

No. 83. The Lords sustained the declarator as to the second tack, and found the same imported a prorogation of the first tack to defend against a singular successor; and found it also relevant, that the defender knew of the second tack at the time of the purchase proveable by his writ or oath: And, further, sustained the other point, that the disposition granted to the defender was on death-bed, without consent of the heir, who, by the warrandice of the tack, was bound to maintain the pursuer's possession; and found the pursuer might, on these grounds, repeat a reduction, by way of defence, in his process of removing.

Act. *Ja. Paterson.* Alt. *Ja. Graham, sen.* Reporter, *Lord Milton.* Clerk, *Justice.*

Edgar, p. 143.

1757. January 4.

THE CREDITORS OF LORD CRANSTON *against* THOMAS SCOT.

No. 84.

Retention of rents allowed by the landlord to his tenant, in consequence of cautionary obligations, and prorogation of his tack for the same cause, whether good against creditors?

Lord Cranston, in April 1735, granted a lease to Thomas Scot, to continue for twenty-one years, from Whitsunday 1734. In 1750, Scot became cautioner for Lord Cranston in a debt of £.527, which he was soon after obliged to pay; and for his relief, Lord Cranston, in August 1752, gave him a prorogation of his tack for three periods of twenty-one years, to commence at Whitsunday 1755, when the former lease expired, at the same rent as in his first lease; with a power to retain, for his payment, the fine or grassum stipulated in the new tack; and also to retain the surplus rent of his farm from the year 1751, over the interest he was previously bound to pay out of it to certain heritable creditors.

In the year 1754, the estate of Lord Cranston was sequestrated. The creditors of Lord Cranston, by infeftments and adjudications posterior in date, contended, That as possession had not commenced upon the prorogation of Thomas Scot's tack, it had not become real before the sequestration; and was therefore ineffectual against them. And *2dly*, That Scot could not even be entitled to retain the surplus rents from 1751 to the time of the sequestration, because their adjudications and infeftments, though posterior to the date of his new tack, became preferable to his assignment from their dates. And further, the sequestration was preferable to such assignment, and must attach all the bygone rents in the tenant's hands.

Answered, Lord Cranston, at the time of granting the prorogation, was in full possession of his estate; the rent was not thereby diminished; and this reasonable act of administration could not be rendered ineffectual by the posterior sequestration; especially as Scot was to be considered as a tacksman in the immediate possession, agreeable to the decision, Richard against Lindsay, (*supra*) though the term of entry upon the prorogation of his tack was not commenced.—*2do*, The surplus rents from 1751 to the date of the sequestration, were to be considered as *bona fide percepti*, and already applied for payment of the cautionary debt.

The Lords found, 28th February, 1755, That the bygone rents preceding the sequestration did not fall under the factory; but that the rents in time coming, since the sequestration, did fall under it.

No. 84.

And having afterwards heard counsel upon the validity of the tack, Found, That the tack was not good against creditors, in respect the tacksman did not attain the possession of the lands set, by virtue of the tack quarrelled, prior to the dates of the infestments in favour of the real creditors, or prior to the adjudications obtained at the instance of the personal creditors; and that the said creditors themselves did first attain the possession by their factor, after a judicial sequestration of the estate; and therefore sustained the reasons of reduction, in so far as concerned the interest of the said creditors; reserving action to the said Thomas Scot against the Lord Cranston upon the personal obligation as accords."

For the creditors, *Wallace, senior, Lockhart.* Alt. *Johnstone, Ferguson.* Clerk, *Forbes.*
W. J. Fol. *Dic. v. 4. p. 324.* Fac. *Cell. No. 3. p. 4.*

1757. July 2.

CREDITORS of DOUGLAS of DORNOCK, against ROBERT and JOHN CARLYLES.

No. 85.

In July, 1729, Douglas of Dornock having borrowed a sum from Robert and John Carlyles, granted them a lease of certain lands, at a rent equal to the interest of their money, to continue for twenty-one years, with a power of retaining the rent for payment of their interest.

The same subject.

The lease contained a clause, by which it was prorogated from year to year after the elapse of the term stipulated, "ay and while the principal sum in the bond remained unpaid."

The estate of Mr. Douglas was sequestrated at the suit of heritable creditors and adjudgers in July 1759, after the twenty-one years specified in the lease were elapsed. But the tenants insisted, That, in virtue of the prorogation, they were intitled to continue in the farm till their debt was paid.

Argued for the creditors of Dornock, That though tacks are, by the law of Scotland, real rights from the time possession has followed upon them; yet prorogation of tacks do not become real till possession has commenced upon the prorogation; and if a preferable right intervenes before such possession commences, the tack cannot be effectual: That the prorogation in this case is from year to year: and therefore possession had not followed upon the prorogation for the year 1757, before the sequestration intervened at the suit of heritable creditors and adjudgers in July 1756, by which the creditors came to have a preferable real right to the whole estate, and to the management of it under the direction of the Court: That this point of law had been decided by the Court, Thomas Scot against the Creditors of Lord Cranston, (*supra*), although a contrary decision had formerly been given, Richard against Lindsay, No. 83. p. 15217.