have been said for the exemption; but that is not the case, there has been still a use of levying.

JUSTICE-CLERK. If it shall be found that the magistrates have a right to levy duties at the markets, it will be entire to consider whether they have a right to compel the sellers to repair to the market.

On the 15th July 1783, "The Lords repelled the defences."

Act. R. Dundas. *Alt.* Ilay Campbell, &c.

Diss. Gardenston, Braxfield, Stonefield, Hailes, Kennet.

Hearing; concluded cause.

1783. *July* 15. JAMES ROSE WATSON *against* ELIZABETH GORDON.

PAPIST—

May succeed to a Lease of Lands.

[*Faculty Collection, IX.* 177; *Dictionary*, 9615.]

HAILES. Should the legislature repeal the statute in question, I might consider myself at liberty to give my opinion on its nature and tendency. But, until that shall happen, I must consider it as the law of the land, and I must interpret it fairly; always remembering, however, that it is a statute purely penal, and not to be extended beyond its express words. This statute is not without precedent; for there are edicts of Louis XIV. of France, devised against his Protestant subjects, in terms nearly similar. There were weighty reasons in 1700 for enacting such a statute. The wild expedition to Darien had proved unsuccessful: the nation was disappointed and impoverished: and to this the distresses of famine were added. A nation, so circumstanced, looks round to discover the authors of its misery. There can be no doubt that King William and his ministers never approved of the Darien expedition, and that every thing was done by the English to prevent its success that could be decently done. This exasperated the people of Scotland, and it became necessary for King William's ministers to do something that might soothe and conciliate their minds. It appears, from Carstair's State Papers, that King William's ministers did, for this purpose, bring forward two bills, one for securing the Protestant religion, and the other for securing the liberty of the subject. Here we see the true cause, as well of the statute in question as of the statute anent wrongous imprisonment. Both of them were owing to the unfortunate Darien expedition. There is nothing in this statute which applies to *tacks*. In common language a *tack* is not called an estate. We say that such a one has left no *estate*, but has left to his heirs a lucrative *tack*; and, if *that* is the language at present, much more must it have been at the beginning of the century, when tacks were not so profitable, or of so long endurance, as at present.

GARDENSTON. This law is a severe one, and I wish that liberal minds had appeared for its repeal. The first clause, as to tacks, is to prevent elusory grants. As to the second clause, there was not the same danger. A tack is not an *estate*, but a *bargain*. There are many Protestants who wish to get rid of such bargains. A gentleman sells his farm-victual to a merchant for a tract of years: such bargain is often lucrative to the merchant; yet it would go to the Popish heir, because it has *tractus futuri temporis*.

MONBODDO. Although this is a penal statute, I should interpret it against the Papist, were the words clear; but I think that the present case falls not either within the words or spirit of the statute. In the first clause, tacks are prohibited, because it would have been exceedingly easy to have eluded the tack by a grant of a tack for an elusory duty. In common language, *estate* does not mean an annuity or a lease. Valuable bonds or valuable effects are more properly an *estate* than a tack is, and yet such subjects would not fall to the Protestant heir. It is admitted that an adjudication, though infeftment should have followed on it, and though carried by service, would not fall under the statute. A lease may be profitable or not. It is a contract. It is not a real right, except by a special act of Parliament for a particular purpose.

JUSTICE-CLERK. I am of the same opinion, and for the same reasons. Besides, this is not an *estate*. In an estate no person is interested but the heir. A tack is a mutual contract, in which the lessor has an immediate and a constant interest. It is contrary to the wish of the proprietor that the lease should be held by others than the legal heirs of blood. In this particular case, the Duke of Gordon certainly looked to the heirs of blood.

ESKGROVE. For reasons of state the legislature devised a statute contrary to general notions of equity. I cannot extend such a statute beyond its express words. The statute would certainly have mentioned *tacks* if it had meant to comprehend *tacks*.

On the 15th July 1783, "The Lords sustained the defences, and assoilyied."

Act. Ch. Hay. *Alt.* A. Abercrombie.

Reporter, Eskgrove.

N.B. This judgment was, in appearance, unanimous; but it is probable that Lord Braxfield was against it, for he had formerly given his opinion, at the service, that Elizabeth Gordon ought not to have been served at all, because the only thing which she could take by the service was the tack, which, being a Papist, she could not hold; and therefore *frustra petis*, &c. In this he was overruled by Lord Gardenston and Lord Hailes, the other assessors, who said that Elizabeth Gordon ought, at any rate, to be served, because, although a Papist, she would carry heirship moveable by the service.