

No. 129. setter was heritor of the lands, especially seeing the defenders had no right to the lands; which was so found, albeit some were of opinion, that such tacks were only obligations, whereby the setter might be compelled to enter the tacksman in possession of the land, but were not real securities, of force to produce removing, and thereby to make warning, being of the nature of personal securities; but most were of another judgment, there being no tack or right in the proponer's person; and found *ut supra*.

Alt. *Nicolson*.

Clerk, *Gibson*.

Fol. Dic. v. 2. p. 421. Durie, p. 436.

* * Spottiswood reports this case :

In a removing pursued by Gallashiels, younger, against Sir William M'Dowgal, the Lords sustained the action at the pursuer's instance, he having only a tack to the lands from which he craved the defender to be removed, which was neither clothed with possession, nor yet had he power, by virtue of his tack, to remove tenants.

Spottiswood, p. 327.

1664. June 16. LAIRD OF TOUCH *against* FERGUSON.

No. 130.

Found, that a tack of lands let *with woods* gives the tacksman power to cut only for repairing or building of houses upon the ground, but not for sale, or otherwise to dispose upon it.

The Laird of Touch pursues Alexander Ferguson, his own tenant, for cutting and selling his woods *pro damno et interesse*. It was alleged, That he had a tack of some lands belonging to Touch, with woods, glens, pasturage, for nineteen years, to be possessed as ——— Ferguson, his father, formerly possessed the same;— but so it is, that his father did cut. It was answered, That though the tack was set with woods, &c. yet that gives only power to cut for repairing the houses, or building upon the ground, but not to cut and dispo; likeas the pursuer offered to prove, that so oft as the defender or his father cutted and disposed, to their master's knowledge, he stopped and unlaed them in his courts therefore.

The Lords repelled the allegeance.

1664. June 23.—In another process betwixt Touch and the said Alexander Ferguson and his brother John, the one of them being sub-tenant to the other, he was unlaed at several times for not coming to Touch's courts, being warned thereto; the unla *toties quoties* was £.5, and in whole extended to more than £.60. It was alleged, That he being only a sub-tenant, without a tack, is not obliged to compear at the court, unless he were cited at the instance of a party by a complaint or process; and though he were obliged to compear, yet to cite him so often, and to unla him so high, is against justice. It was answered, That Touch lying on the borders of the Highlands, he was necessitated frequently to hold courts, for

causing the tenants do such service, for fencing the lands against the insalling of the Highlanders and their goods, as they have in former times been in use to do, and the unlaw is not exorbitant. No. 130.

The Lords sustained the acts of Court; but modified the £.5 of unlaw to 40s.

Fol. Dic. v. 2. p. 423. Gilmour, No. 103. & 105. p. 78.

1668. February 15. JAMES COLQUHOUN *against* WATSON.

James Colquhoun, pipe-maker in Glasgow, having got a tolerance from George Blair (heritor of Lunloch) to dig clay for pipes there, for certain years, excluding all others, there being an anterior tack of the lands, the tenants grant licence to one Watson for digging clay there for pipes; the heritor also concurs with Watson. Colquhoun pursues Watson for intrusion, and to desist from meddling with any clay there, and for paying the value of what he had meddled with. Watson alleged, Absolvitor; 1st, Because the licence granted to the pursuer, being exclusive of all others, was *contra bonum publicum*; 2dly, The licence was posterior to the tenants' tacks, who thereby had right to the whole profits of the ground, and accordingly gave tolerance to the defender; 3dly, The heritor having granted the tack, could not, in prejudice thereof, give power to the pursuer to break the arable ground, and there being much more clay than the pursuer could make use of, ought to give power to the defender to make use thereof for that effect. The pursuer answered, That a total and negative licence was legal, as well as any other total and sole right; and it was free to the heritor to grant the same, but could do no posterior deed contrary thereto, because he had bound up his own hands thereby; and as to the tack, whether anterior or posterior to the licence, it can only give right to the tenant, *uti frui ut colonus*, to manure the ground, and reap the profits thereof, but cannot give him right to any mineral under the surface, whether coal, limestone, clay, &c. which is reserved to the heritor, and he may make use thereof; which necessarily imports, that he may break up the ground to come at it, or else the right were not reserved to him; and he is most willing to satisfy the tenant's damage by opening the ground; neither need any reservation thereof be expressed, because it is implied in the nature of the tack, which gives only power of the surface, tillage, pasturage, and profits thereof; but the tenant has no power to take away part of the ground, or to give licence to any other so to do.

The Lords repelled the defences, and found the pursuer had the only right by the heritor's exclusive licence, and that the tenant, by his tack, had no right to this clay; and that albeit his tack was prior to the pursuer's licence, he could give licence to no other.

Stair, v. 1. p. 527.

No. 131.

A tack of lands was found to give the tenant no right to minerals under the ground.

Found not entitled to make pipes of the clay.