

1759. March 6.

SIR JAMES CLERK of Pencyuk, Baronet, *against* WALTER BENNET, and  
ALEXANDER MILES, his Assigtee.

In January 1748, Sir John Clerk granted a tack of the farm of Burghlie to Walter Bennet, his heirs and assignees, for the space of 19 years after Martinmas 1749, at the yearly rent of L. 411 : 10 : 8d Scots, payable by equal portions at Whitsunday and Martinmas; but under this condition, ' That if one year's rent should be resting unpaid half-a-year after it falls due, then, and in that case, the tack should become void and null, and of none effect.'

Bennet the tacksman committed the management of this farm to his wife, who made sundry payments to Sir John Clerk, and, after his death, to his son and heir Sir James; but there still remained a balance due at Candlemas 1758 of L. 1051 : 16 : 6d Scots. Bennet himself, in the 1757, fell into such bad circumstances, that he was imprisoned by another creditor for a small debt, and took the benefit of the act of grace.

In January 1758, Sir James Clerk raised a process before the sheriff of Edinburgh against Bennet, concluding both for payment of the above arrear, and that he should be removed from the farm, as having incurred the irritancy. The libel recited the tack, and irritant clause thereof, and concluded, ' That in regard the said Walter Bennet has incurred the irritancy of the foresaid tack, by suffering more than a year's rent to be unpaid half-a-year after it was due; therefore, and in terms of the late act of sederunt, he should be decerned and ordained instantly to flit and remove,' &c.

To this process Bennet compeared, denied his wife's *præpositura*, and claimed allowance of sundry articles of compensation. The sheriff, on the 8th of March, found the *præpositura* proved, and repelled sundry of the articles of compensation. Bennet presented a reclaiming petition; and upon advising the same, with answers for Sir James, the Sheriff, on the 22d March 1758, allowed a proof as to one article, adhered as to the others, ' and in regard there is more than one year's rent due by the defender, after allowance of the said article, decerned in the removing, as libelled.' Upon this decerniture a præcept was extracted, and a charge to remove given on the 31st of March; upon which Bennet presented a bill of suspension, and obtained a sist.

The process, so far as respected the conclusion for payment of the arrears of rent, was still carried on before the Sheriff; who, on the 5th of April, found Bennet liable for the sums libelled, and decerned.

On the 13th of April, Bennet assigned his tack to Alexander Miles, a brewer, in security, as he alleged, of the sums Miles should advance for him, and in trust *quoad ultra* for Bennet's behoof; but *ex facie* the assignment was absolute, and Miles immediately entered to possession. On the 14th of April, he inti-

No 68.  
Conventional irritancy of a tack *ob non solum canonem* not purgeable after decree of removing is extracted.

No 68.

mated his right to Sir James, and made offer to pay the arrear found due by Bennet ; which Sir James refused to accept of ; and thereupon Miles consigned the money in the hands of the Clerk of the Bills, together with a bond of caution for the five subsequent crops.

On the 15th April, the Sheriff refused a petition for Bennet, in which payment was offered, and adhered to his interlocutor of the 5th of April ; as also, decerned the officers to charge Bennet to flit and remove within forty-eight hours after the charge, under the pain of ejection. On this a decret was extracted.

In the suspension of the removing, it was *objected* for Bennet and Miles, *imo*, That, upon a proper count and reckoning, it would appear, that the irritancy was not incurred. *2do*, The Sheriff's interlocutor of the 22d of March was only founded on the act of sederunt, as it simply found, that a year's rent was due ; and did not find, that that year's rent had been resting half-a-year after its becoming due, in terms of the irritant clause of the tack ; and therefore the interlocutor was erroneous, as, by the act of sederunt, the Sheriff ought first to have assigned a term for the tenant's finding caution for the arrears, and five subsequent crops, and not to have summarily decerned in the removing. And, *3tio*, Supposing the decerniture to have proceeded on the conventional irritancy, yet the Sheriff ought not to have decerned in the removing, at the same time that he found the arrear due ; but ought to have allowed a reasonable time for the tenant's paying that arrear after it was found due, as he could not know till then how much he was to pay, where the balance was the subject of dispute. It would be very hard, if a tenant's being mistaken in the grounds of his counter claims should afford the means of forfeiting him of his tack, before he could be aware of his danger ; and here an offer of payment was made, and the money consigned, while matters were yet entire, and even before the final interlocutor was pronounced.

