1772. *January* 28 and *July* 22. COUNTESS DOWAGER of MORAY *against* JOHN BANE STEWART and OTHERS.

TACK—FIAR ABSOLUTE AND LIMITED.

I. Tacks may be let by a fiar, notwithstanding of a prior liferent, by way of locality granted by him in a contract of marriage.

II. A tack, not signed by one of the parties, but followed by possession, and other circumstances, whence *res non est integra* was argued, found not effectual; but this reversed on appeal.

PITFOUR. As Lady Moray has not homologated, I see no difficulty. Although her right had been posterior to the tack, still the tack would have been ineffectual as to her, because it is not a proper tack in the sense of law,—that is, a tack clothed with possession. Homologation may bar objections against a tack, but will not render it good against singular successors. Here Lady Moray's right is prior to the tack; it is as good as any other real right. Can a man grant a tack who has denuded himself *pro tanto* or for a life? It is said that there was nothing unfair intended on the part of the late Earl. I do not suppose that there was: but what does that say to the rights of a singular successor, either prior or posterior? If the Countess had been an heir of provision, she would have been obliged to perform Lord Moray's obligation, or to have proved fraud. The right of administration pleaded on, is not a necessary right of administration where entails subsist; yet such right of administration is specially excluded, and a right of administration which may be excluded is not a necessary one. The Earl of Moray could not exercise a right which is conveyed to another. In marriage-contracts there is sometimes reserved to the husband a power of granting leases beyond his own life; sometimes there is a power to the lady of granting leases for 19 years, or for a certain period, instead of the uncertain period of her own life. Thus the rights of husband and of wife may be extended by special convention. The opinion of Sir George M'Kenzie is express; so also is the opinion of Sir James Stewart, (Answers to Dirleton's Doubts *v.* Liferenter;) the opinion of lawyers a hundred years ago; and no judgment to the contrary shows what is the national opinion.

GARDENSTON. Where there is a co-existing right of fee and liferent, the concurrence of both is necessary to the granting of a lease. *Here* the case is different, for Lady Moray has no more than an uncertain eventual right.

COALSTON. It is not necessary to inquire whether Lord Moray is bound by the lease. My doubt is, how far can Lady Moray be bound? Tacks were personal contracts before the Act 1449. That Act made tacks clothed with possession to be good against singular successors; *but an obligation to grant a tack* is not good against singular successors. *Here* is no tack at all,—not so

much as an informal deed: it is no more than a tack to be inferred from acts of homologation. In what a state would purchasers be in, were they obliged to inquire into all facts and circumstances which might infer an obligation on their authors? And where would our boasted security of records be? I am of Lord Pitfour's opinion as to the other question also, but that is unnecessary to be determined.

JUSTICE-CLERK. A right is not to be less secured by the force of the records because it is contingent. Much has been said to subject Lord Moray personally; but the question *here* is, as to the situation of matters at the commencement of Lady Moray's liferent.

MONBODDO. A personal obligation to grant a lease will not be good against singular successors; but, if possession follows, the case is different: but I think that, in this case, there is no title of possession which could be good against singular successors. Although the tack had been signed by Lord Moray, it would not have been good; for there appears to have been a blank in it, as to the quantity of dykes to be built by the tenants. The blank was not filled up by the writer, for the writer appears to have been an instrumentary witness: it must have been filled up after his signing. As this obligation to build dykes is, in effect, part of the rent, and unless it be formal, the tack is imperfect in its essentials. As to the other point, Sir George M'Kenzie's Observations on Act 26th James IV., is much to the purpose. The general clause, *otherwise*, in that Act will extend to the case in hand.

AUCHINLECK. Lord Moray is no party. Here the only question is, Whether can an intended tack, not homologated by Lady Moray, be good against her infeftment?

On the 28th January 1772, "The Lords found the letters orderly proceeded, and decerned in the removing.

Act. H. Dundas, R. M'Queen. *Alt.* G. B. Hepburn, A. Crosbie.

