England, for that the act of limitation, by the express tenor of it, is only where either the whole, or a part, of the penalty goes to the crown, whereas here no part of it goes to the crown."

"When this Bill came to be advised, the generality of Lords seemed still of opinion that the act of limitation, supposing it to affect this case in England, did not do it here; but I again stood out against the interlocutors being laid on that point, and accordingly the Lords simply adhered."

"I do not understand how the action *qui tam* can need to have the king's name in it, except the king has an interest; but be that as it will, in point of form, which, by the by, is certainly not so, yet were it so, still I do not see the act of limitation can reach any other case than is expressed in it, which only is where the king can pursue."

N.B. This case is reported in Mor. p. 4508, and by Elch. ***Pactum Illicitum,*** No. 9, and ***Prescription,*** No. 13.

1737. *January* 25. SIR J. DALRYMPLE of Hailes *against* HEPBURN of Beanston.

BY tack, dated in 1609, the parson of Prestonhaugh, with consent of the patron, and of the dean and chapter of Dunbar, set the teinds of the lands of West Fortune and others to Sir Patrick Hepburn, for three liferents, and three nineteen years. This tack contained an obligation upon Mr. Hepburn, the parson, "Before the ish and end of the years of the tack, to renew, make, seal, subscribe, and deliver to the said Sir Patrick Hepburn, his heirs, &c. other new sufficient tacks of the foresaid teinds, during as many years as is above specified, efter the ish of this tack, and for payment of the same farm and duty."

By the statute, 1693, the teinds of parsonages were granted to the patrons of the parishes; and the estate of the patron of the parish of Prestonhaugh having been sold judicially in 1704, Sir D. Dalrymple, father of the charger, purchased the estate, including the patronage and teinds.

The tack above mentioned expired in 1728. Upon this, the question occurred whether the obligation to renew it for the like number of years was binding upon the charger, who was a singular successor.

The Lord Ordinary "found that such obligation was not effectual against a singular successor."

In a petition for the suspender, it was

PLEADED, that by the act 1449, tacks, clothed with possession, are made real rights, and binding on singular successors; that an obligation to grant a tack is equally binding as a tack itself; and that this reasoning applied *a fortiori* to the charger, whose right flowed from a donator of the right to the teinds, in virtue of the act 1690, c. 23, abolishing patronages, and the 10th of Queen Anne restoring patronages, whereby patrons are made donators of the teinds not heritably disponed, which gift should be construed favourably to the heritors. Besides, the

right to the teinds is granted to patrons by the act 1690, *under burden of ministers' stipends, tacks, and prorogations* already granted of said teinds, &c. which words import a *salvo* in favour of obligations to prorogate, such as that here founded on.

ANSWERED.—It is only when tacks are clothed with possession that they are binding on singular successors; but as the teinds in question had been purchased by Sir D. Dalrymple long before the time fixed for the commencement of the renewed tack, it neither was, nor could be, clothed with possession at the time when he became proprietor of the teinds, and so was but a personal right not binding upon him. A further objection is, that the commencement of the renewed tack which the setter bound himself to grant, is delayed *in tempus indebitum*, till a time when he had no right, and when he could not possibly have a right.—*Craig*, De Loc. § 10. *Stewart's Answers*, Voce Tack. The ground of this objection is that it is not the tack but the *possession* which gives the real right, and the granter of the obligation here in question being denuded before the period fixed for the commencement of the new tack, it was impossible that any possession could be had in virtue of a right derived from him.

As to the argument on the other side, drawn from the maxim, that an obligation to grant a tack is equivalent to a tack itself, that is quite true; but the answer is, that supposing the obligation in question had been actually implemented by the setter, and a prorogation of the tack actually granted by him, such a tack would not have been binding on a singular successor, because no possession could have been had upon it previous to Sir James's purchase. It is here that the suspender's mistake lies. He supposes that possession under the first tack, was possession upon the second. But this is impossible; because, by the conception of the obligation, the commencement of the second tack was to be at the ish of the first; and, therefore, till the first was expired, there could not possibly be possession upon the second, no more than if the tack had contained an obligation to grant an heritable right after the expiry of the first tack, it could be maintained that possession during the tack was possession upon the heritable right.

As to the argument drawn from the act 1693, it does not follow, because patrons are made donators of teinds, under burden of tacks and prorogations, that a tack which would have been good for nothing, *supposing the right had remained with the parson at this day*, should become a good right against the patron.

The Court *altered* the interlocutor of the Lord Ordinary, and found the obligation in the tack effectual against a singular successor.

Lord KILKERRAN has the following notes upon two different sets of the petition and answers.

"Would not a tack of teinds have been effectual against singular successors before the Act of Parliament 1449?—If not, neither are they yet effectual, for that act is restricted to labourers of ground: *ergo*, It must be some other rule than this Act of Parliament."

"Teinds were naturally only personal rights, and not capable of passing by infeftment till the reformation; *ergo*, why not all personal obligements capable to affect them? If the patron's right by Act of Parliament be burdened with prorogation, what is this else?"

