No 247. Mails and duties, not pursued within five years after the tenant's removing, do thereafter prescribe *quoad modum probandi*.

Harcarse, (PRESCRIPTION.) *No* 779. *p.* 220.

1709. *December* 9.

JOHN MURRAY of Philliphaugh *against* JOHN TROTTER of Mortonhall.

No 248.
A fiar having a tack of liferent lands, and after the death of the liferenter commencing to possess as proprietor; in a suit for arrears more than five years after the tack had expired, it was found, that the act 1669 did not apply to the case.

HARRY TROTTER of Mortonhall having taken from Margaret Scot, Lady Chesterhall, a tack of some lands liferented by her, whereof he was fiar, for the yearly tack-duty of 2500 merks; and the Lady having afterwards married John Murray of Philliphaugh, who got the tack-duty assigned to him in their contract of marriage; John Murray, now of Philiphaugh, as representing the said John Murray his grandfather, pursued John Trotter of Mortonhall, as representing the said Harry Trotter, his father, for payment of tack-duties resting before the year 1675, when old Philiphaugh died.

Alleged for the defender; By the 11th act of the Parliament 1669, mails and duties of tenants not pursued within five years after the tenant's removing from the lands prescribe, unless proved to be resting by the defender's oath or writ. And it is more than five years since Mortonhall's tack was expired by the liferenter's death, and he commenced to possess as proprietor.

Replied for the pursuer; This being a correctory law, strictly to be interpreted, and neither extended *de casu in casum*, nor *de persona in personam*, March 20. 1683, Hamilton *contra* Herries, No 255. p. 11061, it will not comprehend the present case; for, 1*mo*, It was made in favours only of *nudi coloni*, poor tenants who labour the ground by themselves or their sub-tenants, because of their presumed rusticity; whereas here the debate is with an heritor and fiar, who attained possession of liferented lands, while the liferentrix lived, by a tack from her of the whole rent, and cannot in propriety of words be designed a tenant in the terms of the act of Parliament. 2*do*, Prescription by the act 1669, takes place only from the tenant's removal, to prevent the hazard they were in of losing their discharges; but here the heritor continues to this day to possess his own lands, without removing at all. 3*tio*, The act constitutes only a prescription of mails and duties and rents of lands not proved *scripto*; whereas the pursuer proves his claim by a written tack; and it is reasonable that rents due by verbal agreement only should prescribe sooner than such as are constituted by writ.

Duplied for the defender; 1*mo*, He pleads no extension of the act, but that his case is in the precise terms of it; for that law is general, making no distinction of tenants, whether they possess by tack, or verbal set; or whether they be rich, or poor; or whether they be tenants of the whole rent, or but of a part; and so long as the liferenter lasted, Mortonhall possessed *tanquam qui-*

libet colonus. Nor could his being in the fee, make any alteration in the case, seeing he neither did nor could ascribe his possession thereto. The setter of the tack was not concerned, whether the tacksman laboured the ground himself, or did subset it; for there are many substantial farmers who subset their rooms; and both *colonus* and *subcolonus* have the privilege of the act of Parliament. As to the cited decision, it is no ways parallel; for it concerns not removing of tenants, but the extension of the privilege of stipendiary maintenances of the inferior clergy to teind-duties payable to bishops as titulars.—2*do*, When the act of Parliament requires five years after removing, that must be understood *civiliter et cum effectu*, viz. That the tenant so removed, as that he no longer possessed by the tack, or by tacit relocation; and the lands were made void and rid to the proprietor. Now it is certain, that a tenant as effectually removes from the lands, when he necessarly changes the title of his possession, or ceases to possess as tenant, as when he actually goes off the ground. 3*tio*, The pursuer cannot pretend, that his claim is proved by the tack, for that constitutes only the tack-duty, and doth not prove what is resting, as was decided betwixt Sir John Home and John Doul, No 11. p. 2077. No 248.

