

1680. February 5.

RAE against FINLAYSON.

JOHN RAE having bought a tenement in Leith from David Aikman, pursues the tenants for mails and duties, who *alleged* absolvitor, because he had a tack for nine years from David Aikman for L. 36 yearly of tack-duty ; and bearing this clause, ' That he should repair the tenement which then was ruinous, and should retain the expenses of reparation, and if it exceeded the tack-duty, the setter was obliged to pay him,' and offered to prove that he had necessarily and profitably expended the whole tack-duty in his nine years tack ; and seeing by act of Parliament it is declared, that purchasers shall not break tenants' tacks, they are thereby become real rights, effectual against singular successors, as was found in the case of Oliphant against Currie, 11th December 1677, *voce* TACK ; where Charles being infest upon apprising of the lands of Mordington, pursues the tenants for mails and duties, and Currie defending upon a tack, being 1300 merks of tack-duty, relief of teind, and two dozen of capons, with a clause of allowance of the Provost's annualrent, which exhausted the tack-duty, except the capons and relief ; this tack was sustained against Charles the singular successor ; and the allowance of reparation ought much more to be effectual ; *2do*, The necessary reparations being profitable, both to seller and buyer, both must be liable therefor, though there were no clause of retention in the tack.—The pursuer *answered*, That it is clear by the tack, that the clause of retention, and repetition of the excesse is annual ; for if thereupon the tenant had pursued for the reparation of the first year, which was greatest, he could certainly have recovered the excesse above the rent, and the setter could not defend himself, that the tenant behoved to accept of the subsequent tack-duties, in which he had allowance by the tack, there being no such clause in the tack, and therefore this clause is merely personal and annual, and so it is not effectual against a singular successor ; nor is it like to Currie's case ; for there, ' by the tenor of the tack there remained a yearly duty, payable to the setter, over above the allowance of the tenant's annualrent, and if the tack-duty had been but a plack, upon consideration that the annualrent was yearly to be discharged, the tack would have been effectual ;' but here the retention is indefinite, and exhausts the whole tack-duty, contrary to the act of Parliament founded on, bearing, ' That the buyer shall not break the tenants' tack, they paying such like duty to the buyer as to the seller.' As to the second, neither the building nor repairing of houses, though never so necessary, infers any real right or hypothec upon the house ; though that hypothec was constituted by the common law, but is rejected by our custom ; and as there was no *debitum reale* upon the house, much less can there be *debitum personale* upon the buyer, who hath no profit by the reparation, seeing he bought the house, as it was worth when repaired.

No 43.
Reparation by a tenant found not to affect a singular successor, tho' provided to be allowed in the tack.

No 43.

THE LORDS repelled the defence upon the clause in the tack, and found the clause to be personal, and not effectual against a singular successor, purchasing *bona fide* for a just price: But if the buyer took assignation to the tack, or knew thereof the time of the bargain, the LORDS allowed the parties to be heard upon that point: But seeing tacks are not ordinary in tenements within burgh, as in lands in the country, they found the buyer not obliged to enquire, whether the tenants had tacks, or what they were.

Fol. Dic. v. 2. p. 66. Stair, v. 2. p. 751.

* * * Fountainhall reports the same case:

IN a case John Rae against James Finlayson, the following point was debated. There is a tack set in April *per verba de prasenti*, (the tacksman having been in the natural possession as a tenant before,) the entry of the tack is suspended till the separation of the corns from the ground. In July thereafter, which is before the entry of the tack, there intervenes an infestment on a comprising, or a disposition; *Quær.* Whether this will be preferred to the tack or not? If the tack were a consummate tack before the infestment, by attaining possession it would be preferable; but here is difficulty, that though he be in possession before the said infestment, yet it is not by virtue of the said tack. The said tack bore also this clause, that in regard the houses set were ruinous, therefore it should be lawful for the tacksman to repair them, though the reparations exceeded the tack-duty for many years, and he should have retention of his tack-duty till he were reimbursed of his meliorations: *De facto* he wares seven years tack-duty on them. Thereafter, this tack-duty is appraised from the setter, and the appriser pursues for the tack-duty of these seven years. The tacksman opposes the express quality of the tack.—It is *replied*, That clause is only personal against the setter.—*Duplicated*, It is real and incorporated with the tack.—*Triplied*, A clause in a tack to possess ay and until a sum be paid is not real, neither doth it defend against a singular successor; *ergo*, neither will this clause. Many thought it only personal. See TACK.

Fountainhall, v. 1. p. 95.

1685. *January.*

SINCLAIR against SINCLAIR.

No 44.

AN appriser having restricted his apprising to certain lands, and the restriction being objected to a singular successor infest upon the apprising; found, That if infestment had followed upon the apprising before restriction, the restriction was but personal; but if it preceded infestment, it did affect and regulate the apprising against the singular successor, because, till infestment, the apprising was transmissible by assignation.

Fol. Dic. v. 2. p. 64. Harcarse.

* * * This case is No 62. p. 5324. *voce* HEIR APPARENT.