

ditor, and took from him an assignation to his tack, but set him a sub-tack, obliging him to relieve him of the tack-duty to the Duke of Argyle, and to pay him L.12 of additional duty. Wallace an anterior creditor who had used personal diligence challenged this disposition on several grounds; among the rest on the ground that the disposition of the tack was not clothed with possession. And Wallace has now adjudged the tack. Answered: The disposition was completed by the tack to the common debtor who was already in possession. We appointed a hearing in presence. We remitted to the Ordinary to enquire and report whether any payments had been made of the sub-tack duties, 10th January 1750.

(The case was ultimately decided in favour of the adjudger, the assignee not having attained possession in any way. It appeared he had received no sub-tack duties prior to the adjudication.)

No. 18. 1752, Feb. 13. THE PURCHASER AND CREDITORS OF JORDANHILL *against* THE EARL OF CRAWFORD, VISCOUNT GARNOCK.

IN 1701 the Earl's predecessor Crawford of Kilbirnie gave Jordanhill a tack for 400 years of a parcel of meadow ground, the tack-duty to be a proportion of the rent of the tenement, to be settled by the tacksman and a friend of Kilbirnie's, the Lord Boyle. In 1708 he sold Jordanhill the whole tenement for a price to be paid and other prestations, particularly thirling Jordanhill's estate to Kilbirnie's, then Viscount of Garnock's, mill. Jordanhill's affairs went into disorder, and the creditors, among the rest adjudged this part of his estate whereof he had not attained possession. But we reduced the minute of sale, not only because the estate of Garnock was entailed, but chiefly because the sale was on Jordanhill's part become imprestable. But he still continued to possess the bit of meadow, at least the factors did, although no rent was paid to Garnock. This bit of meadow was included in the proven rental of the estate and so purchased by Mr Houston the purchaser. But then Earl Crawford (formerly Garnock) claimed the meadow as his property; which brought on different questions. Houston claimed it as a part of his purchase, otherwise to be free of a part of the price. The creditors insisted on the 400 years tack as equal to property; and the Earl objected to the tack so as against law creating in effect a feu and conveying the property without infeftment; 2dly as contrary to the entail; 3dly, without a tack-duty. This was one of the cases reported by Lord Kames as Lord Probationer, though not decided till this day. We all agreed that the tack would not be effectual against singular successors, and that the act of Parliament was only to be understood of tacks of ordinary endurance, otherwise it would render our records of no use. But then we thought it was good against the granter and his heirs, and I thought he might compel them to give him a precept of sasine. As to the third, we thought that where the tack-duty was referred to this *arbitrium tertii* that was no nullity, though he is dead, and that it resolved now *in arbitrium boni viri*, and the judgment of the Court. As to the second, though there was no clause prohibiting tacks, we thought it fell under the clause prohibiting alienations; but then it was objected that the irritant and resolute clauses were not inserted in the titles of the setter of the tack but by reference to the original tailzie, and that the heirs were bound;—and therefore sustained the tack, but thought

the purchaser would be entitled to a proportional abatement, as the rent that should be found due should bear to the proven rental of it.

**No. 19. 1752, Nov. 15. THOMAS AND ROBERT DUNCAN *against* DUNCAN.**

BARRON set a sub-tack of five years to Thomas and Robert Duncan by mutual missive letters, but Barron's letter was not holograph; and the Duncans limed the ground and possessed for a year or two; and then Barron pursued removing in the Sheriff-Court and obtained decret and ejected. The case was brought before us by reduction, and the question was, Whether a tack for five years could be let by a missive letter not holograph but whereof the subscription was acknowledged? Woodhall had found that it could only subsist for one year. The President said he was of the opinion of the interlocutor, which occasioned the Judges giving their opinions, at least several of them at some length. Kilkerran and I distinguished betwixt solemn writs and missive letters. The solemnities of the first are regulated by statute, and they are declared null if these solemnities are not observed. Missive letters are regulated by no statute, but have the authority of custom. Writings that bear to be holograph are probative, unless disproved; but holograph missive letters are not probative, because they do not bear it, unless holograph be proved, which may be done *comparatione*, even after the writer's death. But missive letters not holograph do not prove, and there is no way to prove the subscription but by acknowledgment of the subscriber; but neither the one nor the other are null; and there is no reason why a missive not holograph, whereof the subscription is acknowledged, should not be as binding as a holograph missive when proved. Kilkerran mentioned sundry precedents that I did not distinctly hear, and I mentioned one from my quarto manuscript in July 1726, (not extant) betwixt Sir John Gordon of Park and the relict and children of Northlesly, where the question was touching her conveying her liferent right in lands. At last the President said he was always of our opinion, but only had forgot the terms of Woodhall's interlocutor. So we unanimously reduced the Sheriff's decret, and ordered the petitioner to be repossessed, and found expenses due.

**No. 20. 1754, March 9. ROBERTSON *against* SPALDING of Ashintully.**

See Note of No. 8, *voce* REMOVING.

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**TAILZIE.**

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**No. 1. 1735, July 9. BAILIE *against* CARMICHAEL of Mauldsly.**

FOUND the debts do affect the tailzied estate.

**No. 2. 1735, Jan. 21. CRAIG, &c. *against* DAUGHTERS OF CRAIG.**

See Note of No. 5, *voce* PROCESS.