1771. *February* 19.

JAMES SCOTT of Comiston, *against* GEORGE STRAITON in Wardroperton.

No. 66.
A tack, the termination or ish of which was indefinite, being granted to the tenant and his heirs, whether effectual against singular successors?

Effect of acquiescence in, and homologation of that right.

On the 27th of October, 1620, Sir Robert Grahame of Morphy granted a lease to Andrew Straiton of the lands of Wardroperton, with the salmon-fishing, during the life-time of Christian Straiton, relict of Alexander Bishop of Aberdeen, and for nineteen years after her decease. Andrew Straiton, besides a sum in name of grassum, became bound to pay of yearly rent six chalders and twelve bolls, half meal and bear, and four bolls of wheat, to be delivered yearly in the town of Montrose, as also yearly a barrel of salmon and six bolls of coals.

Upon the 26th April, 1642, Sir Robert Grahame, son and heir of the preceding, entered into a contract with Andrew Straiton, by which he ratified and approved of the contract and tack; and "also, for the causes foresaid, and to farther encourage and animate the said Andrew Straiton, his heirs and successors," he prorogates, extends, and continues the foresaid contract and tack for "nineteen years after the expiry of the years and space of the said Christian's life-time, and of the said nineteen years after her death; and after expiry of the first nineteen years, for the space of other nineteen years; and after expiry of the second nineteen years space, thereby prorogate, for the space of other nineteen years; and so forth from nineteen years to nineteen years, as long as the said Andrew Straiton, his heirs, successors, or assignees, shall desire to bruik and possess the said room and possession; they always paying the said Sir Robert and his foresaids the grassum at the entry of ilk nineteen years space, and the yearly tack-duty underwritten, freely, quietly, &c."

On the other part, Andrew Straiton became bound to pay to Sir Robert Grahame a grassum of 500 merks at the beginning of every nineteen years; the first term's payment at the expiry of Christian Straiton's life-time, and nineteen years after her decease, with the ordinary yearly duty as in the former tacks; "declaring always, that the payment of the said sum of 500 merks in name of grassum, at the entry and beginning of ilk nineteen years frae the first term's payment thereof, with the ordinary and yearly duty presently paid by the said Andrew Straiton, shall be a good, valid, and sufficient right to the said Andrew and his foresaids, to bruik, labour, joice, occupy, possess, and manure the said town and lands, &c. and that in all time coming, during the said Andrew and his foresaids their pleasure, &c. swa that it shall not be leisom and lawful to the said Sir Robert, and his heirs and successors, any ways to remove the said Andrew and his foresaids furth and frae the said town and lands, &c." It is likewise agreed upon betwixt the parties, "That in case the said Andrew Straiton and his foresaids shall suffer the yearly duty foresaid of the said lands, &c. to remain in their hands unpaid for the space of twa years, swa that twa terms of the said yearly duty shall run in the third without payment, making thereof an overterm, as said is; that then this present prorogation of the said tack shall expire, be

null, or of no force nor effect in no time thereafter, with the hail obligements in the same." No. 66.

Upon the 26th of December, 1656, a new contract was entered into; by which, after narrating the original lease and prorogation, and ratifying the same, Andrew Straiton renounced all right he had to the salmon-fishing; for which Sir Robert, on the other hand, discharged him of the grassum to be paid at the expiry of each nineteen years, and of the obligation to deliver the six bolls of coals.

Upon the 18th of October, 1676, Andrew Straiton assigned his right to Robert Straiton his grandson; who being succeeded by a son Robert, the possession was enjoyed by them down to the year 1764, when the last Robert died. At this time, and for some years thereafter, George Straiton, Robert's only son, was abroad or at sea; but he returned in 1768; and having served himself heir in general to his grandfather, assumed the possession of his ancestors.

The Grahames of Morphy having contracted debts, John Scott of Comiston acquired right to this estate, partly in virtue of certain wadsets from Sir Robert Grahame, and partly by sundry adjudications; and in 1681 a charter of resignation was passed in John Scott's favour, comprehending, amongst others, the lands of Wardroperton, the subject of dispute. John Scott was succeeded by his nephew General Scott, the General by his son Colonel Scott, and the Colonel by his brother James the pursuer.

Mr. Scott having brought a reduction of George Straiton's right, stated as the reasons,

1*mo*, That the foresaid contract or deed of prorogation was a right of an anomalous nature, not known in law, and such as could not be binding upon the granter's heirs; at any rate, not upon the pursuer or his predecessors, who were singular successors by adjudication.

