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To the *fourth*; The case of the Marquis of Annandale will not apply; for, 1*mo*, The question here is with a purchaser, whose business it is to examine his author's rights; there, it was with a creditor trusting to a charter and sasine, where it is not usual to examine the warrants of the debtor's investiture; 2*do*, The Marquis of Annandale having long possessed his father's estate, considering him only as apparent heir, his debts became effectual against succeeding heirs.

"THE LORDS found the pursuer barred *personali objectione*, as heir of Elizabeth Williamson."

Act. *David Greme.* Alt. *John Craigie.*

A. W. *Fol. Dic. v. 4. p. 79. Fac. Col. No 58. p. 140.*

1763. *November* 17.
ROBERT WIGHT, Tenant in Murrays, *against* JOHN EARL of HOPETON.

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A tack for two 19 years, containing an obligation to renew from 19 to 19 years, sustained against a singular successor, who was found barred *personali exceptione*, from refusing to fulfil the obligation undertaken by the person from whom he had purchased.

UPON the 19th of June 1718, John Cockburn, then younger of Ormiston, granted a lease of the farm of Murrays, part of that estate, to Robert Wight, and his heirs, (secluding assignees, except such as the said John Cockburn, and his heirs, should be content with and accept of,) for the space of two 19 years from Whitsunday 1718.

This lease contained a clause in the following terms: 'And the said John 'Cockburn binds and obliges him, his heirs and successors, to iterate and re'new thir presents, from nineteen years to nineteen years, after the said two 'nineteen years are first completely out-run and expired, upon the said Robert 'Wight, his heirs and successors, paying, upon each renewal, the sum of 'L. 100 Sterling, as a grassum or entry of the foresaid lands, to the said John 'Cockburn, his heirs or assignees, at the said Robert Wight, or his foresaids, 'their entering to the foresaid lands, after the expiration of the said two nine'teen years, as said is. Which tack and assedation the said John Cockburn 'binds and obliges him, and his foresaids, to warrant, acquit, and defend to 'the said Robert Wight, and his foresaids, at all hands, and against all dead'ly, as law will.'

In 1745, the said John Cockburn disponed the estate of Ormiston to his only son, George. The disposition bore, that George had paid L. 21,745 Sterling of price; and it contained a clause of absolute warrandice, with the following exception: 'Excepting from my said warrandice the feu-rights of certain parts 'of the said lands, granted by me in favour of sundry persons; as also the 'standing tacks of the said lands, barony, and others, set by me, my prede'cessors and authors, to the present tenants and possessors thereof; without 'prejudice, nevertheless, to the said George Cockburn, and his foresaids, to

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'quarrel and impugn the said feu-rights and tacks, on any ground of nullity 'in law, providing the same do not infer warrandice against me and my fore-'saids.'

Robert Wight had two sons, Alexander and Robert. Alexander succeeded to the lease, and granted a subset to his brother Robert; and, upon the 20th of February 1747, he assigned to Agnes Wight, the widow of his said brother Robert, then deceased, in trust, for the use and behoof of Robert Wight, her only son, and the heirs of his body; whom failing, to return to himself and his own heirs, the said tack, and whole obligations therein contained; and, particularly, the obligation upon the master to renew the tack from 19 years to 19 years, upon payment of the stipulated fine or grassum.

In April 1748, this deed of assignment was ratified and confirmed by George Cockburn, the then proprietor of the estate.

In September 1749, George Cockburn sold the estate of Ormiston, and, *inter alia*, the farm of Murrays, to the Earl of Hopeton. The disposition excepted from the clause of warrandice, "all the feu-rights and current standing tacks." It also contained a particular enumeration of these feu-rights and tacks, and, amongst others, the tack of the Murrays, which was thus described: 'A tack, 'by way of contract, between the said John Cockburn and Robert Wight, 'farmer in Murrays, dated 19th June 1718.' And to this enumeration was subjoined a clause, in the following words: 'In and to which tacks, and all 'other obligations, missive letters, and others, if any be, by the tenants and 'possessors of the said lands, and others herein before disponed, or of any parts 'or portions thereof, and whole tack-duties, and others in them contained, for 'the crop 1749, and in all time coming, for all the years and terms yet to run 'of the said tacks, and all other clauses and obligements in them contained, I 'hereby assign the said John Earl of Hopeton, &c. declaring always, that the 'before written exception of the said feu-rights and tacks *respective*, shall not 'infer any homologation of the same, but that it shall be always leisome and 'lawful to the said John Earl of Hopeton, and his foresaids, to quarrel and 'impugn the same, upon any ground competent in law, that may not infer 'warrandice against me and my foresaids.'

