

1706. *February 15.* WILLIAM CARSTAIRS *against* VANSE of BARNBARROW.

MR William Carstairs, Principal of the College of Edinburgh, against Captain Vanse of Barnbarrow. Mr Carstairs, as one of the Queen's chaplains, having a gift of the emoluments of the chapel-royal, pursues Mr Vanse for his teind-duties, payable to the prebendaries of the chapel, conform to an old tack liquidating it to £453 Scots yearly.

ALLEGED,—His predecessor has another tack obliging him to pay £400 to two ministers, and only £53 or eighty merks to the prebendary; so he can be charged by Mr Carstairs, as come in the prebendary's room, but only for eighty merks; but if he will relieve him of the two ministers' stipends, then he'll pay him the haille quota of £453. And that this tack was ratified by the commission in 1618, and a prorogation for 100 years then given him.

ANSWERED,—He was not concerned in that tack; which, as it was null, being set without the Bishop of Galloway's consent, so it never took effect, but only the other tack; conform to which, the dean of the chapel-royal has been in possession of the haille £453 these forty years bygone, though a kirkman needs no more than thirteen years; conform to the rule of the chancery of Rome,—*Triennalis et decennalis possessor non tenetur docere de titulo.*

REPLIED,—That whatever favour kirkmen pretend to, yet Mr Carstairs does no service for this gift. And possession only infers a presumptive right, which can never be obtruded against plain positive titles, as are here produced; and that they were not sooner founded on, is because he has recovered them lately out of his tutors' hands; and it were a jest for John Doull, the agent, who has acquired the right to be archpriest of the collegiate kirk of Dunbar, and any lay lord of erection, to plead possession for a sufficient title, which was only introduced in favour of kirkmen. See Dirleton, *tit.* Backtacks and Prorogations; and Durie, *18th June 1629, Dunbar.*

The Lords repelled the defence, and preferred Mr Carstairs, in respect of the bygone immemorial possession; and though seven years may introduce a possessory judgment in teinds as well as in lands, yet here, there being a preferable right, prescription was required to take it away; and that Captain Vanse could not prove that the tack he founded on had been clad with possession, and so taken effect, within these forty years bygone. *Vol. II. Page 328.*

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1706. *February 21.* SIR JAMES DICK of PRESTONFIELD *against* JOHN SKAILLS and MUNGO COCHRAN.

SIR James sets a tack of the house and parks of Cameron, to the said Skails, for twenty-one years, for erecting a starch-manufactory there, paying £360 of tack-duty, with this irritancy,—That if the tack-duty were not punctually paid each year, the tack should be void and expire. Skails turning bankrupt, Sir James raises a declarator of the irritancy and nullity of the tack; in which Cochran compears to defend; and Sir James objecting, that he had no interest, in re-

gard Skails, the tacksman, was debarred from making over his right to any assignees,—

ANSWERED,—He had power to assume partners, which he was ; and that they had expended above £1000 sterling, in repairing the houses, and buying wheat and other materials for their manufactory of starch ; and he had no other way of reimbursing himself but by this tack. The Lords sustained his interest.

Then he ALLEGED,—That the condition of the tack was usury and odious ; and at worst was purgeable at the bar. *2do*, They must have reparation of their damages, by Sir James's debarring them from the possession, in putting on padlocks upon the doors, and turning his beasts into the park and eating the grass thereof, whereby they are damnified in more than a year's rent.

ANSWERED,—That this being a conventional and not a legal irritancy, it was not purgeable, especially now after two years' failure ; neither did Sir James occasion any damage to them ; but, being applied to as a justice of peace by some of Skails's creditors, he secured the doors, that the goods might not be abstracted, but made forthcoming ; and their pretence of damage could not stop his declarator, but behaved to be liquidated in a process by itself.

The Lords found the irritancy purgeable, and that their failing to pay the tack-duty arose through Sir James's debarring them from the possession of the houses ; and therefore declared they would receive the consideration of their damages *hoc ordine*. And some proposed, That it not being reasonable for the tacksmen under that pretence to retain the whole, therefore, that they might pay up one year, and let the other lie till the event of the damages appeared ; but the Lords left the regulation of that whole matter to the Ordinary, to take trial and probation what was their true damage, and how much should be retained on that account, Sir James restoring them immediately to the possession.

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1706. *February 23.* LORD RANKEILLOR *against* DINMUIR and OTHERS.

LORD Rankeillor, as executor-creditor to Sir John Ayton, against Dinmuir and Others, his debtors. ALLEGED,—They could not pay, because the debts were assigned to the children of the second marriage, and the assignations intimated ; and who compeared and craved preference. ALLEGED,—The assignations were gratuitous, and no better than donations *mortis causa*, and can never compete with lawful creditors. ANSWERED,—They were good, and cannot be reduced on the Act of Parliament 1621, unless Lord Rankeillor subsume that Sir John was under diligence at the time, or bankrupt ; whereas they offer to prove he left an estate sufficient to pay all his debts and more. See *Stair, tit. Reparations*.

The Lords thought the case fit for an accommodation, and recommended to the parties to agree.

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