1669. *June* 24. KENNEDY and MUIR *against* JAFFRAY.

No 30.
Taking a right to a second tack from a third party, infers not a passing from the former, unless the posterior tack had a greater duty or shorter durance, and that the tacksman had paid the greater duty, or bruiked expressly by the latter tack.

MR JOHN JAFFRAY being presented to the parsonage and viccarage teinds of Mayboll, and having obtained decreet conform, there is a double poinding raised by the heritors and possessors of Fishertoun. Mr John Jaffray craves preference as parson, and so having right to the whole benefice; the other party called is Grange Kennedy, and Muir of Monkwood, who craved preference on this ground, that the teinds of Mayboll was of old a part of the patrimony of the nunnery of North Berwick, and the prioress for the time, with the consent of one Nun, who was then only alive, set a tack thereof to Thomas Kennedy of Bargenny, and Gilbert Kennedy his son, and to Gilbert's first heir, and after all deaths for three nineteen years. The prioress having thereafter, at the King's desire, resigned the teinds of Mayboll to be a parsonage, did in her resignation, except the tack set to Bargenny, which was always clad with possession, and was assigned to David Kennedy of Ballinmore, and transferred to Mr John Hutchison, and by him to Kennedy and Muir, as to the teinds of Fishertoun, whereupon they crave preference. It was *answered*, for Jaffray, that by their right produced, there is related another tack granted by Mr James Bonnar, parson of Mayboll for the time, to the Lord Ochiltree, which came by progress in the person of Ballinmore, having then in his person Bargenny's tack, so that Ballinmore's taking that right acknowledges the parson's right, and passes from his former tack, unless in his right he had expressly reserved his former tack; so that neither Ballinmore nor these assignees can now make use of Bargenny's tack, it being a certain ground, that the taking of a posterior tack, having a greater tack duty, or a shorter term, evacuates a prior tack in that same person. It was *answered*, that the allegeance is nowise relevant, Ballinmore not having immediately taken a second tack, but only finding another tack by progress in the person of the Lord Binnie, to remove that impediment, and shun his trouble, he purchased right thereto, but never bruiked thereby.

THE LORDS found that the taking right to another tack, did not infer a passing from the former tack, unless it were proven, that the posterior tack had a greater duty, or shorter durance, and that Ballinmore had paid the said greater duty to Bonar, or bruiked expressly by the later tack.

Fol. Dic. v. 1. *p.* 433. *Stair, v.* 1. *p.* 625.

1678. *January* 23. DUKE of LAUDERDALE *against* The EARL of TWEDDALE.

No 31.
A tack of teinds was found past from, by accepting another tack, of

THE Duke of Lauderdale, as having right by infeftment of erection to the abbacie of Dumfermline on the south side of Forth, pursues the Earl of Tweddale and the tenants of Pinkie, for the teinds of Pinkie. The defender *alleged* absolvitor, because he bruiks by tacks of these teinds, yet unexpired; and produces a tack set by Abbot Pitcairn to M'Gill of Rankeilor, whereby 'the

No 31.
a different duty and endurance, though this last tack contained a ratification of the former.