Non liquet, Gardenston. Hearing on concluded cause.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered:—]

AUCHINLECK. It would be dangerous were the husband not to have the power of granting leases at a reasonable rate of lands provided in liferent to the wife. The tack here is binding on the tenant, and therefore binding on the Countess.

HAILES. It cannot be denied that several of our writers have held that the husband has no power of granting leases, which may be effectual against the wife, of the lands provided to her in her liferent locality. I imagine that they have so held from not distinguishing between conjunct fees, properly so called, and liferents of locality.—The old custom was to secure a provision to a wife by *a conjunct fee*. When marriages were early, the young people were provided in a portion of the family estate, taken to them in conjunct-fee, as well in effect as in name. *There* both husband and wife were fiars, having a co-existing right of property. The husband could not grant a lease of such subjects to be

effectual after his death, when the wife came to have the sole exercise of this right which had been provided to her. To illustrate my meaning, by an example: there is registered in the Books of Session, *7th December* 1540, a marriage-contract between Norman, fiar of Rothes, with consent of George Earl of Rothes, his father, on the one part, and John Low Lindsay and Isobella Lindsay, his daughter, on the other part. The tocher is 2400 merks; the *conjunct-fee* lands are valued at 200 merks of pennymaill. In this case I suppose that Norman Leslie could not have granted a lease of the conjunct-fee lands to be effectual after his death, and during the life of Jean Lindsay, without the consent of Jean Lindsay. In Chambers of Ormond's account of Scotland, *temp.* James VI. the provision of lands to widows is termed their *conjunct-fee.* To this case, not to modern localities, are the decisions in Balfour to be applied: and indeed they are as express as can be. By degrees another mode was introduced: women were provided in liferent-rights of land by way of locality. Our lawyers seem to have overlooked this change in the form, and to have considered those localities as of the same nature with the ancient *conjunct-fees.* This is the only way that I can account for the opinions of Sir George Mackenzie, Sir James Stewart, &c. Certain it is, that, in practice, the husband is understood to have that right which the authorities of those lawyers deny to him. We have all seen in practice what violent controversies have arisen between heirs and widows having locality lands; and yet there is no example of a widow endeavouring to set aside leases of her locality lands granted by her husband.—I think that Lord Moray could have granted a lease to the suspenders.—I think he did what was sufficient to found an action against his heir for compelling him to grant a lease; but I do not see any lease here. There is nothing on which Lord Moray could charge the tenants or take decreet against them: there are only circumstances which may afford a ground of action for executing a lease. This ground of action seems not effectual against the Countess of Moray, infeft in a liferent locality.

Monboddo. I have no notion of the distinction between *conjunct-fees* and a *liferent locality*, which Lord Hailes has endeavoured to establish. Every tack good against the granter, and clothed with possession, will be good against singular successors, no matter by what evidence it is proved. This tack is not good against the Earl of Moray: never having been signed by him, it could only be good by homologation, or by a *rei interventus.* There is no homologation here: all that was done was that the Earl of Moray, or rather his factor, received the rent. There is no *rei interventus* which can apply to a lease of nineteen years. As to the point of law, I think the tack not good. I know no difference between a *conjunct-fee in a wife* and *a simple constitution of a liferent.* Here is the authority of lawyers, and even of a statute, referred to by Sir George Mackenzie. The principles of law are equally clear. By the Roman law, any right, depending upon a conditional event, was, whenever the condition existed, understood to take place from the time the right was granted. This is the case here. I am not moved by the practice of men of business, nor by the general opinion. I do not think that the tenants were bound to Lady Moray.

