

right, title, or claim, which he or his son had by the decease of Sir Robert; and he renounces and conveys in favour of Sir George, all right, title, &c. conveyed in favour of him Mungo, or his issue by his deceased father.

At this time, it was agreed, though not expressed in the deed, that the fee of Mungo's share should be secured to his son Robert; which was accordingly afterwards done by Sir George's making up titles to the estate, and then conveying Mungo's share to Mungo in liferent, and Robert in fee. This transaction was thought at the time beneficial for Mungo and Robert, as it secured them from the hazard of Sir George's getting the whole estate upon a competition.

Mungo died some years after this transaction; and, when Robert came to be of age, he brought a reduction against Sir Thomas Maxwel, son to Sir George of this transaction, as done to the prejudice of his right under his grandfather Sir Robert's trust-settlement.

Sir Thomas's defence was, That Mungo Maxwel, by his mother's contract of marriage, had a right of succession to the estate of Orchardtoun, which Sir Robert had no power to disappoint by a gratuitous trust-disposition to another: That, as Sir Robert had not settled the estate agreeable to the provisions of that contract of marriage, no service as heir of provision was necessary to Mungo's taking the estate: That, the right accrued to him as a *jus crediti*, he being the heir *designative* of the marriage; upon which right he could transact or dispose of it at pleasure: And that accordingly he had, in the transaction of the year 1727 conveyed to Sir Thomas all the right that was in himself.

Answered for Robert Maxwel; Mungo Maxwel having been a papist, was precluded, by the statute against papists, from succeeding at all to the estate of Orchardtoun; and therefore Sir Thomas could not in his right plead an objection to the title of another person.

Replied for Sir Thomas; It is unjust to allow a proof of popery after the papist's death, to affect the rights of parties contracting with him; because, if the objection had been made during his life, he had it in his power to purge the irritancy by taking the *formula*.

"THE LORDS found it proved, That Mungo Maxwel, the pursuer's father lived and died a papist; and therefore, that it is not now competent to Sir Thomas Maxwel, in his right, to set aside the trust-disposition in the year 1727, by which the estate was settled upon the pursuer."

Act. Advocatus Lockhart, Montgomery.
Clerk, Kirkpatrick.

Att. Ferguson, W. Stuart, John Dalrymple.

J. M.

Fol. Dic. v. 4. p. 38. Fac. Col. No 71. p. 161.

1783. July 15. PETER ROSE WATSON against ELISABETH GORDON.

No 11.

A papist may succeed to a lease of lands.

It having been provided by act 1701, c. 3. 'That no person or persons professing the popish religion should be capable to succeed as heirs to any person

No 11.

' whatsoever, nor to buy or enjoy any estate by disposition, or other conveyance, flowing from any person to whom the papist might succeed as heir any manner of way, until the said heirs purge themselves of popery in the manner prescribed by the statute ;' a question arose between these parties, Whether a papist could succeed to a lease? The clause above recited being considered by the one as an exclusion of papists from succession in all subjects descending to heirs, while the other contended, that it related to landed property alone.

For Mrs Gordon, the papist, it was

Pleaded ; The rigorous penalties by this statute imposed on persons on account of their sentiments in religion, dictated partly by the critical situation of the protestant interest in the beginning of the present century, and partly by the intolerant spirit of those times, ought at this period to receive the most limited interpretation.

Though on account of its endurance, a lease does not go to executors, and though by particular statute it is endued with a real quality of affecting singular successors in the lands, it is of its nature a contract strictly personal. In common language it is held as a tenure very different from a right of property in lands, and in many instances, instead of deserving the appellation of an estate, contains a very losing bargain on the part of the tenant.

That the expression here used by the Legislature is applied in its most limited sense, is sufficiently apparent. In a preceding clause, after an enumeration of real rights, tacks are mentioned as a separate subject. A power is there given to landlords to assume the possession of lands let to papists, which, though equally requisite for their security if tacks were comprehended, has been neglected here ; and papists are allowed to renounce their errors in ten years, which could be of little avail in rights which seldom endure for more than nineteen years. By the same statute it is declared, that the legal of adjudications shall never expire in the person of a papist ; and, by 10th of Queen Anne, the Sheriff of the county, or any two Justices of the Peace, are empowered to tender the *formula* to patrons suspected of popery ; which would have been entirely unnecessary, if those rights could not be transmitted in succession.— And in practice, bonds secluding executors, pensions, titles of honour, and offices of dignity, although descendible to heirs, are possessed by papists without challenge.

Answered ; As by the first part of this statute tacks are enumerated among the rights which a papist is declared incapable of acquiring, the subsequent clause, which respects succession under the comprehensive denomination of estate, must be understood to have included this sort of possession, which descends to heirs, was in ancient times completed by infestment, and which, as it is capable of enduring for many centuries, may be of infinitely greater value than the right of property itself.

There would have been an obvious impropriety in preventing papists, who are under no disability with regard to moveable rights, from securing or recovering payment of the debts due to them by means of adjudication. But although it were admitted, that the general expression in this clause was so restricted as to exclude these and the other rights specified by Mrs Gordon, which are not particularly mentioned in the former, no reason seems assignable why a lease, which a papist cannot acquire by singular titles, should be valid in the person of his heir, who is of the same persuasion. The statute of Queen Anne, quoted on the other side, was obviously intended to prevent the neglect of the next protestant heir from hurting the interests of the established religion.

THE LORDS were unanimously of opinion, that leases neither fell under the words nor the spirit of this part of the statute. One of them observed, that the reason why tacks, although not real rights, had been included in a former clause, was to hinder papists from disappointing the statute, by obtaining leases of lands for elusory tack-duties. And another observed, that the power given to the next protestant heir to make up titles to the estate by service, as if the papist were dead, implied an exception of tacks, and other rights which are transmitted without service.

THE LORDS preferred Mrs Gordon the papist.

Lord Reporter, *Eskgrove*. Act. *Hay*. Alt. *Abercromby*. Clerk, *Home*,
C. *Fol. Dic. v. 4. p. 37. Fac. Col. No 114. p. 177.*

*** From the case of Ferguson against Glendonwyne, 17th February 1803, No 122. p. 8733., *voce* MEMBER of PARLIAMENT, will appear the footing upon which Roman Catholics now stand with regard to holding property.

See APPENDIX.

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