The two first 19 years of the lease of Murrays being to expire at Whitsunday 1756, Agnes Wight acquainted the Earl's factor, in 1755, that she was ready to pay the L. 100 of fine, whenever the Earl should be pleased to grant a renewal of the tack; but his Lordship, imagining that he was not bound to grant any renewal thereof, a new transaction was entered into in December 1756, whereby he let the farm to the said Agnes Wight in liferent, and to her son, Robert Wight, and his heirs, for the space of 63 years, at the same rent that was contained in the former tack. This lease acknowledged the receipt of L. 100 Sterling, in name of fine or entry-money, and contained an obligation upon the lessee to pay the like sum at each of the terms of Whitsunday 1777 and Whitsunday 1798.

Robert Wight was minor at the time of this transaction; but, when he came of age, he brought a process of reduction and declarator, in which, calling the Earl of Hopeton and his mother as defenders, he concluded, that the new tack should be reduced, upon the head of minority and lesion, and that his right under the old tack should be declared, and the Earl be decerned to grant a renewal thereof.

Pleaded in defence for the Earl, 1*mo*, The obligation contained in the tack 1718, granted to the pursuer's grandfather, implied only a renewal of the lease for twice 19 years after the expiry of the first term of endurance, and not a renewal to all perpetuity. A perpetuity is contrary to the nature of a contract of lease. A tack without an ish is an anomalous right. It is subversive of the principles established by the law of Scotland in the conveyance of property; and as the words of the clause are not such as necessarily imply a perpetuity of endurance, the intention of parties must be explained according to the nature of the contract between them. Had a perpetuity been meant, they would have expressed their meaning by adding the words *for ever*, which, whether ineffectual or not, would have proved that a perpetuity, not a limited endurance of the lease, was intended.

2*do*, Supposing the obligation 1718 to imply a perpetuity; yet the Earl of Hopeton, the purchaser of the estate, cannot be thereby bound. Leases, so far as they are effectual against singular successors, are in law held to be rights of a limited endurance. This is implied in the statute 1449. It is laid down in all the law books, especially by Lord Stair, B. 2. T. 9. § 27. and 28.; and it is confirmed by various decisions, to be found in the Dictionary, *voce* TACK. An alteration of this rule might abolish the established distinction of rights by the law of Scotland, and weaken the security of the records. There is a legal distinction between a lease and a feu-right. The difference does not lie in the nature of the acknowledgment made by the vassal or tenant, but in this, that the latter is perpetual, the former only temporary; but if leases, perpetual in their endurance, are also allowed to be real against singular successors, feu-rights and infeftments will become superfluous, and property, even the most valuable, may be transmitted in that manner, undiscoverable from any record.

Further: The disposition by John Cockburn, the granter of the lease, to his son George, was an absolute sale for an adequate price; and although George was bound not to challenge the standing tacks, upon any ground that might infer warrandice against his father; yet neither he nor his disponee, the Earl of Hopeton, are bound to fulfil John Cockburn's obligation to renew the lease to Robert Wight. The contract 1718 concerned a lease to endure for 38 years; the obligation in question was to *renew* after the expiry of that term; and the grassum was to be paid upon the *entry* of the tenant, after the expiry of 38 years. These expressions show, that the parties understood the lease to be distinct from the obligation, and that the tenant did not, even in his own appre-

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hension, possess upon the obligation to renew, but upon the lease for a term certain. The obligation to renew was, therefore, of the same nature as an obligation to pay a sum of money to the tenant at the expiry of the lease, which would not have been effectual against the purchaser of Ormiston, although the lease, wherein such obligation was granted, had been excepted from the warrandice by the seller, and assigned to the purchaser, for enabling him to recover the rents.

