

1725. January 6.

WILLIAM RICHARD, Tenant in Fedinch, *against* DR. WILLIAM LINDSAY.

Pitillo of Balhoussie, in the year 1705, set a tack of the half of the lands of Fedinch to George Richard, the pursuer's father, for 19 years. In the year 1720, he set him another tack of the same lands for other 19 years, to commence at Martinmas, 1724, which was the ish of the former. In this last tack there was no reference to the first, and therein the tack-duty was bettered.

In the year 1721, Balhoussie having sold these lands to Dr. Lindsay, Richard, the pursuer, brought an action of declarator against the Doctor, concluding, That the last tack, entered into during the currency of the former, should be declared good and valid against the defender, notwithstanding of the sale; and in this process there was a removing at the Doctor's instance repeated. The reasons insisted on for the tenant were, *1mo*, Because, by the 18th Act, Parl. 6. James II. (which was introduced in favour of poor labourers of the ground), tacks are real burdens upon the land, and effectual against singular successors; and that this last tack was nothing else than a prorogation of the first, appeared from its being to commence precisely when the former expired; *2do*, When the bargain was entered into betwixt the defender and Balhoussie, this second tack was communed upon, and made known to the defender; *3tio*, The pursuer had been at considerable expense in improving of the ground, upon the faith of this last tack; and, *4to*, The disposition to the Doctor being on death-bed, Balhoussie's heir might reduce the same; and the heir being liable in warrandice of this last tack, the reduction must likewise be competent to the pursuer in defence of his tack.

It was answered for the defender, *1mo*, That it appeared, from the words of the law, and the constant practice since, that only such tacks were real and effectual against singular successors in virtue of which the tenant was in possession of the lands; and that this last tack could not be thought a prorogation of the former; for as it had no reference to it, so the tack-duty was different; and if such new and latent tacks should be sustained against purchasers, they never would be certain of attaining the possession of their purchases, for there might be such tacks granted *in infinitum*. *2do*, The purchaser's private knowledge of this tack was not relevant to support it, because he knew it was void in law; and therefore he could no more be tied by it than he could be hurt by purchasing after a null inhibition upon record. *3tio*, The pretence of expenses in improving the ground was affected, for the tenant had done no more than he was bound to by his first tack. *4to*, There was no reduction at the heir's instance; and the tenant never could come at it, but by a constitution against the heir upon the warrandice of his tack; and this action of warrandice could not take effect, but upon eviction.

No. 83.

Prorogation of a tack for a second term of years, to commence at the expiry of the first, found good against a singular successor.

No. 83. The Lords sustained the declarator as to the second tack, and found the same imported a prorogation of the first tack to defend against a singular successor; and found it also relevant, that the defender knew of the second tack at the time of the purchase proveable by his writ or oath: And, further, sustained the other point, that the disposition granted to the defender was on death-bed, without consent of the heir, who, by the warrandice of the tack, was bound to maintain the pursuer's possession; and found the pursuer might, on these grounds, repeat a reduction, by way of defence, in his process of removing.

Act. *Ja. Paterson.* Alt. *Ja. Graham, sen.* Reporter, *Lord Milton.* Clerk, *Justice.*

*Edgar, p. 143.*

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1757. January 4.

THE CREDITORS OF LORD CRANSTON *against* THOMAS SCOT.

No. 84.

Retention of rents allowed by the landlord to his tenant, in consequence of cautionary obligations, and prorogation of his tack for the same cause, whether good against creditors?

Lord Cranston, in April 1735, granted a lease to Thomas Scot, to continue for twenty-one years, from Whitsunday 1734. In 1750, Scot became cautioner for Lord Cranston in a debt of £.527, which he was soon after obliged to pay; and for his relief, Lord Cranston, in August 1752, gave him a prorogation of his tack for three periods of twenty-one years, to commence at Whitsunday 1755, when the former lease expired, at the same rent as in his first lease; with a power to retain, for his payment, the fine or grassum stipulated in the new tack; and also to retain the surplus rent of his farm from the year 1751, over the interest he was previously bound to pay out of it to certain heritable creditors.

In the year 1754, the estate of Lord Cranston was sequestrated. The creditors of Lord Cranston, by infeftments and adjudications posterior in date, contended, That as possession had not commenced upon the prorogation of Thomas Scot's tack, it had not become real before the sequestration; and was therefore ineffectual against them. And *2dly*, That Scot could not even be entitled to retain the surplus rents from 1751 to the time of the sequestration, because their adjudications and infeftments, though posterior to the date of his new tack, became preferable to his assignment from their dates. And further, the sequestration was preferable to such assignment, and must attach all the bygone rents in the tenant's hands.

Answered, Lord Cranston, at the time of granting the prorogation, was in full possession of his estate; the rent was not thereby diminished; and this reasonable act of administration could not be rendered ineffectual by the posterior sequestration; especially as Scot was to be considered as a tacksman in the immediate possession, agreeable to the decision, *Richard against Lindsay, (supra)* though the term of entry upon the prorogation of his tack was not commenced.—*2do*, The surplus rents from 1751 to the date of the sequestration, were to be considered as *bona fide percepti*, and already applied for payment of the cautionary debt.