2*do*, The contract or deed of prorogation could not be binding on the pursuer or his predecessors, in so far as the tack of the lands was thereby prorogated after the granter was denuded by adjudication; and which therefore was not such a tack as could be effectual against a singular successor, in terms of the act 1449. Or,

3*tio*, The deed of prorogation wanted those requisites which were essential to an effectual tack; partiularly a definite ish or termination, the duration of the same being pendent entirely on the pleasure of the tenant.

4*to*, The deed of prorogation was at an end, by the heir of the tacksman having, for the space of ——— years, or thereby, lain out and tacitly repudiated his right and possession. And,

5*to*, An irritancy had been incurred, by two terms rent having run into the third unpaid.

Informations having been appointed, in order to report to the Court, the pursuer repeated his first reason of reduction; and in support of the *second* and *third*, which were chiefly insisted on, pleaded,

1*mo*, A tack, or prorogation of a tack, destitute of certain requisites, viz. either of being clothed with possession, attainted at the time of the entry of the pur-

No. 66. chaser or singular successor, or though clothed with possession, yet destitute of a certain tack-duty or definite ish, was not effectual, in virtue of the act 1449, against a singular successor. When the statute 1449 introduced an exception to the general rule of law, and conferred upon tacks a real quality, adverse to the security of singular successors, it fell to be interpreted in the strictest manner: And accordingly tacks, upon which possession had not followed before the entry of the singular successor, or which were conferred *in tempus indebitum*, were not the object of that enactment. Craig, Lib. 2. Dieg. 10. § 7. 11. Sir G. Mackenzie's Observations on Act 1449. Stair, B. 2. T. 9. § 7. Bankton, B. 2. T. 9. § 3. Haddington, 22d January, 1611, Lord Pitsligo against Philorth, Sect. 5. *infra*. Durie, 11th July, 1627, Wallace against Harvie, *Ibidem;* 3d March, 1630, Maxwell, Sect. 4. *infra*. 22d November, 1632, Hamilton, Sect. 5. *infra*. Stair, 21st June, 1671, Neilson against Menzies, Sect. 5. *infra*. 24th February, 1676, Cullen, *Ibidem*. The same doctrine held with respect to prorogation of tacks, or tacks to commence at the expiry of former standing tacks; and for this reason, that the tacksman's possession, in virtue of these, could not be ascribed thereto, and the requisite possession must be under the right *de quo queritur*. Haddington, 5th January, 1602, Lord Drum against Jamieson, Sect. 4. *infra*. Edgar, 7th January, 1925, Richard against Lindsay, *Ibidem;* 4th January, 1757, Creditors of Lord Cranston against Scott, *Ibidem;* 2d July, 1757, Creditors of Dornoch against Carlyle, *Ibidem*.

Tacks, without a tack-duty, or a definite ish, were of old unknown in the law of Scotland; not the object of the statute 1449, and therefore not effectual without the requisite form of law by infeftment. Craig, Lib. 2. Dieg. 10. § 9. Balfour, Assedation, C. 9. Stair, B. 2. Tit. 9. § 24. Bankton, B. 2. Tit. 9. § 5, 9. Such rights, till later times, were null and ineffectual, even against the granter and his heirs. Craig, Lib. 2. Dieg. 10. § 2. Stewart against Lord Gairlies, No. 42. p. 15187. Aiton against Tenants, No. 44. p. 15187. Stair, B. 2. T. 9. § 16, 27. This rule, however, was of late so far relaxed, that rights of unlimited endurance, if it evidently appeared to be the intention of parties that they should be perpetual, were now, as implying an obligation not to remove, held good and effectual against the granter and his heirs. Agnew against Earl of Cassillis, No. 47. p. 15189. Crichton against Lord Air, N. 362. p. 11182. Carruthers against Irvine, N. 59. p. 15195. Bankton, B. 2. T. 9. § 5. But this rule was no farther extended, as such rights, like other obligations inconsistent with the nature of a tack, were still ineffectual against singular successors, unless where sasine had followed as a confirmation of the right. Hamilton against Tenants, No. 45. p. 15188. Thomson against Reid, Sect. 6. *infra*; Rae against Finlayson, Sect. 4. *infra;* Cockburn against Simson, Sect. 6. *infra;* and the same rule held if the tack-duty was elusory, or the term of endurance exhorbitant; Alison against Ritchie, No. 61. p. 15196.