*Answered* for Sir James, *imo*, That Bennet's claims of compensation were all groundless, and had been justly over-ruled ; and the extent of the arrear found due, clearly shewed, that the conventional irritancy had been incurred. *2do*, The Sheriff's interlocutor of the 22d March, decerning in the removing, must be applied to the conventional irritancy, which was specially libelled and insisted on ; and not to the irritancy introduced by the act of sederunt ; for the act was only mentioned in the libel, as regulating the manner of removing, when once the conventional irritancy was found to be incurred. And, *3tio*, It is an established rule, That conventional irritancies of tacks *ob non solutum canonem*, cannot be purged when found incurred, but by immediate payment at the bar. Here no such offer was made till long after the precept of removing had been extracted, and a charge given upon it. If a tenant's proponing groundless claims and defences against such an action were to stop the removing till all of them were discussed, such removings might be defeated or postponed for almost any length of time. It is sufficient to support the Sheriff's decerniture, that it

appears the fact was such as he found ; so that the irritancy had been then truly incurred ; and it was in such a case *ultra vires* of the Sheriff, to have assigned terms, *ex proprio motu*, for purging that irritancy. Nor could the offer and consignment made by Bennet's assignee, after extracting and executing the precept, stop the effect of the irritancy, which was already declared, even before the assignation was granted by Bennet, who had never offered, and was unable to pay. The decerniture to remove, contained in the interlocutor of the 15th of April, was altogether superfluous.

“ THE LORDS found the letters orderly proceeded, and decerned.”

For Sir James, *Rae.*

Alt. *Macquenn.*

Reporter, *Colston.*

N. B. As Bennet's bill of suspension had been passed by three Ordinaries, ' in respect of the consignment of the bygone rents found due by him,' a warrant on the clerk to deliver up the money to Sir James was afterwards demanded ; but as the money was proved to have belonged to Miles, who advanced it in expectation that his right to the tack would have been sustained, the Lords ordered it to be redelivered to him.

*D. R.*

*Fol. Dic. v. 3. p. 338. Fac. Col. No 181. p. 322.*

1761. June 30.

FINLAYSON and WEIR *against* CLAYTON.

THE Duke of Hamilton's commissioners set a tack of the lands of Potterhill, to Finlayson and Weir for nineteen years. The tack contained this clause :  
 ' That in case two terms of the said tack-duty shall run into the third unpaid, in that case the present tack shall, at the option of the said Duke and his fore-saids, become thenceforth extinct, void and null, without the allowance of being purged at the bar.'

The Duke of Hamilton sold these lands to Clayton, and the tenants having incurred the irritancy, Clayton brought a process against them before the Sheriff for payment of three year's rent, and concluding that they should be decerned to remove in terms of the above clause. The tenants claimed some articles of compensation, and offered instantly to pay the balance. The Sheriff, after allowing these articles of compensation, found a balance due amounting to more than three terms rents, and decerned in the removing. The tenants presented a bill of advocation, which was taken to report.

*Pleaded* for the Tenants ; That immediately upon the balance being ascertained, they consigned the sum in the hands of the clerk of court, and offered to find caution for payment of the rents during all the years of the tack. That it is an established point in the law of this country, That the legal irritancy of feu-rights *ob non solutum canonem*, introduced by statute, may be purged at the bar : That it was found in a case observed by Lord Fountainhall, 23d March

No 68.

No 69.

A conventional irritancy in a tack, by which it was provided that it should not be allowed to be purged at the bar, found not to be purge-able.