'Abbot having feued to Rankeilor the lands of Pinkie, sets to him and to his 'son, and to two heirs succeeding them in the fee of Pinkie, the teinds thereof.' Which tack and lands of Pinkie were disponed by Rankeilor to the Earl of Dumfermline Chancellor, and Tweddale has right thereto by apprising of the lands and teinds of Pinkie from Dumfermline. The pursuer *answered*, 1*mo*, That the defender cannot found upon this tack, because tacks are *stricti juris*, and not competent to assignees, unless expressed; and here assignees are not expressed. 2*do*, This tack is set to the heirs of Rankeilor, succeeding to him in the feu of Pinkie, and so is competent, neither to the heirs of Rankeilor, unless they could succeed in Pinkie, which they cannot, it having been disponed to the Chancellor, much less can it belong to the fiar of Pinkie, not being heir to Rankeilor. 3*tio*, Dumfermline did accept of a new tack from Queen Ann, as Lady of Dumfermline, his entry to be declared from the date of the new tack to Dumfermline and his son, and two heirs succeeding them, which is incompatible with the first tack, and though it bear a ratification of that first tack, yet being incompatible to take a new tack, and not resting on the ratification, nor including a provision to bruik by either of the tacks, the posterior tack is a clear passing from the former, as is constantly observed in all tacks, that a posterior tack of a different duty or endurance takes off a former; and here the endurance and whole substantials are different, for in place of Rankeilor and his son, and two heirs after them, the Queen's tack is to Dumfermline and his son, and two heirs after them, not beginning from the ish of Rankeilor's tack, but from the date of the Queen's tack, which is declared to be Dumfermline's entry to the these teinds; and as to the Queen's tack, there is a reduction raised against the same, and now repeated by way of reply, that the Queen's right being but a liferent, her tack could endure no longer than her life, and the tacit relocation thereby was interrupted by inhibition. The defender *replied* to the *first*, That though tacks which are short belong not to assignees unless expressed, yet long tacks for several liferents belong to assignees, unless expressly excluded, as hath been often decided. To the *second*, The tack being set to Rankeilor and his heirs succeeding to him in Pinkie, doth only design what heirs he provides that tack to, to the effect that the lands and teinds of Pinkie should belong to the same heirs, so that if he change the possession of Pinkie to heirs-male of tailzie or provision, *hoc ipso*, the teinds of Pinkie would befall to the same heirs, which is an ordinary clause in tacks of teinds, but is no limitation, or clause irritant, hindering him either to assign or appoint other heirs in these teinds; for if he had sold the lands and not the teinds, or if the lands had been apprised from him and not the teinds, it cannot be imagined that thereby he should lose the right to the teinds, but only that the teinds should belong to his heirs and assignees whatsomever. To the *third*, Though accepting a new tack from the same author imports a passing from the old, yet here the setters have different rights, and the tacksman's intention is evident, not to pass from the old, whereof he takes a ratification from the Queen; and it is clear that it is lawful to take incompatible rights by infeftment or tack, which cannot both concur at once, but if either of them

No 31.

be reduced, or taken away, the other may be founded on against a third party, being author of neither, as here the Duke of Lauderdale is, so that if Tweddale should renounce the tack to Rankeillor, he might defend himself thereon, and exclude the Duke. 2*do*, The defender being an apprirer, and finding two tacks in his author's charter chest, he may ascribe his possession to either, as he might have apprised the one and not the other; neither hath he founded upon the Queen's tack, but by a warrant from the Lords both the tacks were produced out of Dumfermline's charter chest, so that if the Queen's tack be reduced, the defender may found upon the Abbot's tack, and having possessed *indiscriminatim*, without ascribing his possession to either tack, law attributes the possession *potiori juri*, and so to the Abbot's tack, if the Queen's be temporary; and the defender and his authors having possessed so long by these tacks, they are not not only secure as *bona fide possessores*, or by tacit relocation, but they have the benefit of a possessory judgment, having possessed 7 years without any interruption, which doth still secure them till reduction, which is but now lately raised; wherein if the pursuer insist, the defender hath this relevant defence, that there can be no reduction of his right till Rankeilor his author be called, and no objection against Rankeilor's tack is competent by reply. It was *duplied* for the pursuer, That he needs not reduction, nor makes use of it as to Rankeilor's tack, nor can it have the benefit of a possessory judgment, because the defender succeeding in Dumfermline's right, continues Dumfermline's possession, which cannot be ascribed to the Abbot's tack, but to the Queen's tack, by which Dumfermline declared his entry to possess, to be of the date of the tack; and whatever might be pretended in case the Queen's tack was reduced *simpliciter* as null, that the first tack might be founded on, because a null tack is no tack, but it is beyond question the Queen's tack was valid, she having unquestionably a liferent-right, whereby her tack was good during her life, but ceased thereafter; and the pursuer hath good interest to allege that the first tack is innovated and passed from, as well as he might allege it were renounced, for thereby it ceaseth, and his right takes place *remoto medio impedimento*.