Though tacks therefore of a perpetual nature were now held to be binding upon the granter and his heirs, it would never follow that they were binding upon sin-

gular successors in consequence of the statute 1449, from which such rights could derive no benefit. Neither could it, in any degree, avail these anomalous rights, that possession had followed upon them before the entry of a singular successor. Purchasers were not bound to take notice of them; and if this held with regard to those where the acquisition was merely voluntary, *a fortiori* must it apply to singular successors of another description, viz. adjudgers, whose right was not created by voluntary purchase, but by the necessary act of the law. No. 66.

The decision in the case of Fraser of Beladrum, No. 63. p. 15196. and the Earl of Hopeton against Wight, No. 35. p. 10461. *voce* PERSONAL OBJECTION, which might at first view be considered as establishing a contrary doctrine, were not, when maturely weighed, adverse to the present argument. Both of them went upon specialties. In that of Fraser, though the term of endurance was long, still there was a definite ish. Infeftment had besides followed on it; so that it was in its nature real, without the aid of the statute: And it was also much doubted whether Lord Lovat, in whose place the Crown came, could be regarded as a singular successor in the lands. In the case of the Earl of Hopeton *contra* Wight, the important speciality occurred, that as the Earl's author had confirmed the tack, so the Earl himself had done various acts and deeds homologating the same, and was therefore barred, *personali exceptione*, from objecting to the obligation of renewal.

Secundo, The tack or prorogation was not binding upon a singular successor, in respect, 1*mo*, That no possession had followed upon the deed of prorogation in 1642 before the entry of the singular successor in 1672. The prorogation was to commence only at the expiry of the tack 1620: And as Christian Straiton, for whose life, and for nineteen years thereafter, the tack was granted, appears to have been alive after the year 1653, the tack 1620 could not be expired in 1672; and hence, at that period, no possession could have been acquired upon the prorogation. Although possession had followed upon this deed before the entry of the singular successor in 1672, yet the objection, that the prorogation therein conferred, being *in tempus indebitum*, would be fatal to its subsistence, The deed of prorogation was of a complicated nature, and to be explained as containing so many distinct tacks or prorogations of nineteen years each, for each of which a grassum was payable. Though possession therefore had actually followed before the entry of the singular successor in 1672, yet, after expiry of the first prorogation of nineteen years, current at the time of said entry, the succeeding nineteen years, considered as a new tack or fresh prorogation, was at all events not clothed with possession before the entry of the singular successor, and must accordingly be understood to be conferred *in tempus indebitum*. In that case the prorogations in the deed were no longer binding upon the singular successor, nor would the possession upon the prorogation for the nineteen years remove the objection; Creditors of Dornoch *contra* Carlisles, Sect. 4. *infra*. Whatever, therefore, the defender's predecessors possessed after expiry of the nineteen years current at the time of the entry of the singular successor, was imputable to tacit relocation alone,

No. 66. which could be put an end to at pleasure. 2*do*, Upon the supposition that the deed of prorogation was not considered as containing so many distinct tacks; but as one entire tack, and the succession of nineteen years after nineteen years as the term of endurance; yet as it laboured under the want of a definite ish, the same being pendant entirely on the will of the tenant, it was on that account unavailable against a singular successor.

Tertio, The two preceding propositions being established, the conclusion followed, that the pursuer's predecessor, John Scott, being, about the year 1672, a singular successor by adjudication of the lands in question, the said tack or prorogation was either never binding upon him, or at least no longer than till the expiry of the nineteen years current at the time of his entry. And hence,

Quarto, As the prorogation was not binding upon the pursuer's predecessor, so neither was it now binding upon the pursuer himself. For,

1*mo*, Whatever might be held to be the nature of the right in question, either as including so many distinct tacks or as one entire tack, there being neither charter nor sasine, there was clearly no title whereon, according to the statute 1617, a right to lands could be acquired by prescription. Nor could the negative prescription in any shape apply; for if the right under reduction was ineffectual, against the pursuer's predecessors when they entered to the lands, the possession from that time must be accounted to be *ex gratia*, and as such imputable to tacit relocation, which could never hurt any ground of challenge competent to those authorised to bring it. 2*do*, Nothing had occurred in the present case which could be interpreted into an acknowledgment or homologation of the defender's assumed right as a right of property. The possession was evidently imputable only to tacit relocation; the nature of which never could be altered by any length of endurance, but might be continued as such till the tenant was interrupted; Stair, 16th January, 1663, Earl of Errol against Parishioners of Urie, Sect. 14. *infra*. The receiving of rents, instead of injuring, aided the pursuer's plea; for these were always received from the defender's predecessors, not as possessing under any *right*, but in the most general terms *as the rent* of their possession.

