

1742. December 2.

BARTLET *against* STEWART.

No 123.

Effect of the clause, "that the tenant shall remove without warning."

IN the question between Robert Stewart, late Provost of Aberdeen, (whose lease of the lands of Dunnotter and Fetteresso from the York-Buildings Company bore a clause, That at the expiry of the tack, which was at Whitsunday 1740, he should remove, that the Company might enter thereto, without warning or process of removing) and William Bartlet, who had obtained a new lease, commencing from Whitsunday 1740, it was *argued* among the Lords, What should be the effect of such clause?

And it was agreed, that though a formal warning was not requisite, yet still some notice or intimation to the tenant was necessary in time for the tenant's providing himself; which in common cases probably might be thought to be 40 days before the term, though that was not spoke to.

It seemed also to be thought, that if once the precise term passed, at which by the tack the removal is agreed to be without warning, without the granter taking the benefit thereof, the clause would have no more effect; for that the obligation would not continue with respect to every subsequent term. But this received no judgment.

It was only in general found, that in regard no intimation was made to Provost Stewart to remove at Whitsunday 1740, he was *in bona fide* to intromit with the rents of crop 1740.

Fol. Dic. v. 4. p. 225. Kilkerran, (REMOVING.) No 4. p. 481.

* * C. Home reports this case :

ANNO 1721, the York-Buildings Company granted a lease of several lands to Provost Stewart, &c. their assignees and sub-tenants for the space of 19 years, from Whitsunday 1721; and by the lease, the tacksmen bound themselves to remove at the expiry thereof, without any warning, or process of removing. This tack determined at Whitsunday 1740, before which the Provost made the Company several offers for a renewal of his lease, which they refused, and, in April 1741, they granted a new tack of the said subjects to James Holworthy, who assigned the same to William Bartlet, upon which he claimed a right to the rents of the lands 1740 and 1741; and in the competition that ensued therefor, it was *pleaded* for William Bartlet, That Provost Stewart ought, in terms of his tack, to have removed at the expiry of his lease (Whitsunday 1740) though he was not formally warned to remove; and even abstracting therefrom, there were no *termini habiles* upon the statute 1555, for a legal warning, in order to debar him from uplifting the rents of lands of which he had no natural possession, the whole of that act being apparently calculated allenary for tenants, who are in the natural possession; consequent,

ly, if there was no necessity for a warning, there could be no tacit relocation, which is the consequence of the omission to warn; and this will be of more force, if the nature of the tack to the Provost is considered, which indeed approaches nearer to an assignation to the rents of lands than a proper tack, seeing it could never be in the view of parties, that the tacksmen were to apprehend the natural possession of the lands; besides, as the Company rejected the Provost's offers, it was a sufficient notification to him, that they did not intend he should have any further concern in the lease, upon the conditions he had it before, whereby there can be no place for pleading a tacit relocation, supposing the contract were of that nature as to admit of it; besides, William Bartlet sufficiently interpellated the Provost from intromitting with any of the rents, as he took instruments against him in June 1741, not only to account for his past intromissions, but likewise that he should desist from uplifting any more of the rents in time coming, which is sufficient interpellation as to the crop 1741. See Stair, Tit. TACKS, § 23.; 6th March 1632, Lady Lauriston, No 46. p. 13810.; and a late case betwixt Lord Darnly and Campbell of Shawfield, See APPENDIX.

Answered for Provost Stewart, That no notice or intimation was ever given to him by the Company, or any other in their right, that he should remove at Whitsunday 1740, when the tack expired; neither did he ever show any inclination to renounce; which mutual forbearance, he understood, amounted to a tacit relocation, upon the footing of the former tack, in consequence whereof he uplifted the rents from his sub-tenants; that his title to the two years rent in question, in virtue of tacit relocation, is clearly founded on the principles of law; as it could not be disputed, that his lease was a tack in the most proper sense and form, such as entitled him to the natural occupancy of the lands, though, for his conveniency, he sub-set the same, so that the nature of the subject was clearly capable of tacit relocation; and if it had not been for the clause in the tack, dispensing with a warning, there can be no doubt but it would have been necessary, seeing, with respect to the Company, the Provost was the proper and immediate tenant of the whole lands let by the lease. Nor is it material to inquire, whether a warning would have been necessary, if that solemnity had not been dispensed with in the tack, because such dispensation does not bar tacit relocation, which takes place by the silence and acquiescence of both parties. Neither can the intimation in June 1741 have any effect or operation, even with respect to the rents of that year, seeing the tacit relocation commenced at Whitsunday 1740; after which he ought to have had due notice some time before Whitsunday 1741, to remove, otherwise he had a title to the rents of that year due by his sub-tenants, upon the footing of tacit relocation. See Stair, Tit. TACKS, § 38. & 23.; Craig, § 10. *hoc. tit.*

THE LORDS, in respect no intimation was made to Provost Stewart to remove at Whitsunday 1740, nor any person appointed by the Company that year to uplift the rents, found he was *in bona fide* to intromit with that year's rent, and

No 123.

is only accountable for the tack-duty ; but found him accountable for the rents, crop 1741,

C. Home, No 211. p. 352.

1744. July 28.

ANDREW EDMONSTON of Ednem *against* ARCHIBALD and JAMES BRYSON.

No 124.

A promise made by a tenant, who possessed by tacit relocation, to remove at the next ensuing term, while it was competent to the master to use a formal warning, and not resiled from till the term day, when no warning could be used, found binding upon the tenant.

ARCHIBALD BRYSON possessed the farm of Boonerton of Ednem several years, under the pursuer's father, by a verbal agreement ; and after the late Ednem's decease, the pursuer, as apparent heir to his father, allowed the tenant to take in James Bryson his son, as sub-tenant in part of the farm.

In February and March 1744, the pursuer had several communings with them anent their giving more rent for the farm, which they refused ; whereupon, as the time of warning was drawing near, he asked them, If it would be necessary for him to use a formal warning ? To which Archibald, in the presence and hearing of his son, told the pursuer, that they would take no advantage of him, if he should not think fit to warn them away ; and that it was not necessary for him to use any warning, and that they would remove at Whitsunday next. When the term came, they refused to remove, which obliged the pursuer to raise a process of removing, and *insist*, That as the Brysons had come under an express promise to the pursuer, to remove at Whitsunday last, which he offered to prove by their oath, they were bound thereby to remove accordingly, without any legal warning against them ; and that it was not in their power to resile just upon the term-day, *rebus non integris*.

Pleaded for the defenders, That the pursuer being not yet infeft in the lands, could not insist in a removing ; *2do*, That a verbal promise to remove was not binding, but that parties might resile till it was put in writing ; *3tio*, That as the pursuer was not bound to let them go at Whitsunday, by accepting of a renunciation from them, it would be unequal to find them bound to remove while the pursuer was loose ; *4to*, A separate defence was made for James Bryson, that though he was present when his father made the promise, yet he gave no express consent thereto.

Answered to the *first* defence, That it was not competent to object to the pursuer's title, as the defenders acknowledged he was apparent heir to his father, from whom they received their possession ; and that they had paid rent to him as such, which was such an acknowledgment of his right, as barred them from objecting thereto ; neither was there any place for this objection here, seeing he was not insisting to remove the defenders, in consequence of any real right in the lands, but merely upon the express promise made by them to him. There could be no doubt the pursuer was entitled to continue his father's possession, and had a full right to his estate, barring, that his title wanted