within the *sixty* days, he cannot be in a better situation than other creditors. But that is not the case here. Heritable security was intended from the beginning.

PRESIDENT. If the Act 1696 could have the interpretation put upon it by Messrs Mansfield, I would certainly move for an application to Parliament for its repeal.

On the 15th February 1771, " The Lords assoilyied from the reasons of reduction ;" adhering to Lord Kennet's interlocutor.

*Act.* R. M'Queen. *Alt.* H. Dundas.

*Diss.* Monboddo.

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1771. *February* 19. JAMES SCOTT *against* GEORGE STRAITONS.

TACK—

**The termination or ish of which was indefinite, being granted to the tenant and his heirs, if effectual against singular successors? Effect of acquiescence in, and homologation of that right.**

[*Faculty Collection, V.* 225 ; *Dictionary,* 15,200.]

PRESIDENT. The case of *Belladrum* is not to the purpose ; for in that case the tack had ish. Neither is the case of *Lord Hopeton and Wight* to the purpose ; for *there* the tacks were excepted from the sale, and in a manner homologated. The question is, whether the tack is good, which has not an ish? It is good against Sir Robert Grahame and his heirs, but the pursuer says that *he* is a singular successor. Answer : He has homologated the right by taking payment of rent, and even of vicarage, for near a century. I also think there is a good plea of prescription here. No infeftment was necessary in the case of patronages. Possession has been held sufficient to give a right, because infeftment does not commonly follow upon patronage. *Here* also is a subject upon which infeftment does not generally follow.

KAIMES. I doubt as to prescription, but I am clear as to homologation.

MONBODDO. I never heard of a right like this. I do not think it a tack at all ; there is not so much as a mutual contract ; for the tenant might renounce his possession at pleasure. It is, however, binding on the granter and his heirs, anomalous as it is. As to singular successors, the case is different. Records secure singular successors, except as to tacks, which are provided for by the statute 1449. Now this tack is not in the form of the tacks mentioned in the statute 1449 : it is not *for terms ;* it is but going one step further to make a tack good without any prestation of rent. I do not see any homologation. The receipts are cautiously worded, for *occupation of land.* Neither do I see how prescription can take place here. Patronages are not just in the case of the statute 1617, but approach near to it. The

difficulty here, that the right is absolutely null. There is no evidence that the tenant possessed upon the right, because there was a different tack-duty paid. This implies some other sort of agreement than that founded on.

PRESIDENT. There is no material variation in the quantity of rent, but only some difference as to the species of the grain paid,—*nine* bolls, part bear, part meal, instead of *four* bolls wheat.

GARDENSTON. Nothing more generally known than this singular right. When I resided in that country, I often heard of it. It is impossible that the pursuer's authors could fail of knowing how the right stood, when they saw a rent paid not the fourth part of the present value of the lands. If there is a law for removing this defender, it will be very hard law. In the case of *Belladrum*, they who thought the tack null, proceeded upon the idea that a tack for 1100 years was a tack without an ish. Here there is more probability of an ish than in a tack for 1100 years, for this tack excludes *assignees*; and, even in the happy state of mediocrity, where luxury does not enervate, there is little probability that a family will subsist for 1100 years. Here there is a sufficient prorogation; tacit relocation will not be presumed.

HAILES. For clearing up this case, dates are to be observed. Bishop Forbes died in 1618: the tack was granted in 1620, for the life of Christian Straiton, and 19 years over. In 1642, the perpetual prorogation was granted after the death of Christian Straiton, and 19 years over. In 1656, there was a change in the prestations, and part of the subject was given up by the tenant. In 1681, the pursuer's author obtained his charter of adjudication: from that time his real right in the subject commenced. If the 19 years was current in 1681, then Christian Straiton was alive in 1662; that is, 44 years after the death of Bishop Forbes: *this* in itself is not probable, because the contrary is probable. The presumption then is, that she was dead before 1662, when 19 years, measured from 1681, commenced. And, accordingly, there is reason to believe, from the writings in process, that she was dead in 1656; consequently, the 19 over had expired before the date of the right of the pursuer's author in 1681. At that time, then, the tenant's right had commenced upon the prorogation, and every hour's possession by the singular successor was an acknowledgment of that right. If a tenant has a tack of 19 years, and possesses longer, his possession must be imputed to tacit relocation, because he possesses, and has no pretension to possess; but tacit relocation the permission of the master. The case different here: for the possession in 1681 was in consequence of a valid title. Although exceptionable at the instance of the singular successor, it follows that the prorogation was not *collatum in tempus indebitum* to a period when the power of the granter had ceased.

AUCHINLECK. As a tack for 1100 years has been found good, so also would a tack for 10,000. It has been common to grant tacks of teinds so long as water runs and trees grow. My only difficulty is, that here there is no proper contract mutually binding. There is *locatio*, but where is the *conductio*; yet the long acquiescence goes far: it is extraordinary to bring a challenge after so many years. As Lord Gardenston mentioned what he had heard during his residence in that country, so I may mention what I have heard in passing through that country, that the possessor of Wardropperton had a perpetual

tack. If they who resided in the country, or passed through it, heard of this extraordinary right, how is it possible to say that the heritor himself knew nothing of the matter?

JUSTICE-CLERK. An ish to a tack is not necessary: so it was determined in the case of *Holmains*. It will be good against the granter and his heirs. Tacks to perpetuity, and for 1000 years, are equiparate. So long a homologation upon the part of the singular successor puts this pursuer in the same state as if he were the heir of the original granter. The law does not require so exact a correspondence between the two parts of the contract *locati conducti*. A master may have the power of resuming his land; and yet the tenant may be bound to hold it, and so *vice versa*. There is no danger to singular successors, for they may challenge *tempestive*, instead of acquiescing for a century.

KENNET. I should be sorry that tacks without an ish, or of an immoderate endurance, should be good against singular successors: but we are relieved of this difficulty by the plea of homologation, which I think is good.

PITFOUR. Such a tack is good against heirs, not against singular successors. In the case of *Belladrum*, the House of Lords did not mean to determine the contrary. This lease was not *collatum in tempus indebitum*. The prorogation was running in 1681: this is my idea, which has been now fully supported and confirmed by a disquisition of one of my brethren. In 1681 the singular successor might have insisted to void the lease: *now* he is bound both by homologation and prescription.

On the 19th February 1771, the Lords sustained the defences, and assoilyied.

8th March 1771, adhered.

*Act.* J. Scott. *Alt.* A. Wight.

*Reporter*, Pitfour.

*Diss.* Monboddo. [This judgment agreeable to the opinion of Coalston, who was absent.]

Affirmed on appeal.

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1771. *February* 20. ANDREW ROSS and OTHERS *against* JOHN GLASFORD and COMPANY.

## CHARTER PARTY—MUTUAL CONTRACT.

**A vessel on a trading voyage being captured, the sailors entitled to wages *pro rata itineris*.**

[*Faculty Collection*, *V.* 239; *Dictionary*, 9177.]

AUCHINLECK. It is not agreeable to equity to deprive a workman of his wages. *Here*, properly speaking, there were three different voyages to Newfoundland, Lisbon, and Glasgow. Shall the accident of a loss on the *third* voyage deprive them of their wages on the other two? Suppose the ship had been