Coalston. It is not necessary to determine whether the tack is binding on

the Earl of Moray. Supposing both a verbal set, and a *rei interventus*, barring a power of resiling, my doubt is, Whether this would be good against a singular successor? *Rei interventus* is no more than a personal bar. The Act 1449 relates only to written tacks, or to tacks having *terms to run*. Were we to find the writing in controversy binding against singular successors, it would unhinge the security of singular successors. They would be obliged to inquire into every verbal communing of the seller. A tack, clothed with possession, may be good against the granter, and yet not against singular successors. It is of the utmost importance that tacks, artificially patched up by proofs and circumstances, be not considered as valid against singular successors. It is not necessary to determine the other point. The marriage-contract goes upon the supposition that the estate was to be under tenandry. *No vacua possessio* is warranted: Tacks are a natural burden on lands: purchasers of every kind must take the lands with the burdens.—If lands were disponed with infeftment of warrandice, this would not bar the power of granting tacks. In practice, the consent of the liferenter has never been required to tacks granted by the husband.

GARDENSTON. If the tack is good against the granter and his heirs, why not against singular successors? It is just as good a tack as any in the law of Scotland. There is no danger here as to singular successors, for the singular successor, upon inquiry at Lord Moray, would have got satisfaction as to the state of the case. [This is certainly an erroneous argument. In treating of a general point, we must lay characters out of the question. By the same argument, there is no security from records more than if there were none, and every personal debt good against purchasers. For it may be said, the purchaser has nothing to do but to ask the seller what burdens there are upon his estate, and he will learn all that is necessary for his security.] There is a distinction as to singular successors: there are different species of them. The singular successor *here* is not one who gets a right immediately, but who has only an eventual right, which perhaps might never take place. In common cases of singular successors, the granter is denuded: *here* not. The power of administration was, moreover, from the nature of the thing, reserved. Clear of Lord Auchinleck's opinion as to the other point.

KENNET. Consideration being had both to principles and practice, I think that Lady Moray could not challenge the tack granted by her husband, although after her infeftment. The contrary doctrine would be productive of the worst of consequences.—Rents could not, upon that supposition, be procured. Tenants could not be bound. The tack is binding on Lord Moray and his heirs. As to the point of Lady Moray being a singular successor, my difficulty is not removed. The Act 1449 mentions *terms to run*: here the tack is binding on Lord Moray as having *terms to run*, and therefore binding on singular successors.

KAIMES. I have no doubt that the granting of a liferent locality does not interrupt the husband's administration. The question, however, is, Whether a proprietor is not bound to regard the interest of the liferenter? The warrandice does not mean that 9,000 merks is the *ultimatum*, but only that the lands shall be worth that sum at least: if the rest had been as good as it could have been,

there would have been less difficulty. Here there is, by carelessness, a lease at an under value. As to the lease being binding on the Earl of Moray, it was his will that the lease should be in writing: he has not signed; therefore there is a declaration that this lease is not his will. I do not see any legal evidence of homologation. Of Lord Coalston's opinion as to the sense of the statute 1449; and I cannot express my sentiments so well as he has done.

PITFOUR. I do not think Lord Moray bound; for this tack required writing to its probation and constitution. It is said that the tenants were bound, therefore Lord Moray is bound. I do not see that. In a mutual contract, one side cannot be bound. The tack might have been homologated by a *rei interventus;* but I see nothing of that. Suppose Lord Moray to be bound, still the defence of singular successor seems invincible. The favour of tacks must not be carried so far as to render the commerce of lands impracticable. The Act 1449 never meant to bring in a bag of pleas under the cover of tacks. An intention of a tack can never be equal to its *execution.* I do not think the tack good against the liferenter: the principle is—*prior tempore potior jure,* and *nemo potest plus juris dare quam ipse habet.* I think the Earl of Moray was denuded of the temporary liferent, in the event that happened, just as in the case of a wadsetter. The Earl's right is *tanto minus* of the liferent right: the tenants ought to have secured themselves by taking the consent of the liferenter. Sir George M'Kenzie plainly lays down the principles for which I argue. I see no bad consequences from them.

