

1630. March 9.

AULD against THOMAS.

No 24.  
Whether a  
tenant hold-  
ing of a life-  
renter, could  
be removed  
by a com-  
priser, to  
whose infest-  
ment of an-  
nualrent, the  
liferenter had  
consented?

ALEXANDER AULD, butter-man, who had comprised a tenement in the Canon-gate for bygone annualrents, wherein he was first infest in the said tenement pursues removing against John Thomas, occupier of a little outshot of the said tenement. It was *alleged* by him, That he had tacks to run, set by the liferenter of the said tenement during his lifetime, and that long before the said comprising, and by virtue thereof in possession. It was *alleged* by the pursuer, That the tack cannot defend the defender, because he cannot be in better case than the liferenter, setter of the tack; and she was denuded of the property by a deed preceding the tack, viz. by consenting to an annualrent out of the said tenement, whereupon the property was comprised; and so the annualrent being the cause of the comprising; and prior to the tack, the comprising should be drawn back *ad suam causam*; and so after the consenting to the said annualrent, she might do no deed to prejudice the same, no more than if she had consented to the alienation of the property. To which it was *duplied*, That the consent to an annualrent was not *habilis modus*, to have denuded her of her property; and, as the person who had only an annualrent out of the tenement could not by that right remove a tenant, no more could that person, by virtue of a comprising of the property since the byruns of the said annualrent, remove a tenant, who had a tack prior to the compriser. Which exception and duply the Lords found relevant.

*Auchinleck, MS. p. 196.*

\* \* Spottiswood reports this case :

ALEXANDER AULD, butter-man, pursued a removing against John Thomas, tenant of a tenement in the Cowgate, comprised by the pursuer. *Alleged*, Absolvitor, because he had tacks of the said tenement granted to him by Janet Yule, liferentrix thereof, for terms yet to run, and that before the pursuer's comprising, and, by virtue of his tack, ever in possession since. *Replied*, The tack cannot defend the excipient, because the liferentrix, before the granting thereof, was in effect denuded of her liferent, and had no power to set a tack, in so far as her umquhile husband, with her consent, having disposed an annualrent to the pursuer forth of the said tenement, he has comprised the property thereof for the byruns from the liferentrix and her husband's heir, and is infest thereupon holding of the superior; and so the comprising proceeding upon that disposition of annualrent whereunto the liferentrix consented, as it would be a sufficient ground to remove the liferentrix herself, so it must be against the defender, having right from her by tack. *Duplied*, Her consent to the annualrent denuded her not of her liferent, which stood notwithstanding thereof, by virtue whereof she might lawfully have set tacks. *Triplied*, The comprising proceeding upon a deed done by the liferentrix herself, must be drawn back *ad suam causam*, viz. the alienation of the annualrent whereunto

she consented, which being before the defender's tack, the liferentrix could not set the same. THE LORDS sustained the exception.

No 24.

*Spottiswood, (REMOVING.) p. 288.*

\* \* Durie's report of this case is No 8. p. 570. *voce* ANNUALRENT INFESTMENT.

1631. March 9. Lord JEDBURGH *against* TENANTS.

No 25.

THE Lord Jedburgh disponed some lands to some men by contract and charter, containing a procuratory of resignation; but before they were infest, he dispones the same lands by contract of marriage between his son Sir Andrew Ker and the Lady Yester, to the Lady in liferent, whereupon she was infest. After her husband's decease, she sought these men to be removed. They defended themselves by their infestment, clothed with so many years possession, and their disposition before her right, all which could not be taken away summarily in such a judgment. THE LORDS repelled this allegiance, in respect of her infestment intervening between their charter and their sasine: As to that, that it was an infestment standing unreduced, clothed with twenty years possession at least, the LORDS repelled it not, for they are not in use to put a liferenter to a reduction.

*Spottiswood, (REMOVING.) p. 288.*

1631. March 29. L. HADDO *against* L. LUDQUHARN.

No 26.

IN a removing, by the L. Haddo *contra* L. Ludquharn, from the house and manor place of Haddo, and the mains thereof, pursued by the minor, within the years of his minority, against Ludquharn, being his curator, standing *sine quo non*; it being *alleged* by the curator, That no action ought to be sustained at the pursuer's instance, seeing he was not seized in the lands libelled; and the minor *replying*; That this exception ought to be repelled, as not competent to be proponed by the curator, against his own minor, who ought to have obtained himself infest; and the curator *answering*, That *stante curatela*, no such action of removing ought to be sustained at the minor's instance, against his own curator;—the LORDS repelled the exception and duply, and sustained the action of removing, at the minor's instance against his curator *sine quo non, etiam durante cura*, and decerned him to remove both from house and mains; seeing the minor was married, and might crave his house to himself and his wife to dwell in. But for removing from the land, I consider not the reason thereof, that in law, the curator might be removed from the mains, his office standing; albeit, if the minor had wanted maintainance, he might have had

Removing sustained at the instance of a minor without a sasine, against his curator, *et ante redditas rationes.*