

No. 87. clauses; *2do*, The inhibition can never supply the defect in the right itself. It may secure the right *tantum et tale* as it is, but cannot render it more obligatory or effectual than the law has made it.

“ The Lords repelled the reasons of suspension, and found the letters orderly proceeded.”

For Bryson, *Hamilton Gordon, Lockhart.* Alt. *Jo. Dalrymple.* Reporter, *Woodhall.*
Clerk, *Gibson.*

Fac. Coll. No. 211. p. 381.

1761. January 15.

SIR ARCHIBALD DENHAM of Westshiel *against* WILLIAM WILSON, Writer in Edinburgh.

No. 88.

It was provided in an entail, that the heirs should not grant tacks with diminution of the rental. It was found, that bonds or bills taken from the tenants for certain sums, payable by annual moities during the course of their tacks, transmitted to the succeeding heir of entail, altho' there was a separate rent paid not less than the old rent.

By the entail of the estate of Westshiel, it was provided, that the heirs of entail should not grant tacks with diminution of the rental, or for a longer period than nineteen years.

Sir Robert Denham succeeded to this estate; and when he came to renew the leases, he thought it was unnecessary to raise the rents so high as might have been done; but having stipulated in the tacks a rent somewhat above what the lands formerly gave, he, at the same time, took from several of the tenants bonds and bills for certain other sums, payable in equal yearly proportions, for the same period of years with the endurance of their tacks, but without mention of the tacks in any of these bonds or bills, or that they were given on account of the possessions of the granters.

These bonds Sir Robert assigned to William Wilson, writer in Edinburgh, to whom he owed a considerable sum of money; and the bills were confirmed by Mr. Wilson, after Sir Robert's death, as a part of his executry.

Sir Archibald Denham, the succeeding heir of entail, brought an action against Mr. Wilson, concluding, that these bonds should be delivered up to him, the heir of entail, as his property, seeing they had been granted by the tenants as part of the future rents of the estate.

Pleaded for the defender: *1mo*, There is no evidence that they were granted by the tenants in respect of their possessions; *2do*, Allowing this to be the fact, they can only be considered as *grassums*, which it is lawful and customary for heirs of entail to take; and this pursuer has no reason to complain, as Sir Robert counteracted none of the prohibitions of the entail. He granted leases for no longer space of time than nineteen years; and, instead of diminishing the rental, he considerably augmented it.

Answered for the pursuer: The bonds and bills themselves, when compared with the endurance of the several tacks, afford real evidence that they were granted by the tenants on account of their possessions; and as it is the legal and necessary consequence of a right of property in lands, that the proprietor is entitled to the

natural possession of the lands themselves, or to receive from the tenants the yearly sums or prestations stipulated to be paid or performed by them in consideration of their several possessions, the pursuer must have equal right to the annual sums payable by these bonds and bills as to the other rents payable by the tacks: Nor can the defender screen himself by pretending, that these bonds and bills must be considered as given for *grassums*—"Grassumas dicimus summas pecuniæ quæ in principio assedationis aut solvuntur, aut promittuntur, supra annuam mercedem;" Craig, L. 16. 2. Dieg. 10. § 4. But here it is plainly an *annua merces* which the tenants became bound to pay. And the giving sanction to devices of this kind, to disappoint succeeding heirs of the future rents of an estate, might be attended with many bad consequences.

Replied: It seems admitted, that no complaint could have been made against Sir Robert Denham, had he taken from the tenants bonds for a particular sum of money, payable at one term; and it can make no substantial difference, that, instead of this, he indulged them with several terms of payment. Neither could the pursuer have complained, though Sir Robert had granted to the defender a lease of the whole estate at the old rent, and allowed him to subset; though, in that case, the pursuer would have been equally deprived of what he calls the raised rents. Nay, further, Sir Robert might have discharged these bonds; and there appears to be no good reason why the pursuer's situation should be bettered by their being assigned to a lawful creditor, for payment of a debt, which, was it not for the entail, he himself would be bound to pay.

"The Lords found, That the bonds and bills in question, granted by the tenants of Westshiel to the deceased Sir Robert Denham, appeared to be securities granted by the tenants for part of their future rents; and therefore belonged to the pursuer, and the other heirs of entail on the said estate in their order."

"And upon a reclaiming petition, and answers, adhered."

Act. *Williamson et Advocatus.*

Alt. *Wight et Lockhart.*

Clerk, *Justice.*

J. C.

Fac. Coll. No. 6. p. 10.

1761. July 29.

JOHN GORDON CUMING of Pitlurg *against* ROBERT GORDON of Logie.

Robert Cuming of Birnes executed an entail, in 1729, by which he provided his estate to the second son of his eldest daughter, and the heirs-male of his body; whom failing, to a number of other substitutes.

This entail contained a variety of provisions and limitations; and, amongst others, the following clause: "In case it should happen any of the said heirs of tailzie to commit or be accessory to any acts of treason against our sovereign Lord, then, and in that case, the life-rent of the committer thereof shall only be lost so far as concerns the committer; but the heritable and irredeemable right and property of the lands and others foresaid shall, after their decease, return and remain

No. 89.
Effect of certain terms of limitation and restriction.