

No. 60. that they could not be removed, and might dispoⁿe their rights to extraneous persons. See APPENDIX.

Fol. Dic. v. 2. p. 419.

1730. February 3.

ALISON *against* RITCHIE.

No. 61.

A tack being let for an elusory tack-duty, and for an endurance of 2400 years, was found not to have the benefit of the act of Parliament in favour of tenants, and therefore not good against singular successors. See APPENDIX.

Fol. Dic. v. 2. p. 419.

1737. November 22.

REDPATH of Angelraw *against* WHITE.

No. 62.

In a removing against a tenant, who had entered into possession, in virtue of a minute of tack, which bore no term of endurance, it was pleaded, That a tack wanting an ish, is void and null, Stair, Tit. Tack, § 27. Such a tack must be perpetual or nothing. It is a principle, that all obligations are, in their nature, perpetual; therefore, there can be no *medium*, but either that the tack is null or perpetual; for, supposing it once legally constituted, there is nothing to limit the endurance. Answered, Though other obligations be, in their nature, perpetual, this is inconsistent with the nature of a tack; and therefore it must be *in arbitrio judicis* to fix the time of endurance; and, as to this, there are clauses in the tack, which show it was intended to endure longer than one year, such as, that the tenant is tied to muck a certain quantity of ground yearly, to bring home to his master, every year, twenty loads of coals, &c. The Lords sustained the tack for two years. See APPENDIX.

Fol. Dic. v. 2. p. 420.

1758. December 6.

HIS MAJESTY'S ADVOCATE *against* CAPTAIN JAMES FRASER of BELLADRUM.

No. 63.
Tack for
1140 years
valid

Upon the 8th June, 1670, Hugh Lord Lovat, in consideration of a sum of money advanced, granted a tack to Simon Fraser, his heirs, assignees, or subtenants, of the lands of Fingask, for nineteen years, from Whitsunday 1670; "and after the ish and expiration of the said nineteen years, for all the days, years, and terms of other nineteen years; and at the ish and expiry of the said second nineteen years for all the days, space, and years and time of other nineteen years; and so forth, from nineteen years to nineteen years, during all the years of twenty times nineteen years; and after the expiry of the said space of the said first twenty times nineteen

years, for all the years of other twenty times nineteen years, and ay and while the said second twenty times nineteen years be fully completed and outrun ; and after the expiry of the second twenty times nineteen years, for all the space of other twenty times nineteen years ; and ay and while the said three times twenty times nineteen years be completed and outrun ;" with warrandice at all hands, and against all mortals.

The tack-duty payable by the tenant was 56 bolks farm-bear, 4 bolks horse-corn, 2 custom-cows, 4 wedders, 4 lambs, 4 dozen poultry, and 15 merks of tithe. A precept of sasine was subjoined to this tack, upon which the tenant was infest 16th June 1670, and his sasine duly recorded upon the 30th of the same month.

Upon the 14th November, 1673, Hugh Lord Lovat being then dead, and his estate vested in the Earl of Seaforth, Sir George Mackenzie, and Hugh Fraser, by virtue of certain apprisings ; these apprisers confirmed this lease by a writing upon the back of it.

Upon the 14th January, 1701, William Fraser, eldest son of Simon Fraser the tacksman, in consideration of £.400 Scots, assigned the lease to Hugh Fraser of Belladrum.

Upon the 19th March, 1747, Lord Lovat was attainted ; and James Fraser of Belladrum, the tacksman, entered a claim upon the tack, although the statute did not require claims to be entered upon tacks.

It was objected to this lease by his Majesty's Advocate, *1mo*, That being for so long a term as 1140 years, it was an anomalous right, and could not be effectual by the law of Scotland ; *2do*, Supposing it good against the granter and his heirs, yet it could not be good against a purchaser ; otherwise the faith of the records would be unhinged, and purchasers rendered insecure ; *3dly*, That the late Lord Lovat was not heir to Hugh Lord Lovat, the granter of the lease, but possessed the estate as a singular successor, or purchaser from Hugh Fraser, the great-grandson of the granter ;—and that Hugh Fraser himself did not represent the granter ; for that Lord Hugh, the granter's son, did not represent his father, but possessed upon apprisings and adjudications ; and Hugh Fraser, his grandson, who conveyed the estate to Lord Lovat, did also possess upon singular titles.

Answered, *1mo*, There is no law, or usage limiting leases to any certain number of years. Every lease, of whatever endurance, is, at common law, good against the granter and his heirs. Thus a lease was sustained against the heir of the granter, which was let " as long as the grass groweth up, and the water runneth down ;" 23d January, 1717 Curruthers against Irvings No. 59. p. 15195.

It is besides an established point, That tacks are capable of being confirmed by the positive and negative prescription, so as to cut off all challenge on account of want of power in the granter, as has been decided in several cases with respect to long tacks of teinds ; and prescription must also confirm this tack against any challenge on account of the length of its endurance.

