1748. *June* 15. DICK of Grange *against* JAMES COOK.

No 7.
A ſuperior who had poſſeſſed on a decree of non-entry afterwards reduced, found accountable only for actual intromiſſions, not by rental; and the rents received were found to impute in payment of feuduties bygone and in time coming.

DICK of Grange feued an acre of ground to William Brown, who having built ſome houſes upon it, diſponed it, 9th June 1702, to Charles his ſon, with procuratory and precept, on the laſt whereof he was infeft, under the burden of 500 merks to the diſponer's daughter Anne, and L. 289 Scots due to Robert Cook: And Charles, of the date of the diſpoſition, granted bond to his ſiſter for her portion, who inhibited him thereon 19th November 1703.

William Brown died 1722, and his ſon Charles having left the country, the feu-duties fell into arrear, whereupon William Dick, now of Grange, obtained a decree of non-entry againſt him, 19th December 1731, calling therein James Cook, the ſon of Robert, who poſſeſt one of the houſes, whoſe intereſt is to be further noticed, and three tenants; omitting ſome others. He afterwards obtained a ſpecial declarator, 2d February 1732, and begun to uplift the rents; wherein, as he *alleged*, he was much impeded by James Cook, who 1736 proteſted againſt his repairing one of the houſes, claiming the ſubject as his property, and continually pulling off the tickets put upon them for ſetting

Grange ſerved Cook with a precept of warning, and purſuing a removing, compearance was made for Janet Oſwald to defend him as her tenant, ſhe having adjudged from Charles Brown, on theſe grounds, That Anna Brown, 12th February 1717, aſſigned her debt to James Renton, who having acquired a title, to be after noticed, to the land and houſes, reſtricted the ſame, 20th May 1724, to a ſecurity for the ſaid 400 merks, for which he declared the ſubject ſhould be redeemable from him by the granter; after which he diſponed it, 27th June 1725, to the ſaid Janet Oſwald his wife, who adjudged for the ſaid 400 merks, and charged Grange as ſuperior, 29th June 1727, to infeft her; and took a decree of mails and duties 3d November 1729; and 21ſt July 1731, diſponed her right to James Cook; ſo that the appearance in her name was made in his behalf.

Charles Brown had, 8th February 1709, diſponed the ſubject to David Burd, under the burden of Anna Brown and Robert Cook's debts, who was infeft baſe, and diſponed the one half, 17th September 1709, to Robert Cook; and, with conſent of Cook, 24th February 1710, diſponed the half to James and John, ſons of the ſaid Robert, who were infeft 26th February 1724.

Burd had alſo, 12th March 1717, diſponed the land and houſes to James Renton, who had paid Anna Brown's debt; declaring it ſhould be optional to him to reſtrict this diſpoſition to a ſecurity for the ſaid debt; and this was the title above-mentioned, whereon Janet Oſwald's adjudication, acquired by Cook, proceeded; who at the ſame time had in his own perſon right to a quarter of the ſubject, by progreſs, as is ſaid, from Charles Brown; and was now ſerved heir to his brother 7th Auguſt 1745, as he was to his father 3d January 1730, on

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which titles he claimed right to the whole, alleging the half diſponed by Burd to his brother, and him, not to be the ſame diſponed to their father.

The cauſe reſolved into a competition for the mails and duties, on the titles of the decreet of non-entry and the adjudication, both which were objected to: And the Lord Ordinary, 13th January 1737, 'preferred Grange for payment of his bygone feu-duties and reparations, and for payment of his feu-duty in time coming, and ordained him to give in an account of charge and diſcharge;' and, 22d June, 'found him liable to account by a rental.'

Cook had, 27th January 1739, offered a charter to be ſigned by the ſuperior, which was objected to; the Lord Ordinary, 27th January 1740, 'found the decreet of declarator at Grange's inſtance void and null, and aſſoilzied James Cook from the removing as to the houſe poſſeſt by him, in reſpect of his right of property to one-fourth part of the ſubject; and found the free rents intromitted with by Grange behoved to impute in payment *pro tanto* of his current and bygone feu-duties, and ordained him to give in an account of charge and diſcharge, conform to the rental in the ſpecial declarator.' And, 12th November 1747, 'In reſpect of the charge given to the ſaid William Dick as ſuperior, and the ſubſequent tender made to him of a charter of adjudication to be ſubſcribed by him, and ſufficient ſecurity for what ſhould be found due for entering the adjudger, found that the ſaid William Dick could not now, ſo long after the ſaid charge, and alſo after the ſaid tender, redeem the ſaid adjudication, eſpecially conſidering James Cook, who had now right to the ſaid adjudication, and for whom the ſaid tender was made, ſtood alſo infeft baſe in the property of at leaſt a half of the ſubject contained in the ſaid adjudication; found that the ſaid William Dick of Grange was accountable for the rents of the ſaid tenements before his decreet of general declarator, and his entering into poſſeſſion in purſuance thereof, only in ſo far as it was or ſhould be proven that he intromitted therewith; but, from the time of his entering into poſſeſſion upon the ſaid decreet, found that he ought to have uſed diligence, and therefore ought now to account by a rental, ſo far as to ſatisfy his current and bygone feu-duties; but, after ſatisfying theſe, found him accountable only for his actual intromiſſions, until the interlocutor reducing his decreets of declarator, and preferring to the mails and duties for payment of his feu-duties bygone and in time coming, and of the expences and reparations made by him, dated 13th January 1739, and 15th November 1740: But, in reſpect that the ſaid William Dick was then in the actual poſſeſſion of the ſubject, by ſetting tacks, or uplifting rents, excepting a ſmall houſe poſſeſſed by the ſaid James Cook, therefore found the ſaid William Dick liable to account for the rents from 15th November 1740 by a rental, unleſs he ſhould prove that he was obſtructed by the ſaid James Cook from levying the rents.'

