

1625. *January 22.*RONALD *against* STRANG.

No. 108.

A tacksman obtained a bond from the lessor of the tack, granting that he had borrowed a sum from the tacksman, and allowing him to retain possession till he were paid, and also to retain his annual-rents out of the tack-duty. The Lords found this a real right, even against a singular successor, altho' it was alleged that it had no ish, because it really had an ish, tho' indeterminate, viz. whenever the debt should be paid.

Isobel Ronald, relict of David Ritchie, being decerned to remove from a bake-house in Edinburgh, at the instance of Strang, for null defence, pursues for reduction of that decree of removing, upon this ground and reason, which she alleged would have assoilzied from the removing, to wit, because she and her umquhile husband foresaid, David Ritchie, had a tack of the bake-house set to them, for a certain duty, for certain years thereafter; which years, albeit they were all expired before the warning, whereupon removing was obtained; yet before the expiring thereof, divers years, John Young, and Strang his spouse, setters of the said tack, by their bond, bearing, "them to have borrowed a sum of money from the said umquhile David Ritchie, and the said pursuer his spouse, and which they bound them to repay to the said David, and his said spouse, and the longest liver of them two, and their heirs, executors, and assignees, at the term therein appointed; and failing thereof, they were contented that the said umquhile David, and the said pursuer his spouse, should bruik the said bake-house, ay and while they were repaid of the said sum, borrowed as said is, for payment of the same duty, contained in the said preceding tack, defalking always, and retaining in their own hand, out of the duty of the tack, as much as was effeiring to the annual of the said sum borrowed in the bond. Likewise they consented, that the bond should be to them as sufficient as a tack, conform to the which tack and bond the husband was in continual possession during his lifetime; and since his decease, his relict, now pursuer, had continued the same possession, which she alleged ought to be found, that lawfully she may retain the same, ay and while the sum be paid. This reason was found relevant to reduce the decree, and the foresaid bond was found a good title to maintain this pursuer against the removing; and it was not found to be a naked personal bond, but that it was a real right, whereby the pursuer might lawfully bruik, ay and while the sum were paid. Neither was this allegiance respected, proponed for the excipient, who alleged, that that bond ought not to militate against him who was a singular successor, and had, for great and onerous causes, acquired the heritable right of that land, and was infest therein, but that the same ought only to produce warrandice, or other execution against the parties, who would be obliged to fulfill the bond, and who made the same. Likeas he alleged, that that bond could not be found a real right, not being an heritable right, and that it could not be found as a tack, seeing it had not a certain defined space, for the which it should last, and at what time the same should expire, but was in effect perpetual, and so should not be respected as a lawful formal right, to exclude a singular successor; and so much the rather, by reason that the same was a bond usury, appointing the pursuer to retain out of the duty of the first tack, for the annual of the money lent by the bond, twelve for each hundred, which made the whole bond unlawful; and also it was alleged, that this pursuer, being the relict of the

husband, to whom the bond was given, could not be heard to pursue upon this bond, nor clothe herself therewith, seeing she will not have right to the sums lent in the bond, but falls under the husband's testament, and pertains to his executors, and so she cannot have right to bruik thereby;—all which was repelled, and the bond found a real right to maintain the wife in possession, while the sum were paid to any having right to receive the same; seeing by the bond it was so provided, that she should retain the possession; and seeing the bond bore the clause aforesaid, “that it should be as sufficient as a tack:” And where it was alleged, that the bond was perpetual, wanting a certain time of ish; it was also repelled, by reason albeit it had not therein a precise determinate time specially, yet it had a time of ish, viz. at the payment of the money; sicklike as in tacks set in wadsets, during the non-redemption, which has no other certain special time of ish but indefinite, when the tacksman pleases to redeem; and this right was found good to defend against a singular successor sicklike as against the granter's self, if he had been pursuing removing: And where it was alleged to be usury, as said is, the Lords reduced the proportion of the annual-rent only to ten for each hundred, and the said bond had a special duty therein insert, and so differs from the other decisions here marked.

No. 108.

*Act. Hope & Mowat.**Alt. Belshes & Lermonth.**Clerk, Hay.**Fol. Dic. v. 2. p. 422. Durie, p. 158.*

* * Kerse reports this case :

Found a bond that a person should bruik ay and while the sum therein contained was paid, to be a good and real right *contra singularem successorem*, because the bond bore entry, ish, and duty; and the Lords found, that albeit the ish was not definite, but astricted to the repayment of the money, yet it should be valued *contra singulorem successorem*.

Kerse MS. p. 104.

1628. July 12.

BENNET *against* TURNBULL.

No. 109.

By contract, lands being disponed, not in the form of a real right, but simply to be possessed, without paying any duty in place of the annual-rent of a sum owing by the disponer, and with power to retain possession till the principal was repaid, this was not found good to defend against a singular successor.

*Fol. Dic. v. 2. p. 423. Durie.** * This case is No. 11. p. 2181. *voce* CITATION.