2dly, It was the ancient practice, prior to the statute 1449, to insert a precept of sasine in tacks, and to take infestment, which had the effect to render

No. 63. them valid against purchasers ; and this method was followed in the present case : But, independent of that infestment, this tack must be effectual in consequence of the statute 1449, by which all tacksmen in possession are declared to be secure against purchasers ; so that unless the length of the endurance shall be considered as a nullity of the lease, it must be effectual both against the heirs of the granter and against purchasers. And upon the faith of the law so standing, many leases have been purchased in different parts of the kingdom for a thousand, and others for several hundred years. A list of many such leases was exhibited ; and it was averred, that in several instances great sums had been laid out in buildings, and other improvements, upon the subjects leased.

Neither is it true, that the faith of the records will be exposed to any danger by supporting such leases ; because the statute 1449 is only in favour of tenants who are in the natural possession, and no purchase of land is ever made without inquiry made at the tenants with respect to the endurance of their leases, who have no interest to represent them as shorter than they truly are.—Supposing, therefore, that Lord Lovat had been truly a purchaser, yet this lease must have been binding upon him ; and, of consequence, must be good against the Crown in his right.

3dly, Though Lord Lovat, the forfeiting person, purchased the estate from Hugh Fraser, yet he was bound by an express article of the bargain, to indemnify Hugh Fraser against the warrandice he should incur in consequence of any challenge brought against the deeds of Hugh Fraser's predecessors.—Lord Hugh, the son of the granter, did indeed possess the estate upon an apprising for a very small sum ; but that apprising did not comprehend every part of the estate ; and therefore his possession of the other parts not contained in the apprising did subject him to a passive title. Hugh Fraser, the grandson of Lord Hugh, did also incur a passive representation of the granter of the lease ; for he granted a trust-bond to the late Lord Lovat for £.30,000 Sterling, for the purpose of completing a title to the estate in Lord Lovat's person ; and upon that trust-bond, Lord Lovat did, by adjudication, make up a title to the whole estate of Lovat, and in particular to the superiority of the estate, which remained in the *hereditas jacens* of the granter of the tack ; in consideration of which trust-bond, Lord Lovat paid to Hugh Fraser £.12,000 Sterling. Hugh Fraser, by this sale of the superiority, did therefore subject himself to a passive representation of the granter, and was bound to fulfil his predecessor's deeds, at least to the extent of what he gained by the succession ; and as Lord Lovat, the forfeiting person, became bound by the transaction with Hugh Fraser to indemnify him for the warrandice he should incur in consequence of any challenge brought against the deeds of his predecessors ; no challenge could therefore be brought against this tack by the late Lord Lovat : And the crown, in his right, is also barred from all such challenge ; especially as Lord Lovat had confirmed the lease, by accepting of the rent under it for a course of years.

Upon the 14th January, 1758, the Court found, That the tack in question was good against the heirs of the granter ; but found, that it was not good against

Simon late Lord Lovat, the forfeiting person ; nor is now against the Crown, as coming in his place. No. 63.

Upon the 22d December, 1758, upon advising a reclaiming petition and answers, the Court again found, That the tack in question was not good against the Crown.

Upon the 3d February, 1759, upon considering a second petition and answers, the petition was found not competent, so far as it reclaimed against two interlocutors in presence, finding the tack not good against the Crown ; but the Court resolved to consider, if the tack may be restricted to a shorter time, and to what time it may be restricted ; and ordered memorials upon that point. And these memorials having been given in :

“ The Lords, in respect of the consent of his Majesty’s Advocate, found, That the tack in question may subsist for nineteen years from and after Whitsunday 1765, and no longer.”

N. B. This judgment was, in March 1762, reversed upon an appeal, and the claim sustained.

Act. Macqueen, King’s Counsel. Alt. Johnstone, J. Dalrymple, Lockhart, and Ferguson.
Fol. Dic. v. 4. p. 321. Fac. Coll. No. 141. p. 256.

1760. June 27. IRVINE and FORSYTH *against* KNOX and ARNOT.

The Lords sustained a tack for 1260 years.

Fol. Dic. v. 4. p. 321. Fac. Coll. Sel. Dec.

* * * This case is No. 33. p. 5276. *voce* HEIR APPARENT.

1673. November 17. WIGHT *against* EARL of HOPETOUN.

A tack granted for two nineteen years, with an obligation on the granter, his heirs and successors, to renew it after that term from nineteen years to nineteen years in all time coming, upon the tenants paying a certain sum as grassum at each renewal, was found binding against a singular successor in the lands, who had accepted of a disposition with an exception of tacks and obligations to grant tacks, in the clause of warrandice.

Fol. Dic. v. 4. p. 321. Fac. Coll.

* * * This case is No. 35. p. 10461. *voce* PERSONAL OBJECTION.