ALEMORE. The consequences would be very bad. Many cases of this kind will occur in tailyied estates. The principle would lay waste the greatest part of Scotland: tacks will be desultory, and confusion will arise. Localities were granted in order to support tailyies, by preventing the increase of burdens on the estate, and in order to make the widow independent of the heir. This locality is not of the nature of a disposition to an onerous purchaser: the liferenter must submit to the fiar, not the fiar to the liferenter. The husband has still the administration,—the right of locality notwithstanding; but he cannot do any thing fraudulent, to hurt the right of the liferenter. If the lease is binding on Lord Moray, it is binding on Lady Moray; for a liferenter cannot challenge a lawful act of administration of the husband.

ALVA. A husband, notwithstanding the right of locality, retains a right of administration. But I doubt whether Lord Moray was bound by this transaction, or whether any thing more was incumbent on him than to indemnify the tenants.

PRESIDENT. Where lands are settled in locality to a wife, it is in the power of a husband to grant leases for a competent rent. The opinion of lawyers may be otherwise, but practice has mitigated that strictness. There is no example of a tack set by a fiar and reduced by a liferenter. Many marriage-contracts have been directed by great lawyers, without any idea of this supposed right in the liferenter. The consequences of a different rule as to times past would be dreadful. Many marriage-contracts are in the style of Lady Moray's,—many tenants are in the situation of the suspenders. All those tenants must be removed, and actions of warrandice against the setters must be commenced,—tacks must sleep during the liferent, and tenants must starve in the *interim.* As

to consequences in time to come, no man will be able to set his lands without his wife's consent. A liferenter takes with the burden of tacks: there is no such thing as that drawing back of her rights, mentioned by some of the judges. I do not think that, in 1449, it was in the power of the liferentrix to remove tenants. I think that Lord Moray was bound, and, consequently, Lady Moray. This will not hurt singular successors; for the record of tacks is *possession*. The purchaser can always see *who* is in *possession;* if he does not, the blame is his own.

On the 22d July 1772, the Lords found that the late Earl of Moray, notwithstanding the prior liferent, by way of locality granted to the Countess, and her infeftment thereon, had right to grant tacks of the lands, contained in said locality, effectual against the Countess: But found that the *tack* in question, (it should have been writing,) not having been regularly executed by said Earl, is not effectual against the Countess; and, therefore, in so far adhere to their former interlocutor, finding the letters orderly proceeded.

On 5th August 1772, refused a reclaiming petition as incompetent.

Act. H. Dundas, R. M'Queen, A. Lockhart. *Alt.* G. Buchan Hepburn, A. Crosbie, Ilay Campbell.

Diss. Alemore, Gardenston, Kennet, Auchinleck, Stonefield, President.

1772. *February* 21 and *July* 29. JAMES CATHCART of Carbieston *against* JAMES ROCHIED of Inverleith.

JURISDICTION.

Brief of division among heirs-portioners. Sheriff of the county, where the lands are situated, the only judge competent thereto. Advocation from him, when *in cursu* of obtempering a brief at one party's instance, for dividing so much of the common estate as lay within his territory, to the Macers of the Court of Session, as Sheriffs specially constituted for dividing the *universitas* partly situated in another county, in virtue of brieves to that effect issued upon the application of the other party interested in the division—*Refused.*

[*Faculty Collection, VI.* 21; *Dictionary*, 7,663.]

GARDENSTON. The division ought to proceed before the macers, because the lands lie in different counties.

PITFOUR. Such brieves have seldom occurred, because generally estates were limited to heirs-male, and division thereby prevented. It will be difficult to say how the Sheriffs have the power of division, or that the Court of Session ever refused to advocate the brieves of division. If this matter is left with the Sheriff, it will be inextricable; for the whole estates must be divided. One portion in each estate cannot be given to one, and another to another: the different shares of the heirs-portioners must be laid together in one shire or another.

HAILES. The argument for Mr Cathcart contains many things new to me. The notion that, in former times, females were generally excluded, is undoubt-