1747. *February* 19. GENTLE *against* HENRY.

No 37.
A tacksman when entitled to pursue a removing.

ON the 20th May 1745, the Lord Strathallan set in tack to Matthew Gentle the kirk-house of Kinkell, malt-barn, and others thereto belonging, and the ferry-boat of Kinkell, for nineteen years, to commence at Whitsunday 1746. As no precept of warning could be got in spring 1746 from Lord Strathallan, who stood then attainted for high treason, the tacksman was advised to issue a precept of warning in his own name, against John Henry the present possessor, which was sustained by the Sheriff of Perth, who gave forth decree of removing on the 15th August, desiring Henry to remove in forty-eight hours after the charge.

Of this decree Henry obtained suspension; and, at discussing, insisted on the reasons following; that the decree had proceeded without a legal warning in name of the heritor. The only cases in which a tacksman can warn in his own name are, where there is an express power for that purpose given in the tack itself, or where it is a liferent-tack, or where the tacksman has been in possession by uplifting the rents; "nisi in his tribus casibus," says Craig, L. 2. Dieg. 9. De Migrando, § 22, colonus actionem de migrando non habet; 2*dly*, That the tack had become void by the attainder of the Lord Strathallan before the time possession was to follow on it; for by the late act of attainder, unless the persons therein named, shall surrender on or before the 25th July 1746, they are declared to stand attainted from the 16th of April preceeding.

Answered to the first, That the warning was regular in name of the tacksman, as such power to the tacksman is in all tacks implied, as was found, 12th March 1629, Gallowshiells *contra* Mackerston, *voce* TACK. 2*do*, Even in terms of the quotation from Craig, it was regular, as a tack for nineteen years is equivalent to a liferent tack, Stair, B. 2. T. 9. § 41; and to the 2*d*, that without entering upon that question, how far such objection might be competent to the Crown, it was *jus tertii* to the suspender, who has no right from the Crown to make the objection.

THE LORDS found, "That the tack not being for more than nineteen years, and the tacksman not in possession, he had not a title to pursue a removing."

It was on this occasion *observed*, That in no case was a brocard more aptly applied, that omnium quæ a majoribus statuta sunt ratio reddi nequit. One can see a reason, why no other tacksman should have a title to remove, but one who is in possessione fructum recipiendorum, as removing is the effect of a real right; but why a tenant, who has a liferent-tack, should have a title to remove, when, by its being a liferent tack, it does not become a real right; or why a tenant, not in possession, should have a title to remove, when his tack is for thirty years, more than if it were for three years, was said not to be easily understood. Meantime, as our lawyers had so laid it down, that where a tack is for life, as

Craig and Stair, or for more than nineteen years, (for so the Lords understood Stair, *loco citato*, as requiring more than nineteen years), the tenant should have that power, THE LORDS were not willing to give judgment contrary to these opinions. No 37.

As to the 2*d* point, There was no occasion to give judgment on it; though it appeared to be the opinion of the Court, That where a tacksman had not obtained possession before the attainder of the granter, the Court could not give decree for putting him in possession; and that it was not *jus tertii*, as the Court is bound to take notice of the public law.

Fol. Dic. v. 4. *p.* 222. *Kilkerran, No* 4. *p.* 482.

*** D. Falconer reports this case:

MATTHEW GENTLE having, in May 1745, taken from the Viscount of Strathallan, a tack of the ferry-boat of Kinkell on the water of Earn, together with some land used to be set alongst with it, to commence at Whitsunday 1746, executed a warning in March preceding his entry, against John Hendry the former tenant, and obtained decree of removing before the Sheriff of Perth, 15th August 1746.

The decree was suspended for this reason, That a tacksman had no right to remove tenants, unless he either had a liferent-tack, or an express power to remove, or were in possession, Craig, L. 2. D. 9. § 22. Stair, B. 2. T. 9. § 26. who mentioned a tack for several nineteen years, as equal to a liferent-tack, and § 41. insisted that it ought to be for nineteen years and above, to give him this power.

Answered, That a tack for nineteen years, and all above it, were reckoned equivalent to liferent tacks; and a removing was found to be competent to a tacksman, 12th March 1629, Gallowshiels against Mackerston, *voce* TACK.

Replied, That Stair required a tack above nineteen years; and the decision behoved to be understood of a case where possession had been obtained.

Some of the Lords declared their opinion, That no tenant could remove who had not obtained possession; but as this tack was only for nineteen years, they did not determine that point.

THE LORDS found, That the tack not being for more than nineteen years, and not clothed with possession, did not entitle the charger to remove the possessor.

Reporter, *Kilkerran*. Act. *Lockhart*. Alt. *Haldane*. Clerk, *Gibson*.

D. Falconer, v. 1. *No* 169. *p.* 223.