

No. 102. after her husband's death. Compearance is made for the Town of Aberdeen, who have a right to a wadset granted by the husband after the tack; who alleged, that the tack, having its entry after the husband's death, could have no effect against their public infeftment, albeit posterior thereto, because it is possession only that makes a tack effectual against singular successors. It was answered, That the pursuer being provided to a wadset-right by her contract of marriage, and that being redeemed, she had only this tack in place of it; and as base infeftments to wives, though they bear to be in life-rent after their husbands' death, and so can have no possession during their lives, more than this tack, yet they are always sustained in favours of wives on their contract of marriage, or provisions in place thereof. It was replied, That infeftments have symbolical possession, and are valid rights, though base, albeit public infeftments are preferred to them when they are private, *retenta possessione*; but tacks are in themselves only personal, till they attain possession; but if the tack had been to the wife or her trustee, to take present effect, the husband's possession might have validated the same, and so have enjoyed the benefit of the same, *jure mariti*; but if such tacks as these were found valid against singular successors, being latent betwixt conjunct persons, they could never be secured.

The Lords preferred the infeftment to this tack, albeit it was alleged that, by the custom of Aberdeen, infeftment could not be granted to wives, but to men who are burgesses in the burgh.

*Stair, v. 2. p. 421.*

No. 103.

Effect of an obligation to renew a lease.

1715. February 16. WALTER CARMICHAEL *against* LOCKHART of Cleghorn.

In an action for mails and duties against the tenants of Wester-millrig, at the instance of Walter Carmichael, he produces, as his title, a tack from Sandilands of Boall, proprietor, in favour of Carmichael's predecessors, *in anno* 1618, which bears to be in implement of another tack *in anno* 1597, and acknowledges the receipts of by-gones, and sets the lands for 19 years for an elusory duty containing also an obligation to receive the said Carmichael and his foresaids kindly tenants in the said lands, after the ish of that tack, for £.40 of grassum, at the beginning of each 19 years tack, besides the yearly duty, and to reiterate and renew, as often as need beis, &c. upon which there is a decret of registration *in anno* 1637, and a decret of suspension *in anno* 1638, running in the terms of the tack.

On the other hand, there is produced for Lockhart of Cleghorn, a charter of the said lands, granted by Carmichael of Bonington superior, with a sasine, both proceeding upon a disposition to Cleghorn from his own lady and her sisters, as heirs to Winram of Wiston their father, who had right by an expired comprising against Sandilands.

Alledged for Cleghorn, the heritor, *1mo.* That the tack was null as wanting an ish ; *2do.* That though the obligent to renew might have been good against Sandilands and his heirs, yet it could not militate against him a singular successor.

Answered for the tacksmen, *1mo.* That there was an ish at the expiration of ilk 19 years ; *2do.* That as singular successors are disenabled by act of Parliament to break tacks set to tenants, so here there seems to be no difference between a tack and an obligent to grant one, “*nam pactum de assedatione facienda, et ipsa assedatio parificantur*” providing they be both clad with possession. And it is as easy for a singular successor to inquire into the one as the other, since neither is registrated, and therefore equally presumed to be unknown : For this he quotes two decisions from Viscount of Stair, pag. 314. in fine, where this case has been determined, viz. March 20th 1629, Laird of Finmonth *contra* Weems, *voce* VIRTUAL, and another observed by Hope, viz. Crawford *contra* Minister of Faile, No. 25. p. 14737. *voce* SPUILZIE.

Replied for Cleghorn, That such an obligation to renew, is not a tack ; and if pleaded as such, it is null, as wanting an ish ; for though it might be good for the first 19 years, after expiring of the original tack, yet no longer : Nay the obligation, though perpetual, might indeed bind Boall and his heirs, but not a singular successor ; otherwise such an obligation would be more favourable than a tack itself, which nevertheless cannot stand before a sigular successor, if it want a determinate ish.

The Lords preferred the tacksmen to the mails and duties for bygones, and, in time coming, until removing ; reserving all defences in the removing, as accords.

For Lockhart, *Archibald Hamilton.*

Alt. *Muir.*

Clerk, *Mackenzie,*

*Bruce, v. 1. No. 69. p. 84.*