

1711. *January 31.* WILLIAM RAMSAY, Petitioner.

RAMSAY, Earl of Dalhousie, having gone alongst with his regiment to Spain, and died there; William, his cousin-german, takes brieves out of the Chancery to serve himself heir-male to him *cum beneficio inventarii*, conform to the 24th Act 1695. The last Earl had been persuaded by his mother to dispone his estate and honours to his own sister, failyieing heirs of his body. Against which it was objected, that the title could not be conveyed unless the Queen had accepted the resignation, and conferred them of new, which she had not done; and as little could he dispone the lands and estate, because he stood interdicted, and a quorum of his interdictors had not consented. The present Earl, for perfecting his right, made up inventories; but the Sheriffship of Mid-Lothian being vacant, by the death of the last Earl, who was Sheriff-principal of that shire, he knew not where to apply, seeing the foresaid Act of Parliament requires these inventories to be made before the Sheriff where the lands lie; and that he, or his depute, record the same in his books, and give forth extracts thereof. And this being an event he could not foresee, law must have a remedy for this defect: and therefore he gave in a bill to the Lords, as the common judicial fountain of justice, who, by their pretorian power, can only supply these failures, that they might appoint some persons in place of the Sheriff to subscribe his inventories, and to order their recording in the Sheriff-court books of Edinburgh, in the terms of the Act of Parliament, that his service may be no longer delayed. It was instanced that, in Sir John Erskine of Alva's service, the Sheriff of Stirling being then deceased, the Lords authorised the Provost of Stirling to supply his place, in 1696. But, in a later case, where the Earl of March was served heir, he being himself Sheriff-principal of Tweeddale, the Lords directed their warrant to Blackbarony for that special effect.

In this case of Dalhousie, the Lords being informed that the Queen had given a commission to the Lord Balmerino, to be Sheriff-principal of Mid-Lothian, and he had named the Master, his son, and Mr Thomas Rig to be his deputes; the Lords empowered any of them two, on their taking the oaths, to sign Dalhousie's inventory in the terms of the Act of Parliament. Which being done, he was accordingly served heir *cum beneficio inventarii* to his cousin last infest.

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1711. *February 10.* ANNA PATERSON, Lady Craiglockhart, *against* BURTON.

GEORGE Porteous of Craiglockhart, herald painter, sets a tack of his lands of Craiglockhart to one Burton, for L.1000 Scots of tack-duty, for thirty-one years; but with this quality, that if George himself should think fit to dwell in Edinburgh, and not in the mansion-house of Craiglockhart, the tenant, in his absence, might possess it, without paying any additional rent for it, except the keeping a horse and a cow at grass and fodder, both summer and winter. George afterwards repairs the house, making it more convenient than formerly;

and enters into a verbal agreement with the same tenant, to let him have the constant use of the house for L.100 Scots of more rent yearly, and dispensing with his keeping the horse and cow. And, accordingly, for the space of ten years, he pays that augmented rent, and takes yearly discharges of the same. But Burton dying, and his son succeeding to the years of the tack yet to run, Anna Paterson, relict of the said George, and liferentrix infeft in the lands, claims the said additional tack-duty for their possessing the house: and they refusing payment, she pursues them. Against which they oppone their father's tack, and offer to perform all contained in the four nuiks of it; but disowned their knowledge of any such verbal paction, which destroyed that clause in the written tack allowing them to possess the house when the heritor was absent without any further augmentation or burden: and their father's paying a separate duty has certainly been *per errorem, et quod indebite solutum potest conditione indebiti repeti*; at the least, can never bind them to continue any such practice, contrary to the tenor of the original right by which they buik. And their father's possession and their own, of the mansion-house, was mererely precarious, and momentary: for they had not security for a month, yea, not for a week; but he or his wife might come out and dispossess them.

ANSWERED,—This bargain was not contrary to the first tack, but only an addition thereto; and whatever mistake might be pretended, if it had been only for a year or two, yet such deliberate continued acts, for ten years' space, without reclamation or murmuring, but accepting such a long tract of consecutive discharges, as if done by error and mistake, passes all comprehension, and shocks the common sense and reason of mankind. And use of payment of annualrent, where there was neither natural nor civil obligation antecedent, did infer an obligation *pro futuro*; as was found, 17th November 1671, *Hepburn* against *Congalton*. And they some years set the house, and got 100 merks of rent; which being conjoined with the horse and cow's maintenance, whereof they were liberated, extended to much more than £100 Scots by year. Likeas, they had the yards, parks, and inclosures, into the bargain.

The Lords found that the father's paying an additional duty for his possessing the house and its pertinents for so long a time, obliged his son to pay the same duty for all the years he has possessed it since his father's death, and so long as they continue still to possess it: but being only verbal, there was *locus pœnitentiæ*, and power to resile and give over every year; therefore they found the tenants may renounce the possession, and free themselves of the said additional tack-duty in time coming; but in that case they return to be liable for the cow and horse's grass, summer and winter, as they were before.

The Lords proceeded on this ground, That the discharges expressly bore that the payments were made by the tenant for his possession of the mansion-house; which clearly, by such a long tract, instructed a new bargain made betwixt them. But the Lords seemed to make a difference betwixt bygones and in time coming; for, *quoad* bygones, they found the tenant simply liable; but in time coming, only in case they continued to possess the house.