

1725. February 3.

THOMAS FAIRHOLM of Pilton *against* GEORGE LIVINGSTONE, one of the Under-Clerks of Session.

No 250.

The act 1669 held not to apply to a tacksman of a whole estate.

JAMES RIDDEL of Kinglass, with consent of Sir James Cockburn, Sir Robert Miln, and Walter Riddel, three of his creditors, set a tack to Dr Livingstone, in the year 1682, of the lands of Kinglass, coals, coal-heughs, salt-pans, &c. to continue for seven years, for payment of a certain tack-duty to his creditors, by the proportions contained in the tack.

The Doctor died the year following; but his widow continued to possess, in virtue of the tack, till the expiry thereof, and for one year longer, by a tacit relocation.

Sir James Cockburn and Sir Robert Miln's debts being assigned to Mr Fairholm, he pursued George Livingstone, as representing his father the Doctor, to account for and pay these tack-duties.

The defences offered for Mr Livingstone were, *1mo*, That the pursuer had no title to insist, because the debts assigned to him were paid out of the price of the estate of Kinglass; *2do*, That the mails and duties pursued for were prescribed by the 9th act, Parliament 1699.

It was *answered* to the *first*, That nothing was more ordinary than in a ranking to oblige a creditor, whose debt affected two different subjects, to assign his debt, upon his being preferred on one of them, that so the postponed creditors might carry a right to the other subject.

To the *second* it was *answered*, *1mo*, That the prescription only regarded, and was in favour of poor tenants, who had no tacks, at least, it did not relate to tacksmen of a whole estate; for, in the case of Murray against Trotter, 9th September 1709, No 248. p. 11054. the LORDS found, "That the act of Parliament did not extend to the case of a tacksman of a whole liferent." *2do*, That there was interruption, in so far as Chisholm of Hairhope, during the currency of Dr Livingstone's tack, obtained a decret of mails and duties against Mrs Livingstone; of which decret a suspension was obtained upon a multiplepounding *anno* 1687, in which Walter Riddel's interest was produced, but the competition never was discussed.

It was *replied*, as to the point of prescription, That the act of Parliament was general, and enacted, 'That tenants not being pursued within five years after their removal, the mails and duties should prescribe;' and from this act there was no exception, unless the tenants acknowledge what they owe by a special writ under their hands; which plainly must be a particular writ, constituting the rents, distinct from the tack-duty, which only shows the tack-duty, but not what may be owing of it by the tenants. As to the decision quoted, it was *answered*, That there, though the right was conceived in form of a tack, yet the nature of the right was the turning a liferent into an obligation for an an-

nuity. And as to the interruption, Mr Livingstone *answered*, That any interruption at Hairhope's instance was during the currency of the tack, before the prescription begun to run; and Mr Livingstone being reponed against his decret, the matter landed in a competition not wakened within five years.

No 250.

THE LORDS sustained the pursuer's title; but found that the act of Parliament 1669 did take place in this case.

Act. H. Dalrymple, sen.

Alt. Ja. Boswell.

Clerk, Hall.

Edgar, p. 162.

1729. July 10.

NISBET *against* BAIKIE.

No 251.

THE quinquennial prescription of mails and duties takes place equally whether the tenant has possessed by written or verbal tack.

Partial payments, made within the five years, found no interruption of prescription, as tending rather to fortify the presumption, that all bygones are cleared.

A tack of mails and duties falls not under the act, which regards only tenants who are in the natural possession, by labouring the ground.—See APPENDIX.

Fol. Dic. v. 2. p. 117.

1739. June 19.

STRAHORN *against* CUNNINGHAM.

No 252.

THE five years prescription of mails and duties, after the tenant's removal, does not take place against an heritor, though he have sold his lands, and that the purchaser has been five years in possession; the tenant still remaining in the ground.

Kilkerran, (PRESCRIPTION.) No 2. p. 415.

1771. March 7.

LAUHLAN DUFF *against* WILLIAM INNES of SANDSIDE.

No 253.
Quinquennial
prescription
of the act
1669, c. 9.
pleadable by
the cautioner
of the tenant.

LAUHLAN DUFF, factor for Lord and Lady Fife, as executor of the Earl of Caithness, pursued Innes of Sandside for payment of a certain sum of money, in consequence of two obligatory missives, granted by Sandside's father. Sandside, in defence, *pleaded*, That these missives being cautionry obligations for mails and duties, owing by tenants removed from the land, and the debt against