"Upon the whole, I am of opinion, the Act of Parliament 1449, has nothing to

do in the case. *Second*, That even the want of possession is no objection even to a singular successor against a tack of teinds.—*Vide* for this, *Stewart on Nisbet*, title tacks. But then the objection to Beanston is, that this obligation is to grant a new tack at a time that became *tempus indebitum*,—*vide* Craig, *loco citato*, in the answers, as also the decision, June 18, 1629,—*Dunbar* contra *Turner*, and *Stewart on Nisbet*, *voce* Bishops. If, says he, a bishop, during the standing of a former tack, sets a new tack, and live thereafter in the benefice till the ish of the former tack, the new tack commencing in his time, will subsist."

"The Lords altered the interlocutor on this ground, that they considered the obligement in the tack as a continuation of the same tack, being *in eodem corpore juris*, and not a new tack, to which only the reasoning upon that topic, and which had occasioned my difficulty as marked on the other copy of the petition, herewith put up, did apply."

"It was observed, that there were many instances in Scotland of tacks of teinds, which contained several different tacks, one to commence after the ish of the other, which being *in eodem corpore*, were all valid; and in this case there being an obligement to renew, at a certain period, behoved to be judged by the same principles as if, in place of the obligement to renew it had actually been a tack to commence after such a period; and, moved by this reasoning, had changed the opinion I had conceived, and voted with the majority for altering the interlocutor."

"But as this was a point only started at advising; after the vote had passed, casting my eye on the tack, and seeing the words of the obligation, I repented my vote, and hope it will come again before us by a petition."

Accordingly a petition was given in by Sir. J. Dalrymple, in which, besides repeating the arguments formerly urged, he stated the following considerations with a view to meet the reasons which had been suggested from the bench at advising the previous pleadings.

It had been suggested from the bench, that there might be a difference between tacks of lands and tacks of teinds, and that the Act 1449 mentioned only lands and not teinds. From this it was inferred in favour of the suspender, that if rights to teinds are still to be considered as personal rights, then an obligation to grant a tack at the ish of a former tack, will be valid even against a singular successor, in the same way as any personal right can be qualified by a back-bond even against a singular successor.

The answer to this is two-fold. In the *first place*, as the statutes relating to lands had in almost all cases been extended to teinds, though not expressly mentioned therein, *e. g.* in the case of the statute with respect to apprisings, adjudications, and the prescription of heritable rights and retours, therefore, the same should be done in the case of tacks, under the Act 1449. *Stewart* voce *tacks of teinds*. In the *second place*, this view, supposing it to be correct, places the suspender in a worse situation than before; and instead of furnishing an answer to the charger's argument, renders that argument unnecessary, because, if tacks of teinds are but personal rights, and have no aid from the statute, then they cannot affect a singular successor at all, any more than a tack of lands did, prior to the Act 1449.

As to what had further been suggested, and seemed chiefly to influence the decision, viz. That the obligation "to renew the tack was equal to a tack; and

if so, that there were not here two tacks, but one tack, and which was clothed with possession;" it was stated, in addition to the former argument, that this was contrary to the decision, *Laird of Corsehill* against *Wilson*, 11th March, 1626, where it was found, 1*st*, That a bond to renew a tack, contained in the end of a tack, makes no part of the tack, but is a separate obligation. 2*dly*, That such a bond, however binding on the granter, is not effectual against a singular successor,—as was also found, *Hamilton*, 2d March, 1626.

On advising this petition with answers, the Court *altered* their first interlocutor, and returned to that of the Lord Ordinary.

Lord Kilkerran says,

"The reasoning went on this, that there was no argument from a tack for nineteen years, and five years thereafter, and after that for five nineteen years, that because all that was one tack, *ergo*, the obligation founded on in this case made the years for which it was granted to be one tack with the former endurance. I had no occasion to give my vote, being that week in the chair, but had it come to my casting vote, I had been for altering."

This case is reported by Elch. (Tack, No. 5.) and Fol. Dict. 2—17, (Mor. 9444.)

1737. *February* 16. SIR JOHN INGLIS of Cramond and OTHERS *against* ROYAL BANK OF SCOTLAND, as Creditor to Joseph Cave.

IN October, 1734, Cave purchased from the pursuer a quantity of barley of that year's crop. The price was made payable some time after delivery. On 21st January, 1735, Cave, whose affairs had gone into disorder, executed a disposition *omnium bonorum* to trustees for behoof of his creditors.

By this time, 538 bolls of the barley had been delivered to him in different parcels, part of it having been delivered on the very day above mentioned, when his bankruptcy was announced.

Upon this, the pursuers brought an action before the Sheriff of Edinburgh against Cave, and the trustees for his creditors, concluding for restitution of the barley, upon the ground that Cave having bought it at a time when he knew himself to be insolvent *dolus dedit causam contractui.*

The barley being measured over, by order of the Sheriff, it appeared that 156 bolls were still extant without any alteration, and that 221 bolls had been made into malt.

The case having been advocated, the Lord Ordinary ordered memorials on these two points, 1*st*, The relevancy of the libel, or claim of the pursuers for recovery of the victual sold and delivered by them. And, 2*dly*, upon the effect of the specification, as to so much of the barley as has been converted into malt.

In order that the question of law might not be embarrassed by disputes as to the fact, it was agreed that it should be assumed in the argument that Cave knew himself to be insolvent in October, 1754, when the bargain was made for the sale of the barley, upon the understanding that, in the event of the Court deciding the