

Leith-hall, before his death, had taken up a judicial rental of his estate, when Patrick Leith compeared, among the other tenants, and emitted an oath, in substance importing, that he possessed the lands of Christ-kirk, and others therein mentioned, by agreement with Leith-hall, for 19 years from Whitsunday, 1756, for payment of a certain tack-duty particularly mentioned; and this oath, subscribed by the tenant, was, by a diligence from the Court, recovered out of the factor's hands, and upon it Patrick Leith founded, as sufficient to support his possession for 19 years, from Whitsunday, 1756. And

Pleaded: That though the law required writing to intervene in bargains with regard to heritable rights, the form of that writing is no where ascertained. It is enough if the intention of parties appear; and, in this case, the agreement of parties is perfectly clear from the tenant's deposition, where the term of entry, the endurance of the tack, and the rent payable, are distinctly specified, and taken down in writing, subscribed by the tenant, and accepted of by the master; which, joined to the possession which followed, and the proprietor's receiving the rent agreeable thereto, must be held as sufficient to support the tenant's defence against the removing.

Answered: The purpose of taking the judicial rental was no other than to ascertain the rents payable by the different tenants, and could not alter the nature of the right or title under which the tenants hold their farms, so as to impose standing leases upon lands possessed by verbal agreement, which, though ever so explicit, are not binding upon either party for more than one year. The oath, in this case, imports no more than that such were the terms of the verbal agreement between Leith-hall and the tenant; but, as the agreement could only be binding for one year, the tenant, by setting forth the terms of that verbal agreement in his oath, which was taken down in writing, cannot invert the nature of that agreement, or create any stronger obligation against the proprietor than what the verbal agreement itself imported.

“ The Court, 5th August, 1766, sustained the reasons of suspension. But, upon advising a reclaiming petition for Captain Stewart, with answers for Patrick Leith, 25th November, 1766, that interlocutor was altered, and the letters found orderly proceeded. And a petition for Patrick Leith against this last interlocutor was, 10th December, 1766, refused without answers.”

For Captain Stewart, *Lockhart & Cosmo Gordon*. For Patrick Leith, *David Rae & Robert Blair*.

*Fol. Dic. v. 4. p. 322. Fac. Coll. No. 110. p. 378.*

1772. July 23.

COUNTESS DOWAGER OF MORAY, against BAIN, STEWART, and Others.

Objected by the Countess Dowager of Moray to certain leases of land, granted by the late Earl, her husband, That though signed by the tenants, and followed

No. 28. by possession on their part, they had never been signed by the Earl. The Lords found the leases ineffectual, and decerned the tenants to remove; but this judgment was reversed on appeal.

*Fol. Dic. v. 4. p. 322. Fac. Coll.*

\* \* This case is No. 52. p. 4392. *voce* FIAR, ABSOLUTE, LIMITED.

1788. July 10.

COLQUHOUN GRANT *against* The REPRESENTATIVES of JAMES RICHARDSON.

No. 29.

A missive letter of tack sustained as effectual, tho' not holograph, the subscription not being denied, and possession having followed.

An action of removing from a farm having been brought against the heirs of James Richardson, they produced, as his and their own title of possession, that of both having been held for several years, a missive letter, addressed to Richardson, and bearing the subscription of the landlord, which contained a promise to grant a nineteen years lease of the lands. With respect to the verity of the subscription, the pursuer, who was trustee for the heirs of the alleged granter, refused either to acknowledge or to deny it; and

Pleaded: Writing is essential to the constitution of every obligation concerning heritage. Such writing must be formal and probative, otherwise it has no legal effect. Not even an acknowledgment on oath, of the verity of the subscription to a writing not holograph, will there supply the want of the statutory requisites. That this is now an established rule, appears from the decisions in the cases of Mackenzie *contra* Park, No. 47. p. 8449. *voce* LOCUS PŒNITENTIÆ, and of Stewart *contra* Besset, in 1765, (see APPENDIX); notwithstanding that formerly the point may have been differently understood.

Answered: Though to the transmission of landed property certain forms and solemnities are required, yet by less formal deeds a person may become effectually obliged to execute the proper legal conveyances for that purpose; Lord Kilkerran *contra* Paterson, No. 43. p. 8440. *voce* LOCUS PŒNITENTIÆ; Neil *contra* Andrew, No. 84. p. 10406. *voce* PERSONAL AND TRANSMISSIBLE. It cannot, then, be doubted, that an obligation to grant a tack may be created in that manner. But *factum de assedatione facienda idem est ac ipsa assedatio*; Craig, Lib. 2. Dieg. 10. § 10.; and, when clothed with possession, such a *factum* cannot be objected to on account of any statutory informality; Crawford *contra* Wight, 16th January, 1739, *voce* WRIT; 20th December, 1746, Foggo *contra* Milligan, IBIDEM; 6th March, 1753, Barron *contra* Duncan, No. 25. p. 15177.

The Lords assoilzied the defenders.

Lord Ordinary, Stonefield.

Act. Lord Advocate.

Alt. Elphinston.

Clerk, Orme.

S.

*Fol. Dic. v. 4. p. 322. Fac. Coll. No. 33. p. 53.*