possessor. No doubt a tack, set by a person in possession *qua* proprietor, will defend until warning, because the granter had the *jus possidendi* upon a colourable title; but surely a tack granted by one who never was in possession, nor ever had a colourable title, is not so privileged; and one who takes an assignation, or subset from him, cannot have a *bona fides*, but must know that he is stipulating a thing the granter cannot give him. No 82.

And with respect to the complaint, that the suspender ought to have had a formal summons of removing, it was *answered*, That he was no more entitled to that than to warning; nay, it was not a clear point but he might have been removed *via facti*, as any other servant of the former tacksman might have been.

THE LORDS found the letters orderly proceeded.

Fol. Dic. v. 4. p. 223. C. Home, No 232. p. 378.

1753. *December* 18.

Mrs. PENUEL GRANT and other Tutors to WILLIAM GRANT of Ballendalloch, *against* JAMES GRANT in Chapeltoun.

No 83.
The infant heir of a late tacksman must be warned to remove; and it is not sufficient to warn a person who is in possession for his behoof.

IN April 1741, the deceased Alexander Grant of Ballendalloch set in tack to the deceased William Grant and his heirs, the lands of Chapeltoun, for the space of nineteen years, from Whitsunday 1741. William Grant accordingly possessed the lands, and paid the rent stipulated by the tack till 1747, when he died. After this, his relict continued to possess and manage the farm; William Grant's son being an infant.

In 1749, the relict purposing to marry James Grant, there was a written agreement entered into betwixt her and the infant's two uncles on the father's side; whereby it was stipulated, that the relict should become bound to pay at the next term of Martinmas 200 merks for behoof of the infant-heir, 100 merks to each of two infant daughters, and to aliment and educate all the three for the space of ten years; and the uncles became bound that she should possess the tack during the years yet to run thereof. Soon after this agreement she married James Grant, who gave his obligation to the infants for the said sums. They were also kept in family with him and his wife, and he possessed the lands and paid the rent to Alexander Grant during his life, and for some years to the tutors of his infant-son William Grant.

In 1751, William Grant's tutors warned James Grant to remove from the lands, and obtained decreet of removing against him before the Sheriff-substitute of Bamff.

James Grant obtained a suspension of the decreet, and *pleaded*, That the infant-son and heir of William Grant, the late tacksman, was neither warned to remove, nor made a party to the process of removing, though the person chiefly

No 83. interested; for after his father's death the tack belonged to him, and was not made over by him to the relict his mother by the agreement in 1749; for though she was thereby to possess the lands, yet that was for the behoof of the infant, who was to have a certain sum paid to him, and his yearly aliment, which was certainly a more beneficial bargain for him than if the relict had been taken bound to account for the yearly profits, which might have been very uncertain; and neither is the relict warned to remove, who, if the deed 1749 had been an assignation, would be the tenant.

Answered for the chargers; That it is evident from the deed 1749, that the tack was thereby intended to be made over to the relict; the words are, "That the relict shall continue to possess this farm during the currency of the tack that her husband had, to which her son had right, she paying the rents, services, customs, and others payable by the said tack in the precise terms thereof." Now as the tack did not contain a power to assign, it fell by the assignation, and would also have fallen by the relict's marriage, though it had originally been granted to herself; marriage being a legal assignation.

2dly, The suspender was the person in possession, who laboured the land, paid the rent, and took the discharges in his own name; and a master is only obliged to warn those who are in possession, and is not obliged to call, as in declarators or reductions, all parties having interest.

3dly, The tack founded on could not even have defended William Grant the original tacksman against a removing; because it is null: the witnesses insert therein not having subscribed it. And though the tutors have made search for the other double of the tack amongst Ballendalloch's papers, they have not found it.

Replied for the suspender; That the infant, who has right to the tack, is as much in possession as one of his age can be. He remains in family with his mother and the suspender, who manage the farm for the infant's behoof, though by the agreement 1749, a certain sum is paid to him in place of accounting for the uncertain profits of the tack. And though the tack falls under a statutory nullity by wanting the subscription of the witnesses, yet it is capable of homologation, and is homologated by the tacksman possessing the farm, and the master's receiving the rent in terms of the tack.

THE LORDS were of opinion, That the infant still had an interest in the tack; and that infants having right to tacks could not possess but by others; and, therefore,

They "suspended the letters simpliciter."

Act. *Lockhart & Jo. Grant.* Alt. *Garden.* Clerk, *Kirkpatrick.*

Fac. Col. No 94. p. 143.