In support of the *fourth* reason of reduction, it was maintained, There was an evident *dilectus personæ* in the present case, and that personal residence and natural occupation of the lands were implied conditions of the right: And although, upon the death of Robert Straiton, these ought to have been fulfilled *debito tempore* by his heir, yet as he had never made his appearance, nor made any claim whatever, he had tacitly given up his pretensions; and hence the right to possess, founded on tacit relocation alone, was at an end.

In support of the *fifth* reason of reduction, it was maintained, That as no rent had been paid or received for these lands, for crops 1766, 1767, 1768, 1769, and 1770, and at all events no proper offer of rent till 21st October 1768, an irritancy had been incurred, in terms of the prorogation, by allowing more than two terms rent to run into the third unpaid.

No. 66.

The defender pleaded:

1*mo*, The character of the right in question, so far from being anomalous, was in itself perfectly plain from the nature of the deeds on which it was founded. It was a lease for nineteen years to nineteen years, so long as the lessee and his heirs should choose to bruik and possess the subject, with a clause irritating their right, in the event of their allowing two years tack-duty to run into the third unpaid. Deeds of this kind were obligatory upon the granter and his heirs; and, though not perhaps common about 150 years ago, were now become frequent. An instance occurred in the case Earl Hopeton against Wight, No. 35. p. 10461, *voce* PERSONAL OBJECTION. The same decision, in principle, had been given in the case Carruthers against Irvine, No. 59. p. 15195. where a tack let "perpetually and continually as long as the grass groweth up, and the water runneth down," being objected to as wanting an ish, the Court found, "That, by the meaning of parties, the contract was intended to be a perpetual right to the tenant and his successors; and a similar judgment was pronounced, Viscount Stormont against the Kindly Tenants of Lochmaben, No. 60. p. 15195.

2*do*, In answer to the pursuer's argument, that, in order to render tacks effectual against a singular successor, they must be clothed with possession prior to his entry; and that, in like manner, a tack or prorogation, without a definite ish, could not be effectual against a singular successor in terms of the statute 1449.—it was observed, That though a new tack granted during the currency of a former tack, or a prorogation of that former tack granted during its currency, might be found ineffectual against a purchaser or creditor who acquired right to the lands prior to the expiry of the former tack, yet the present case was very different. The deed of prorogation, upon which the defender claimed possession at present, was the very deed upon which his possession alone could be founded at the time of the pursuer's predecessor's entry to the lands. There was in fact but one deed of prorogation, and one lease thereby created, to continue so long as the lessee or his heir should choose to possess: and the only reason of expressing it, "that it was to continue from nineteen years to nineteen years," was, that by the original prorogation, a grassum of 500 merks was to be paid at the expiry of each nineteen years; which was afterwards discharged by the contract 1656, in consideration of the tacksman giving up the right of salmon fishing. The tack granted in the case of the Earl of Hopeton was conceived much in the same terms; and though every point was laid hold of in order to get free of this perpetual lease, the idea of dividing the lease into a variety of different tacks, so that it could subsist no longer than the expiry of the nineteen years current at the time of the Earl's purchase, never once occurred.

A definite ish or termination, in order to render the tack effectual against singular suscessors, was not required by the statute 1449. Every tack upon which possession had been obtained was secured by that statute, of however long endurance it might be; and that such deeds had been constantly considered as valid tacks, was clearly ascertained from the decisions mentioned, where, though grant-

No. 66. ed in perpetuity, they were nevertheless supported. Though tacks of that nature were for some time discountenanced, they were now become more frequent; and in the late case of Belladrum, *(supra,)* a tack for 1140 years was found good against the Crown, as coming in the place of Lord Lovat, acknowledged to be a singular successor. It was the intendment of the statute 1449 to render simple tacks clothed with possession, equally good to the tacksman as if infeftment had followed upon them, according to the antient practice; and by this means every tack that was effectual against the granter and his heirs, was made equally effectual against purchasers or singular successors, provided it was clothed with possession prior to their purchase. Nor would it avail the pursuer to talk of unhinging the faith of the records, and defeating the security of singular successors; for as long as possession was requisite to establish such tacks against singular successors, they never could suffer from them, as no purchase of lands was ever made without full inquiry into the nature of the leases upon which the tenants possessed, and the terms of their endurance.

