

1630. *March 3.* MAXWELL of Hills *against* TENANTS of GLESSACK.

No. 79.

Maxwell, compriser, pursuing for the mails and duties of the lands comprised, and the defenders defending with a tack set for 19 years, to begin after the ish of a preceding standing tack, then run out, but suspending the entry until a sum were paid to the tacksman by the setter of the tack, and which was unpaid, and which tack was clad with many years possession before the pursuer's comprising; this tack was not found sufficient to defend against this pursuit for mails and duties, any more than it would defend against the removing, the same being pursued by a singular successor; and it being alleged, that the sum was paid to the tacksman, so that the time of the entry had begun, and so the tack was good for the rest of the 19 years since the time the sum was paid, this allegiance was also repelled, because the payment was made since the pursuer's comprising, and so the entry of the tack was conferred *in tempus indebitum*, not having its entry before the comprising.

Fol. Dic. v. 2. p. 422. Durie, p. 499.

1633. *January 18.* EARL MARISHAL *against* His TENANTS.

In a removing, wherein the defenders alleged, That they had tacks for terms to run, set by the pursuer's father; and the pursuer replying, that the Earl's father, long before the setting of these tacks, was only life-renter, and the pursuer heritably infest in the fee, whereby his father could not set tacks but during his life-time, who was dead many years before this warning; it was duplied, that after the pursuer's fee of the lands libelled, by contract betwixt him and his umquhile father, power was given to the father to set tacks during his life-time, and for the space of fifteen years thereafter, which space is not expired. It was triplied, that, by the contract, his father had power to set tacks, during that space only, to such tenants as were kindly, and upon provision that the duties payable for the lands should not be diminished; and the tack excepted on is against both these conditions; for the defenders were never kindly tenants, and the tack-duty is less than the lands ever paid before this tack. The excipient answering, that seeing the tack is clothed with possession, during the whole life-time of the setter, and by the space of ten years since, and seeing there are but three or four years thereof to run, the same cannot be taken away, for any of the arguments adduced, but it is sufficient to maintain him from removing, until it be expired;—the Lords repelled the exception, and admitted the reply and triply to the pursuer's probation, which they received to take away the tack, in this same instance and judgment of removing, it being proved. But it was not answered here by the defenders, that the foresaid arguments proponed against the tack were not competent to be tried so summarily by way of reply, in an action of removing, and that the pursuer ought to pursue action of

No. 80.

Whether a tack let by a life-renter for a period beyond his life may be afterwards homologated?

- No. 80. reduction thereon; which if it had been proponed, it might have been, that the Lords would have found so, that it ought to have been tried in a reduction, and not so summarily in a removing; but this was not alleged, but contended, that the tack was sufficient, albeit it had these defects.

Act. *Nicolson.*Alt. *Falconer.*Clerk, *Gibson.**Durie, p. 664.*

* * Auchinleck reports this case:

The Earl Marishal, upon a warning made before Whitsunday, 1632, pursues Fraser, tenant of a room of St. Hauch, to remove. It is excepted; that he has tacks set to him by the Earl's father. It is replied, that the alleged tacks cannot defend him, because they were set after the pursuer was in the fee, and by contract betwixt the father of the pursuer and the Earl, his son, it was only leisom to the father to set tacks during his life-time, and fifteen years after his decease, to the kindly possessor, and without diminution of the rental; but this tack was set with diminution. To which it was duplied, that the pursuer could not object this nullity, seeing he had continually, since the decease of his father, now by the space of ten years, received by his chamberlains the mails and duties of the said lands, conform to the tack, and therefore has homologated and approved the same; and seeing there were so few years to run of the tack, he ought to bruik the same for these years as well as he has done for the years by-gone. To which it was answered, that the receipt of the duties contained in the tack was sufficient to defend him from by-gones, but would not hinder the pursuer to annul his tack for time to come; which the Lords found relevant. Some thought this a hard interlocutor.

Auchinleck MS. p. 199.

1634. *March 14.* BISHOP of ROSS *against* DRUMMOND.

No. 81.

The Bishop of Ross reduced a tack set by his predecessor to Mr. John Drummond, for diminution of the rental, because the land which paid 14 chalders of victual was set in tack for £.100, contrary to the act of Parliament Ja. VI. Parl. 10. Cap. 11. made against conversion of victual in money.

Auchinleck MS. p. 204.

1680. *Februry 5.* RAE *against* FINLAYSON.

No. 82.

The Lords found, That a tack *in prædiis rusticis* did militate against the buyer of the lands, but not *in prædiis urbanis*; because these used not to be under tack, but only let from year to year.

Fol. Dic. v. 2. p. 417. Stair. Fountainhall.

* * This case is No. 43. p. 10211. *voce* PERSONAL AND REAL.