Pleaded in a reclaiming bill, That Grange could not be obliged to account to Cook, who had no right to the ſubject; for the adjudication was led after

No 7. Charles Brown was diveſted, upon a bond which was not in the perſon of the adjudger, her huſband never having diſponed it to her, but only the diſpoſition in ſecurity by Burd to him. But ſuppoſing the adjudication a good right, the ſuperior was entitled to redeem, and for that purpoſe to bring the adjudger to account, which he offered, and was ſtill willing to do: Neither could he be barred by expiration of the legal, as this privilege was competent before legals were introduced, Stat. Alex. II. and the adjudger had it in his power to delay his offer of a charter till the legal was expired, which would elude the privilege if it were not then competent. The charge given could not interpel him to declare his option, being given for another purpoſe; to wit, to make the adjudication effectual in a competition: And beſides, Grange could not be properly charged on an adjudication againſt Charles Brown, who was not his vaſſal, but held of William his father; and when the charter was at laſt offered, he was not obliged to ſign it till the event of the competition, and it was improperly conceived, as if Charles had held of Grange, whereas it ought to have been a charter of reſignation on William's procuratory.

He ought not to be accountable for a rental, in reſpect he poſſeſt by a title which was unaccountable, though now reduced, and therefore he ought not to be liable for omiſſions.

Answered, That Janet Oſwald's title was Anna Brown's bond conveyed to her huſband, and by him to her, and the adjudication was properly led againſt Charles Brown, who had been inhibited before he was denuded: That the ſuperior had no option, if the adjudger was willing to pay him a year's rent, act 36. Parl. 1469, ſince which time the ſanction of the ſtatute of K. Alexander II. had been ſuperſeded; but ſuppoſing him to have had this option, he ought to have declared it on his being charged ſoon after the adjudication; for the plain intent of the charge was for an entry, though it had alſo the other effect mentioned: And no damage could ariſe to the ſuperior, if the charge ſhould be delayed, as he was obliged to know of the abbreviate on record, which was therefore contended to be a ſufficient interpellation: The tender of a charter was uſed to prevent the effect of non-entry, and the charter offered proper, for Charles could not on his father's death be vaſſal to himſelf: Grange might have confirmed his baſe infeftment; and if there was any defect in the ſtile, it might have been mended.

Observed, That Grange was *bona fide* poſſeſſor, and not accountable for the rents, further than to apply them to his own claims of duties and reparations, for ſo far a *bona fide* poſſeſſor was accountable; and alſo that his decreet had been opened on a ſlender nullity, to wit, that the proceſs falling aſleep, had been wakened, and the former Ordinary being dead, the wakening enrolled before a new one; whereas there ought to have been a petition for an Ordinary in place of the former, and the wakening produced before him.

THE LORDS found, that the petitioner not being ſuperior to Charles Brown, the perſon againſt whom the adjudication was led, could not be charged upon

the ſaid adjudication, neither had he title to redeem the ſame; and found that he was not obliged to account by a rental from the time of his obtaining decreet of declarator, nor even after the interlocutor preferring him to the mails and duties, for payment of his feu-duties bygone and in time coming, but was only accountable for his actual intromiſſions. No 7.

For Grange, *Hay.* Alt. *A. Macdouall.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 2. *p.* 94. *D. Falconer, v.* 1. *No* 258. *p.* 348.

1751. *January* 23. THE CREDITORS of KINMINITY *againſt* SUTHERLAND.

No 8.
Rents uplifted by a perſon in poſſeſſion of a judgment of the Court of Seſſion, being expended in defending that right in an appeal, where it was ſet aſide, were found *bona fide percepti.*

In the caſe between theſe parties, 23d November 1748, D. Falconer, p. 14. *voce* HEIR APPARENT, the Lords having found the decreets of conſtitution could only have effect as decreets *cognitionis causa*, to affect thoſe lands to which the debtor had a title made up in his perſon; in conſequence removed the ſequeſtration of the eſtate of Clyne.

The judgment was reverſed upon an appeal, but there was no appeal brought againſt removing the ſequeſtration.

The creditors purſued the heir of Clyne, and his mother the factor, for the rents of the ſaid eſtate; who defended themſelves, that ſhe had employed them, in defending againſt the appeal: The ſequeſtration being removed, the heir might recover the rents from the factor, and *bona fide* expend them; and it was the ſame thing if the factor, his mother, expended them for his uſe.

THE LORDS found, that the ſequeſtration being removed, and no appeal brought againſt the order removing it, the lady was in *bona fide* to apply rents in her hand, in ſupporting the Lords decreet againſt the appeal brought againſt it.

Reporter, *Juſtice Clerk.* Clerk, *Forbes.*

Fol. Dic. v. 3. *p.* 95. *D. Falconer, v.* 2. *No* 184. *p.* 224.

1757. *December* 1. GORDON *againſt* MAITLAND.

No 9.

A LADY having poſſeſſed an eſtate for ſome years, upon a diſpoſition which was afterwards ſet aſide, her *bona fide* intromiſſion with the rents was found to impute in payment of the annualrents on a bond of proviſion due to her upon that eſtate; but the ſurplus rents were found *bona fide percepti*, and not imputable in extinction of the principal ſum in the bond of proviſion.

Fol. Dic. v. 3. *p.* 94. *Fac. Col. No.* 63. *p.* 101

See The particulars *voce* TAILZIE.