

disposition was not equivalent to a tack ; nor sufficient to defend him against a third party, who was infeft, but only to pursue the granter for implement.

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1665. *January 25.* ALEXANDER BRODIE *against* The TENANTS of NEW-GALLOWAY.

ALEXANDER Brodie, being infeft in the barony of Kenmuir, whereof the lands of New-Galloway are a part, pursues a removing against the tenants of New-Galloway.

It was ALLEGED for the tenants' not removing,—Because the town is erected in a burgh royal, and the pursuer produces no infeftment of the houses and tenements held in burgage.

The Lords repelled the allegiance, unless the tenants would allege that New-Galloway was dismembered from Kenmuir, and that the town of New-Galloway was infeft, holden of the King in burgage, upon the Viscount of Kenmuir's resignation.

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1665. *January 26.* JAMES LOGAN of ———— *against* ELIZABETH GALBRAITH.

THERE is a tenement of land in Leith, called the Catchpail, whereof umquhile William Logan, skipper there, was heritor ; and, by his contract of marriage with Elizabeth Galbraith, he was bound to infeft her in an annualrent of 300 merks forth thereof; whereupon she is infeft, holden of the superior. The said William Logan, her husband, being deceased; and, not being excluded by her contract of marriage, she is likewise kened to a third of the said tenement, after the decease of the said William, her father's brother's son. James Logan of Consone is heir served to him ; and he disposes the said tenement to Richard Logan, his second son ; who pursues removing against the said Elizabeth, she being tenant for the time, after the decease of her husband: and Mary Cave, relict of umquhile John Logan, elder brother to the said Robert, did defend thereupon. Decreet is given *parte comparante*, but nothing proponed for the said Elizabeth ; who, being now charged to remove, suspends, upon this reason, That she is kened to a terce of the said tenement, and so cannot be removed till it be divided ; that she has greater interest in the tenement than the charger, because she is provided to the annualrent of 300 merks forth thereof, long before the charger's right ; for the byruns whereof, she has adjudged the property, and thereupon stands infeft.

To the *first* it is ANSWERED, *1mo.* Competent and omitted, in the foresaid decreet. *2do.* The said tenement being within burgh, there can be no terce of the same. Neither can she allege that she bruiks the two parts *pro indiviso*, the said exception being only in case of lands and tenements, containing several dwelling-houses, which are of their own nature divisible ; which this tenement is not : and to the two parts thereof the pursuer has unquestionable right, and so ought to

have the possession ; the two parts always drawing the third part with them. To the *2d* reason it was answered, That, notwithstanding of the adjudication, and infestment following thereon, she ought to remove ; because she having possessed the tenement continually since her husband's decease,—the possession whereof exceeds the annualrent,—she is satisfied of her annualrents by her possession, and so could not adjudge for the byruns of the same.

The Lords found, That the two parts should draw the third, and therefore decreed the tencer to remove ; but, if she was willing to take the house of the pursuer for the rent, he should prefer her to any other, she finding caution for the two parts of the house-mail.

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1665. *January 28.* THOMAS AIKENHEAD *against* JANET and MARION AIKENHEADS and their HUSBANDS.

UMQUHILE Alexander Aikenhead, uncle to Thomas Aikenhead, and tutor nominated and confirmed to him, and having granted the receipt of several bonds granted to umquhile Mr Thomas Aikenhead, and assigned by him to his son Thomas ; the said Alexander, having received payment of the said sum belonging to his said pupil, the said pupil pursues Janet and Marion Aikenheads, only daughters and children to the said Alexander, as heirs and executors to their father, and upon the rest of the passive titles, and their husbands for their interests ; the said Thomas, the pupil, insisting against the said Janet Aikenhead and her husband, as successor by the lucrative title, *post contractum debitum*, in so far as her father disposed to her certain tenements of lands and other heritable sums or rights.

It was ALLEGED for the defenders, That she could not be liable as successor, *1mo.* Because, *hoc dato*, that her father had disposed to her any heritable sums or tenements for love and favour, and for her provision ; the pursuer behoved to pursue reduction thereof, *via ordinaria*, upon the Act of Parliament. *2do.* She could not be liable, because any dispositions made to her and her husband were for onerous causes, *intuitu matrimonii*, by contract of marriage, or otherwise. And the said rights cannot be quarrelled, nor fall under the compass of the Act of Parliament ; as was found in the case betwixt Simpson and Liddle.

To which it was REPLIED by the pursuer, That the defender's father being both tutor and debtor to him, and thereafter making disposition and assignation to the defender's own daughter, one of the apparent heirs-portioners, and who was *alioqui successura* ; the disposition granted for love and favour, without any onerous cause, must make her liable as successor ; at least, she and her husband must be liable to the pursuer *in quantum lucrati sunt*, which will exceed the debt, acclaimed by the pursuer ; who, in all law, is most favourable ; his tutor having intromitted with his means, which the said tutor could not dispoise to his own daughter and apparent heir ; but she must be liable, *ut supra* : and there is necessity for the pursuer to reduce the said rights, seeing he insists against his upon the passive title, as successor.

To the second, it was ANSWERED, *1mo.* The dispositions and rights whereupon she insisted as successor, were not made by the contract of marriage betwixt the