3tio, Upon the supposition that it would have been competent to the pursuer's predecessor to have set aside the lease in question in 1681, when he is said to have acquired the right, yet, *post tantum temporis*, no such challenge could now be allowed; the pursuer's predecessor having from that time downwards acquiesced in and homologated the right to possess, upon which the defender founds: Besides, that all ground of reduction was now cut off by the negative prescription.

4to, In answer to the pursuer's argument, that the deed of prorogation was at an end, by the heir of the tacksman having for a space of three or four years lain out and tacitly repudiated his right, it was enough to observe, that there never was any intention of doing so, nor could it from the curcumstances be presumed. The defender's father died in 1764, and his mother, who life-rented the subject, in the end of 1765. As he himself was abroad, upon the application of one of his tutors a factor was appointed in 1767; who accordingly managed the farm for those having the interest, till 1768, when the defender returned home, and assumed the possession of his ancestors.

5to, As to the pursuer's allegation, that an irritancy had been incurred by two year's rent having run into the third unpaid, it was a sufficient answer, that the whole tack-duty for crop 1766 had been paid upon the 4th March, 1768; the rent for crop 1767 was offered under form of protest, and refused; upon the 21st of October, 1768, the defender himself, in presence of a notary and witnesses, offered payment of every thing that was due; and that having also been refused, the prices of the farm meal were, upon the 9th of March 1769, regularly consigned agreeable to the clause of the contract 1642.

It was observed upon the Bench, that this right would at any rate be binding against the granter and his heirs; but as to its being binding upon singular successors, the chief point suggested, as creating any difficulty, was there being no proper tacksman duly and equally bound with the master to support the right as a tack. The indefinite term, or defect of an ish, was not considered as injuring

the right as a lease: However much a determinate ish might formerly have been thought requisite, that nicety was now departed from; and if an ish, as in the case of Belladrum, was postponed till upwards of 1100 years, it might, on the same principle, be extended to as many thousands. Besides, as the tack was granted with a limitation to the tenant and his heirs, it might be considered as containing an ish, viz. when the family was at an end. Some of the Judges thought, that the difficulty suggested, as to there being no proper tenant duly and equally bound with the master, was of no importance; there was nothing inconsistent in the tenant having the privilege of a breach, though the master had none: And here the tenant's privilege of liberation was not absolute; he could only take advantage of it at the end of every nineteen years; so that during the currency of each of these he was strictly bound as a tenant. Though upon these different points the Judge in some degree differed, they were almost unanimously of opinion, that the strong homologation and acknowledgment of the right, in this case, for 99 years, removed every difficulty, and barred even the pursuer and his authors, as singular successors, from bringing it now under challenge. No. 66.

The judgment was kept in general terms; sustaining the defences proponed for the defender, and assoilzieing from the reduction: And to this judgment the Lords adhered, by refusing a reclaiming petition without answers.

Affirmed upon appeal.

Lord Ordinary, *Pitfour.* For Scott, *J. Scott, Rae.*
Clerk, *Pringle.* For Straiton, *Wight.*

R. H. *Fac. Coll. No.* 74. *p.* 227.

1803. *July* 2. JOHNSTON'S TRUSTEES, Petitioners.

No. 67.
A tenant possessing on a lease during all the days of the granter's life, must after his death be legally warned to remove.

Thomas Johnston of Templehall let to his eldest son Patrick, from Whitsunday 1786, during all the days of the granter's life, the lands of Templehall, at the yearly rent of £.200.

Of this date, (21st October, 1799), he executed a trust-deed and settlement in favour of his two younger sons, and another gentleman, as trustees, conveying to them the whole of his property, to the exclusion of Patrick, the heir-at-law.

Thomas died on 30th March, 1803. The Trustees entered into possession, and raised an action of removing against Patrick before the Sheriff of Berwickshire, which was executed on the 4th of April. The trustees were infeft on the trust-disposition on the 5th.

To this action Patrick objected, that the summons was incompetent, as the Trustees had no power to raise any action till they were infeft; and that he had not received the legal warning, as the summons should not only be executed, but should also be called in Court forty days before Whitsunday.

The Sheriff sustained these defences, (21st May, 1803.)