THE LORDS found, that the defender could not found upon his tack, unless it were found competent to assignees, and that he produced an assignation from Rankeilor to Dumfermline, and that there needed no reduction, or calling of Rankeilor as to that tack, because the defence thereon could not be relevant, unless the defender found upon a progress communicating that tack to him, which if it were not communicable, or not communicated, could not defend him; but the LORDS found, that the defender's author Dumfermline having accepted a tack from the Queen, valid in itself during her right, being of a different commencement, endurance, and tacksmen, that he did not innovate and pass from the former tack, and it was incompatible therewith, and yet the ratification of the former tack could have no effect, not being rested in, but another right being accepted, incompatible with the ratification; but seeing the defender and his authors had possessed 7 years by the Queen's tack after her death, before any inhibition or interruption, the LORDS found that the de-

No 31. fender had the benefit of a possessory judgment, and freed him from the bygone teind duties before the reduction, but found the reason of reduction relevant against the Queen's tack, that her right was temporary by liferent, *et resoluto jure dantis resolvitur jus accipientis.* But the LORDS did not determine or sustain that Rankeilor's tack was not assignable, because it exprest not assignees, or that it ceased so soon as Rankeilor ceased to be fiar of Pinkie.

Fol. Dic. v. 1. p. 433. Stair, v. 2. p. 598.

1724. *July* 14. JOHN and THOMAS WHITES *against* HUGH SNODGRASS.

No 32.
A person disponed his lands to his nephews, who at the same time granted to the disponer a bond for a certain sum payable to him and his assignees, which in the narrative was said to be the onerous cause of the disposition. Some years after this, the disponer granted to the same persons another disposition of the same lands, bearing to be for onerous causes, and an equivalent paid of the worth of the lands, of which he thereby discharged the disponees. Found, that by this last disposition, the bond given by the disponees was not discharged.

HUGH SNODGRASS of Nettleherst, in May 1711, executed a gratuitous disposition of his lands in favours of the pursuers (his nephews by a sister) which he burdened with his own liferent and payment of his debts, and the disposition was to become void in case of his having heirs of his own body; he also reserved a power to alter or innovate at pleasure. Of the same date with this disposition, the disponees granted a bond for L. 3000 Scots, payable to him or his assignees, secluding heirs or executors; and this bond mentioned, that it was given as the onerous cause of the disposition.

In August thereafter he made a second disposition of the same lands in favours of the same persons, which varied in no other way from the former, than that it was conceived irredeemable, and upon this disposition the pursuers were infeft.

In the year 1719, he granted a third disposition of the same subjects to the persons above mentioned, which bore to be for onerous causes, and a sum of money paid equivalent to the worth of the lands, of which he thereby discharged the pursuers, for himself, his heirs, executors, or assignees; and this he declared was in corroboration of the second disposition.

In December 1722, he gratuitously assigned the bond for L. 3000 to Hugh Snodgrass the defender, who was his nephew by a brother, and his heir of line; the assignation was intimated to the Whites a few days after it was granted, and inhibition was used against them; upon which they insisted in a reduction of their own bond; and *contended*, That by the last disposition, which proceeded upon a narrative of an adequate price received, there was an innovation of the former right; at least in so far as to be an effectual discharge of the back-bond relative thereto; for had the disposition *anno* 1711, and the back-bond been conceived in way of a contract, with an obligation to pay a certain price at the disponer's death, there could be no question, but that a subsequent disposition of the same lands to the same persons, bearing the price to be instantly paid, would be an extinction of the former obligation. It was farther *argued*, That though the pursuers should not be able to instruct, that there was a price really paid when the last disposition was granted, yet that could make no difference in a question betwixt them and this gratuitous assignee, because he could be in no better case than his cedent, who could not quarrel a disposition from himself upon the head of its being granted without payment of any price, since the deed expressly contained an acknowledgment to the contrary.