

No. 22. of his working, which cannot be applied to the event which, by his fault, has fallen out.

The Lords found the letters orderly proceeded.

Act. *Boswel.*

Alt. *Hay.*

Clerk, *Gibson.*

Bruce, v. 1. No. 113. p. 141.

1742. *January 15.* LORD BRACO *against* SIR HARY INNES.

No. 23.

A verbal promise not to remove a tenant is not proveable by the master's oath.

Anno 1724, Lord Braco set a tack, for nine years, of his salmon fishing in the Spey, to Sir Hary; and, after the term was expired, charged him to remove. Sir Hary suspended, on this ground, That the charger had frequently promised not to remove the suspender so long as he paid the yearly tack-duty, and offered to prove it by his oath; so that the question resolved into this, How far or how long a verbal paction or promise, not to remove a tenant, may subsist and be effectual?

In support of the reason of suspension, it was urged, That though it be held to be the law of Scotland, that verbal tacks are only good for one year, and consequently may not be proveable by witnesses, so as to have effect for a longer space, or not to be good against singular successors, yet the present case is somewhat different, where the promise or paction not to remove the suspender is offered to be proved by the oath of the charger, which is not to create a real right without writing; but the suspender, being already in the natural possession of the subject, is entitled to continue therein, paying his rent by tacit relocation, until that be taken off by warning, &c. which has been used in this case: But the question is, Whether paction or promise, on the part of the pursuer, if the same shall be acknowledged, does not afford a sufficient exception in this action, so as to repel, *personali exceptione*, the pursuer from insisting therein, contrary to such paction. The rule *quoad pacta servanda*, &c. admits indeed of various exceptions; but this question does not fall under any of them; for here the promise is not to do or perform any thing, consequently the obligation resulting therefrom is completed, being no more than to abstain from warning or removing the suspender, while the charger continues heritor, and the tenant pays his rent duly. The point therefore comes to this, What shall be the effect of this promise? The suspender believes it reaches further than a year, and is not sufficiently implemented, by forbearing removing for a year after the ish of the written tack; because the matter of the paction went further than that. It was not circumscribed to any time, but depended on the payment of the tack-duty. See Spottiswood, REMOVING, p. 279.

Answered for Lord Braco, That writing was necessary to the constitution of a tack for a term of years; not only because such rights as tacks being heritable, and concerning lands, are reckoned matters of importance, but, when granted for a term of years, are alienations: Hence it is, that the promise to grant such

tacks, or even the verbal set for a term of years, can never have any effect, although offered to be proved by the parties' oaths; Keith, No. 9. p. 8400. *voce* LOCUS PŒNITENTIÆ; Skene, No. 10. p. 8401. *voce* LOCUS PŒNITENTIÆ. Nor is there any difference betwixt an heritor's paction or promise to continue or prolong a tack for a term of years to the former tacksman, and a paction or promise that he should not remove the tacksman after the determination of a tack current. This at least is obvious, that both have the same effect; and it is a fair consequence, that where the effects of both are the same with respect to the master and tenant, both ought to be governed by the same rules in law; that is, that such pactions ought to be established by writ, according to the usual solemnities; and wherever writing is to be interposed, there is *locus pœnitentiæ* before the same is subscribed.

The Lords found the reason of suspension not relevant to oblige the charger not to remove the suspender for more than one year after the ish thereof; and it not being denied by the suspender, though alleged by the charger, that the suspender has had allowance to possess two years since the ish of the tack, found there was no need of any proof of the agreement mentioned in this reason of suspension, the same being already sufficiently implemented as far as it was obligatory; and therefore repelled the reason of suspension.

Fol. Dic. v. 4. p. 322. C. Home, No. 187. p. 311.

1750. February 8. GARIOCH against FORBES.

Alexander Garioch of Kinsterey, purchaser of the lands of Lesmore, from Gordon of Wardhouse, pursued a removing against Alexander Forbes, possessor of a part of the lands, who defended himself, upon an agreement between him and Wardhouse, the pursuer's author, which had been executed by two missives, one by Wardhouse, bearing, that Forbes was to have a tack for 19 years, the other from Forbes, accepting the offer. This was sustained against the singular successor; who was found liable in the tenant's expense for disputing it, which he did on the ground, that this was no tack, but only an obligation to grant one, and that such obligations are not effectual against singular successors.

Fol. Dic. v. 4. p. 322. Kilkerran, No. 9. p. 537.

1753: March 6. WILLIAM BARRON against THOMAS DUNCAN.

Barron granted a subset of cersain lands to Duncan, for five years. The agreement was executed by mutual missive letters betwixt them, which were written by a third party; and Duncan entered into the possession of the lands, and possessed the same for one year.

No. 23.

No. 24.
Obligation to
grant a tack,
if effectual
against singu-
lar successors?

No. 25.