a tack of the teinds, or to accept of a disposition of lands, it was sufficiently relevant to be proven by the defender's oath, without any writ; and the promise, in the first place, being to procure a tack of the teinds, which in law was obligatory, albeit the other party accept of the right of lands, could not be binding, except writ had intervened; yet the adjection thereof to the first member of the alternative gave the defender only power to resile from that part, in case he thought it better for him to procure a tack to the teinds, than to accept of the heritable right of lands.

The Lords did find, That such a promise being complete, albeit it was alternative, was not at all obligatory to infer that the defender should receive back again a disposition of the lands sold, and refund the price; or to procure a three nineteen years' tack of the teinds; unless it had been put in writ by way of contract or bond. *Page* 420.

1674. *July* 7. MR ALEXANDER LISK *against* GILBERT ROB.

IN a pursuit, for damage and interest, at the instance of Mr Alexander Lisk, upon this ground, That he had set his lands to Gilbert Rob, and he was obliged to enter and possess the same at Whitsunday; and that, after the flitting Friday, he had required him to enter to the possession, and taken instruments upon his refusal:—

It was ALLEGED, That the defender, not being required until five days after the term, and the houses and lands not being made void and red, by the removal of the present tenant, the defender was not obliged to remove from his old room his whole family and goods, having no place to which he might enter.

It was REPLIED, That the defender, being required, was obliged to come to the new room with his family and goods, and then have required the heritor or his tenants, that he might have present possession; otherwise the heritor was not obliged to remove the present tenant, and make his room void: which not being done, the defender is liable for damage and interest.

The Lords did look upon this as a general case; and, after much reasoning amongst themselves, did at last find the defender liable in damage, unless he would offer to prove that he had required the pursuer, after the ordinary day of flitting, to enter him to the possession; or otherwise, that he offered to prove that the heritor had set a new tack: Notwithstanding it was urged, that the removing of a present tenant is necessary in order to the entering of a new; and that the master, being obliged in law to enter the tacksman, he ought to make the room void, and put him in a condition that he might enter. This was hard.

Page 421.

1674. *July* 10. THOMAS ANDERSON *against* SIR GEORGE PRESTON of VALIEFIELD.

THOMAS Anderson, as having right to an annualrent out of the lands of Overtoun; whereupon he obtained a decreet of poinding of the ground; which being

suspended; and reduction raised at the instance of Sir George Preston, upon this reason, That he stood infeft in the foresaid lands upon an expired comprising; whereas the charger's right was only a base infeftment of annualrent, never clad with possession, until the suspender was publicly infeft upon his comprising:—

It was ANSWERED for the charger, That the reason was no ways relevant; because his infeftment of annualrent was prior to the suspender's comprising; and, albeit it was base, yet the suspender had homologated the same, in so far as, since the expiring of this comprising, he had made payment of the annualrent, and had received discharges from the charger.

It was REPLIED, That the payment of annualrent could not infer any obligation upon the charger's right; because the compriser, being a stranger, not knowing the validity of the annualrenter's right, might pay the annualrent for some years; as to which payments it might prejudge him, but could not hinder him thereafter to quarrel his right by reduction or suspension; as in the case of a superior who receives payment of the feu-duty, notwithstanding whereof he may quarrel the vassal's right upon any nullity, or by way of improbation, the feu-duties being to be paid by one who was not entered by the superior himself.

The Lords did find, That payment of the annualrent by the compriser, who was a stranger, and had not granted that infeftment of annualrent, was no homologation of his right; and therefore did suspend the letters, and reduce; unless they would offer to prove, by the compriser's oath, that it was *specialiter actum*, and the annualrenter's right made known when he received payment of the annualrent. *Page* 422.

1674. *November* 12. MR JOHN SEMPLE *against* JEAN SEMPLE and her HUSBAND.

IN an action pursued at the said Mr John's instance, as assignee to a bond granted to John Semple of Balgoune by Semple of Noblestoun, as cautioner for Semple of Stanifleet, who was principal in the bond against the relict and executor of the said cautioner:—it was ALLEGED, That the pursuer could have no right as assignee; because, long before any intimation of his right, his cedent, by a missive-letter written to the principal in the bond, had written, that the particulars betwixt him and Stanifleet were equal; and that he was willing to discharge him, he getting a discharge from him.

It was REPLIED, That the said missive-letter, being written by John Semple, who was a writer to the signet, could only be applied to accounts for writing, he being Stanifleet's ordinary; but could not be interpreted to take away a bond of borrowed money; especially the said offer never being accepted of, nor mutual discharges thereupon granted.

The Lords did sustain the defence, founded upon the missive-letter, to take away the bond, notwithstanding of the reply; upon these special reasons, That it was an old bond for an inconsiderable sum, whereupon Balgounie had never distressed the principal nor cautioner; nor had left it amongst the inventory of his debts: but they did declare, that the defender should procure a discharge to Balgounie's executors from Stanifleet, or warrant them against Stanifleet's representatives. *Page* 429.