

1688. February 17.

LAMINGTON *against* JOHN OSWALD.

Lamington having set a two nineteen years tack to Auchinleck in Prestoun, for payment of a small tack-duty, and personal service, and attendance upon the Laird; James Oswald, collector, apprised the tack from Auchinleck, who was several years in arrear for his rent.

Alleged for Lamington: That the compriser should be liable for the by-gone rents due to Lamington by Auchinleck, as a just consequence of a *synalagma*, it being reasonable, that as tacks are real to tenants against their masters, the rents should be real to him against them and their singular successors. *2d*, The service in the tack is personal, and cannot be performed by a substitute. *3d*, The tack-duty being small, the service was to be performed upon the tacksman's expense, as well without as within the Shire. *4th*, The tacksman's obligation to serve his master being general, he is obliged to perform the service in any place within the kingdom.

Answered: Apprisers of, or assignees to tacks assignable, as this is, are not liable for any rents preceding their possession, these being merely personal. *2d*, The service may be as well performed by a substitute; but it should not be strictly required, especially the defender being in a public trust. *3d*, Such personal service should only be performed upon the tenant's charges, when the master is within the shire, otherwise a master might harrass his tenants by travelling up and down the kingdom. *4th*, Except in public expeditions for war, the service should be confined within the shire.

The Lords sustained the first answer, but repelled the second, third, and fourth; in respect of the allegiances and tack.

*Harcarse, No. 957. p. 269.*

Sir P. Home reports this case:

In the reduction and improbation at the instance of the Laird of Lamington against James Oswald, (mentioned 8d February, 1686,) Lamington having insisted, in his raising reduction, that the tack was null, *ob non solutum canonem*, the tack-duty not being paid for the space of sixteen years; as also, by the tack the tacksman was bound for personal service and attendance on horse or foot, in peace or in war, in the King's service, or in Lamington's own, and his heir's, private honourable services, convoys, and attendances, at all times, as occasion shall present, in such form, manner, and equipage most convenient for the time, upon lawful advertisement; and that Lamington had required the defender to perform the personal service by way of instrument, since he had right to the tack, which he refused, and upon that ground likewise the tack is become null; as also, Lamington craved he might have the extract of his certification, seeing the principal tack is not produced, and that it appears by the declaration of the clerk-register and his servants,

No. 162.

Whether an adjudger be liable for arrears, and for personal services?

No. 162. that the principal tack is not amongst his warrants, albeit there are several other warrants extant of writs that have been registrated that day that it was alleged that tack was registrated. Answered, That albeit by act of Parliament tacks are declared to have the effect of a real right, and are sustained to defend against the singular successor, yet the payment of the tack-duty being but a personal obligation in the tack, it does not really affect the ground in prejudice of a singular successor in the right of a tack, but only the tacksman that possessed for the year prior to the singular successor's right to the tack; the defender, as singular successor, can only be liable for the tack-duty these years that he has possessed the lands; and in the competition amongst the tacksman's creditors, the defender, by virtue of his apprising, was preferred to the tack, and since that time the defender has made offer of the tack-duty yearly, and which the pursuer refused to receive; and therefore the tack cannot be reduced, *ob non solutum canonem*, neither can it be found null for not performing of the personal services; because the tacksman being but a mean person, who was obliged to perform these services, and the tack being appraised by the defender, if either a person of equal or of a better quality than the pursuer should come to have the right to the tack, he could not be obliged to perform in person these servile employments mentioned in the tack; but it is sufficient that they be performed by a substitute, and the defender has raised a declarator for that effect; and there can be no certification extracted against the tack, albeit the principal tack be not found amongst the warrants in the register, seeing the said tack appears to have been registrated about fifty-five years, and that it is notourly known that many warrants of the records are lost since the time, and the extract produced is sufficiently adminiculated by the register where the tack is at length recorded. Replied, That of old tacks being only personal rights, did subsist no longer than the granter's right did continue, but now by the act of Parliament tacks being made to have the effect of real rights are of the nature of a feu right during the years of the tack. As the annual prestation of a feu right doth affect the ground in prejudice of singular successors, even for the years that were due before the singular successor's right; by that same reason a singular successor in a tack ought to be liable for the tack-duty, for years not only after his right, but for years preceding; and the preceding year's tack-duty being neither paid, nor any offer made by the defender of these years' duties after his right, cannot purge the preceding failure, and the suspender can be in no better case than his author, from whom he has appraised; and the tack being null through his ancestor's failure in payment of the tack-duty, the tack ought to be declared null against the defender. And the tack bearing the express clauses that the lands are set to the tacksman, his heirs and assignees, of no higher degree than themselves, if the defender conceived himself to be a person of higher degree than the tacksman, then he cannot have the benefit of the tack, or otherwise he ought to perform the personal services contained in the tack, or pay the liquidated value thereof; and the tacks being *stricti juris*, the defender, if he see the benefit of the tack, he ought to perform the services in his own person, and cannot serve by a substitute, see-

ing there is no such thing provided by the tack ; and as the extract cannot satisfy the production in the improbation, so neither can the register satisfy the same unless the principal were produced, seeing the register can make no more faith than the extract. The Lords found the defender liable not only for the year's tack-duty since his decret of preference, by which, in the competition amongst the tacksman's creditors, the defender was preferred by virtue of his apprising ; but also for these years tack-duties preceding his decret of preference to which he was preferred, and whereof he has got payment ; and reduced the tack for not payment of the by-gone duties, superseding extract till a certain day, betwixt and which time allowed the defender to purge by payment of the said by-gone tack-duties or prices thereof, according to the fiars of the grain which grows upon the lands ; and found that the defender was liable to perform the services mentioned in the tack personally upon his expenses, and that he cannot do the same by a substitute ; but assoilzied from the conclusion of the declarator, that the tack should be null for the defender's not performing the by-gone services, and decerned against the defender for the penalties incurred by him through not performing of the by-gone services to which he was required, conform to the instruments produced, extending to £.100 Scots ; and refused to grant certification for not production of the principal tack ; and sustained the extract of the tack produced by the defender, in respect the same was adminiculated by the book wherein it was registrated.

*Sir P. Home MS.*

No. 162.

1743. February 24.

GRANT *against* LORD BRACO.

Upon advising a bill against an Ordinary's interlocutor, finding an assignation to a tack null, in respect the tack was only to the tacksman and his sub-tenants, the Lords were divided upon the question, What the difference was between a tack given to the tacksman and his sub-tenants, and a tack to him and his assignees?

Some were of opinion, that in either case he might assign, and that the difference lay only in this, that where a tack is to assignees, the tacksman is after assignation no more liable for the rent than a feuer is for the feu-duty after a sale of the lands ; whereas, where the tack is to the tacksman and his sub-tenants, the principal tacksman, notwithstanding of an assignation, remains still bound to the settér.

But the more general opinion was, that where a tack is to the tacksman and his assignees, the tacksman remains bound, even after assignation, just as in any other contract, *e. g.* a contract of victual. The assignation to that contract does not liberate the cedent ; and that the difference lay in this, that a power to sub-set did only imply a power to give off a part, but not the whole ; and that therefore, where a tack is granted only to the tacksman and his sub-tenants, an assignation would be null.

No. 163.

Import of a tack to the tacksman and his assignees, and of a tack to the tacksman and his sub-tenants.