3tio, Although the obligation 1718 were held not only as implying a perpetuity, but also as binding on the defender, yet the necessary steps for obtaining a renewal of the lease were not taken by the pursuer. That obligation bears, that L. 100 Sterling should be paid by the tenant at the expiry of the lease for the 38 years; and that was the condition of the renewal. It is true, that application was made to the defender for a renewal; but he rejected the application, and no redress was sought in a legal way; on the contrary, the mother, and the other friends of the pursuer, agreed to the conditions of a new lease. The defender was not bound to suffer his lands to remain without a lease, and without a tenant, until Robert Wight should become major, or until his friends should determine whether they would pay the entry-money in his name; and the defender could not charge him upon an obligation, which, by his own plea, it was optional for him to perform or not, as he thought most expedient. In this view of the case, the defender cannot be bound to undo what has been solemnly done, and, after the lapse of so many years, to grant a renewal, in terms of John Cockburn's obligation, even although that obligation had been perpetual in its nature, and binding upon every purchaser of Ormiston.

Answered for the pursuer, *1mo*, The construction put by the defender upon the clause in the tack, obliging the proprietor to renew it from 19 years to 19 years, is perfectly repugnant, both to the words and to the intendment: The obligation is unlimited; and the obvious meaning of it, in plain language, is, that the lease was to be renewed every 19 years, upon the lessee, and his heirs paying the stipulated fine or grassum. Nor is it to the purpose now to plead, that perpetual tacks are contrary to the nature of the contract of lease. However ineffectual such tacks may be against singular successors, they are undoubtedly good against the granter and his heirs; and so it has been determined in several cases; 26th July 1631, Crichton *contra* Lord Air, *voce* TACK; 23d January 1717, Carruthers *contra* Irvine, IBIDEM.

2do, Supposing Mr Cockburn, the granter, and his heirs bound by this tack, it must be equally binding upon the defender. It was particularly excepted from the warrandice, both in John Cockburn's disposition to his son George, and in George's disposition to the defender; and, in that last disposition, the defender got an express assignation to it, with liberty only to quarrel it upon grounds that might not infer warrandice against his author. This being the case, the defender can quarrel it upon no ground that will infer warrandice against Mr Cockburn; and that recourse would be competent against that

Gentleman and his heirs, were the defender to prevail in the present action, cannot be disputed. Nor will it avail him to distinguish between what he terms the tack which he would limit to two 19 years, and the obligation to grant the renewals. A tack, and an obligation to grant a tack, stand precisely upon the same footing. Besides, as the defender is specially assigned to this tack, and all clauses and obligements therein contained, the exception of it from the clause of warrandice must comprehend every obligation that could infer warrandice against Mr Cockburn.

3tio, There was no improper neglect or omission. The pursuer's mother, who held the tack in trust for his behoof, applied to the Earl's factor for a renewal of the lease, before the two 19 years expired, and offered payment of the grassum; the delay was altogether upon the part of the defender; and it appears, that the intention of that delay and refusal was to prevail with the poor woman to accept of such terms as his Lordship was pleased to offer.

"The Lords found the reasons of reduction of the lease 1756 relevant and proved; and found that Lord Hopeton, though a singular successor, was barred *personali exceptione*, from objecting to the obligation on John Cockburn, in the lease 1718, to renew the same from 19 years to 19 years; and found, that the defender was bound to grant a new lease, in terms of the lease 1718, for the space of 19 years, from and after the expiry of the original lease, and to renew the same at the ish of every 19 years, upon payment of the stipulated grassum of L. 100 Sterling."

For the Pursuer, *Lockhart*. For the Defender, *Sir David Dalrymple*. Clerk, *Home*.

A. W. *Fol. Dic. v. 4. p. 78. Fac. Col. No 122. p. 285.*

1782. *January* 17.

ARCHIBALD TOD *against* ELIZABETH WELLS and Others.

not infeft, having granted a lease, if, upon the sale being reduced, the lessee can challenge his author's right.

ARCHIBALD MEGGET took in lease the lands of Gosford, belonging to Captain Henry Wedderburn. Soon afterwards, Captain Wedderburn, then in India, authorised certain commissioners to sell these lands, which were purchased at a public roup by Sir John Halket. But though the commissioners were thus empowered to sell the lands, they had received no authority to grant a disposition, or to give sasine of them.

In the mean time, Sir John Halket and Archibald Megget entered into a new lease, for a shorter term than that of the former; but, on account of greater latitude being allowed in the culture, a higher rent was stipulated. Captain Wedderburn, however, having died, and the necessary writings remaining unexecuted, Sir John Halket, without opposition, obtained decreet reducing the sale. Megget possessed the farm till the expiry of the term stipulated in the new lease. Upon this, Mr Tod, factor appointed by the Court on