Triplied for the pursuer; A tack is a good instruction that the tack-duty is resting; as a bond is that the sums therein contained are unpaid, until the debtor or tacksman prove payment. The decision betwixt Blackadder and John Doul, mentioned, doth not meet; for there was no tack in that case, and the debate ran upon a mixed obligation granted, not by the tenant himself, but by a third party; besides, that single practick was indeed singular.

THE LORDS found, That the act of Parliament 1669 doth not extend to this case of a tacksman of the whole liferent.

Fol. Dic. v. 2. *p.* 118. *Forbes, p.* 362.

*** Fountainhall reports this case:

1709. *December* 10.—MARGARET SCOT, relict of Trotter of Chesterhall, sets her liferent-lands to Trotter of Mortonhall, for the yearly tack-duty of 2500 merks, and thereafter being married to John Murray of Philiphaugh, she assigns the tack-duty to him. The present Philiphaugh, as executor to his grandfather, pursues this Mortonhall on the passive titles, for payment of some bygone rests of that tack-duty. *Alleged*, Prescribed by the 9th act 1669, declaring, if tenants be not pursued within five years after their removal from the lands, the mails and duties prescribe, unless proved *scripto vel juramento*; and *ita est*, it is 16 or 17 years since the liferentrix died. *Answered*, You are not in the case of that act of Parliament, which was mainly designed for poor tenants labouring the ground themselves, whose rusticity in not getting discharges, or losing them, is very excuseable; whereas, Mortonhall was not in the natural possession, but rather a farmer of the estate, who, *per aversionem*, took

No 248. the room, being fiar and proprietor after the liferentrix's death; 2*do*, To found the prescription, it must be five years after the tenant's removal and leaving the ground, which cannot be pretended in this case; for, after the expiring of the liferent by her death, he continued still in possession as heritor, and so is not in the words and letter of the act, having never removed. *Replied*, The act makes no distinction whether the tenant be rich or poor, whether he be in the natural possession as a *colonus*, or only in the civil, by uplifting the rent; and though he was a tacksman, yet, *quoad* the Lady, he was no more than her tenant. And, as to the *second*, of his never having removed, It is but a sophistical quibble; for he being under a double capacity, both as tenant and heritor, when she died, he ceased to be any more *qua* tacksman, and sat still to possess as proprietor; so the act does not require a corporal removing and evacuation of the ground, but only the ceasing of the first title of his possession; and if a tenant should buy his own room, he needed not remove; but *fictione brevis manus* a virtual removing suffices, and after five years, his former rent would prescribe *quoad modum probandi*.—The Lords, by plurality, found him not in the case of the act of Parliament; and so the debt was not prescribed; but seemed to go more on the ground of his not being properly a tenant, than that of his not having removed off the ground.

Against this interlocutor Mortonhall gave in an appeal, on the 5th January 1710. See Appendix.

Fountainhall, v. 2. p. 539.

1710. *December* 29.

Mr James Daes of Coldingknows *against* Jean Scougal and Robert Semple of Fulwood, her Husband.

No 249.
Some of several partners of a paper mill, assigned their interest in the tack and materials to one of their number, he obliging himself to relieve them of the rent, and pay them each a surplus sum. Found to fall under the act 1669, relative to quinquennial prescription.

Mr James Hume, merchant in Edinburgh, Archibald Hume, Alexander Daes, and others, *in anno* 1672, took a 19 years tack of Dalry mills from Susanna Lockhart, relict of Gabriel Weir, for a certain tack-duty, to carry on a paper manufacture; and, in the year 1682, Alexander Daes and Archibald Hume, by contract, assigned their interest in the tack, and in the instruments, materials, and trading stock, to Mr James Hume, for which he obliged himself not only to relieve them of the tack-duty payable to Susanna Lockhart, but also to pay to each of them 333 merks yearly for their shares of profit, and to leave the instruments, materials, and trading stock, in the same condition. Mr James Daes, as donatar of the single and liferent escheats of Alexander Daes his brother, pursued the Lady Fulwood, as representing Mr James Hume, her first husband, for payment of the 333 merks of superplus tack-duty, for several years preceding the 1688.