainball, v. 2. p. 498.

* * Forbes reports the same case:

IN a pursuit at the instance of the Lord Bowhill and Sir James Nasmyth, against Thomas Jackson, for payment of his rent assigned to the pursuers by Sir James Scott of Galla the defender's master, for relief of a debt they stood engaged for as his cautioners; the defender craved compensation and retention of the rents of his possession till he were relieved of 2,000 merks he was liable to pay for his master, as cautioner to Alexander Horsburgh of that Ilk, before the date of the pursuer's assignation; and till he got payment of L. 1,000 lent by the defender to his master; because, whenever the tacksman came to be creditor to his master by the bond and clause of relief, there was *concursum debiti et crediti*, comprehending all the subsequent tack-duties; in respect they were due by the original obligation in the tack; as to which *dies cesserant, etsi non venerant*; and in obligations *in diem*, compensation takes place before the term of payment.

Answered for the pursuers: The obligation in a tack for payment of the rent, is more a conditional obligation, than an obligation *in diem*; seeing the tack-duty is only payable, on condition the master or setter perform his part; and conditional obligations never afford a ground of compensation. And as arrestment (though it affects all moveable sums due to the arrester's debtor), carries no more of a tack-duty than the current term; no more can be the subject of compensation.

THE LORDS sustained the compensation and retention only for the tack-duties that fell due before intimation of the pursuers' assignation; but preferred assignees to the subsequent rents.

Forbes, p. 328.

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S E C T. VII.

Effect Relative to Executors and Executors-creditors.

1628. November 12. GILBERT WILLIAMSON *against* ELISABETH TWEEDIE.

AN executor nominate having confirmed the defunct's testament, *eo ipso* becomes debtor to the legatars, to whom the defunct left in testament any legacies; so that if the executor convene any of the legatars for a debt owing by them to himself, the legatar may compensate that debt wherefore he is convened by the executor, with the legacy left to him by the defunct, and the executor will not be heard to say that there can be no compensation until the legatar obtain sentence against him; seeing it may be nothing will be due to him of his legacy, or at least not all, by reason the testament is exhausted.

Fol. Dic. v. 1. p. 162. Spottiswood, (EXECUTORS.) p. 118.

No 62.

A legatee may immediately plead compensation against an executor confirmed, to whom he is debtor.

1662. February 8. THOMAS CRAWFORD *against* EARL OF MURRAY.

THOMAS CRAWFORD, as executor-creditor, confirmed to umquhile Robert Inglis, as assignee by his relict, for satisfaction of her contract of marriage, pursues the Earl of Murray for payment of the sums confirmed, addebted by him to the said umquhile Robert.—The defender *alleged* compensation, because he had assignation to a debt due by the said umquhile Robert, which, as it would have been relevant against Robert himself, so must it be against his executor.—The pursuer *replied*; 1st, *non relevat*, unless the assignation had been

No 63.

Compensation against the executor, is not competent to a debtor of the defunct, taking assignation to one of the defunct's debts.