

from her. The charger is not concerned whose use the money was applied to ; but the suspenders must satisfy their bond to the charger, and seek relief from their pupil as accords.

Fol. Dic. v. 1. p. 167. Forbes, p. 514.

1711. December 28.

WILLIAM FERGUSON of Auchinblain *against* HUGH MUIR of Auchindrain.

HUGH MUIR of Auchindrain being debtor to William Ferguson of Auchinblain in 300 merks by bond, and being charged to pay, he suspends, and craves compensation, on a tack set by him to the charger, of the lands of Craigskean, the tack-duty whereof is owing, and so must compensate. *Answered*, If the suspender had been heritor of the lands set in tack, then the compensation would have met, but you set it only as factor for Robert Bailie, (as the tack itself proves), and so the tack-duty is your constituent's and not yours, which makes that there can be no *concursum debiti et crediti* betwixt you and me; it being absurd to extinguish my debt with one you have no proper right to. *Replied*, The tack-duty is payable to me *nominatim*, and not to my constituent; and as I have the sole power to uplift and discharge, so I may compensate; and as he could charge me to maintain him in the peaceable possession, if he were disturbed, and make me liable for his damages, so *a pari*, as I have the *jus exigendi*, so likewise the *jus compensandi*: All mutual contracts being equally obligatory on both parties; and therefore *cui competit actio ei multo magis exceptio competit, cum partes rei semper sint favorabiliores*.—THE LORDS considered, that factors and chamberlains have not the property of their constituent's rents, but only the custody thereof as servants; and that it made no difference in law that he had taken the rent payable to himself, and not to his constituent, seeing his very title of setting it is *qua* factor, and not *proprio jure*; therefore the LORDS repelled the compensation. See the 9th of November 1672, Pearson *contra* Murray *alias* Creighton, No 80. p. 2625. where a chamberlain may not acquire a debt of his master's to found compensation on; which is stronger, and farther than this present decision goes.

Fol. Dic. v. 1. p. 166. Fountainball, v. 2. p. 695.

* * * Forbes reports the same case :

HUGH MUIR having, as factor to Robert Bailie, indweller in Glasgow, set a tack of the lands of Craigskean, to William Ferguson, for a certain tack-duty payable to the said Hugh Muir; and William Ferguson having charged Hugh Muir for payment of 300 merks of principal, with annual rent and penalty, contained in a bond granted by the latter to the former; compensation was not

No 127.

on the pupil's account, who, now major, was willing to apply her debt to extinguish the bond.

No 128.

A debtor was charged for payment of a liquid sum. He suspended, pleading compensation, upon rents due by the charger for subjects over which the suspender was factor. The debt not being due to him *proprio nomine*, compensation found not proportionable.

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 by-gone rents, still *in medio*, in prejudice of a prior infestment 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 infestment 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 Arnots 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 Arnots, and marked with their name,