

1626. *March 2.* HAMILTON *against* TENANTS.

No. 45.

An obligation to receive parties as tenants as long as they could pay the rent, found to be an indefinite endurance, and so ineffectual.

Sir John Hamilton pursuing a removing against some tenants of Bargenie, wherein one compearing, and alleging, that there were tacks set of the lands to his father and mother, during their life-times, in the which tack the setter obliged him to receive the bairns to be procreated betwixt the tacksmen after their deceases, kindly tenants to him, in the said room, so long as they were able to pay the duty contained in the tack ; in respect of the which clause, the eldest son of the tacksmen alleged, that he had sufficient right to bruik, at least during his life-time, seeing he had ever paid, and was content to find security to pay, the duty of the tack. The Lords found the clause foresaid could give no right to bruik longer than warning was made, because it was neither tack nor rental ; and it had no special time therein limited, for the which it should endure ; and found it ought not to maintain the defender for his life-time, albeit he restricted the space to his life-time, and though the clause was conceived in favours of the bairns *indefinite*, and not in favours of any special person, named in the writ, but uncertain ; and therefore repelled the allegiance ; but here a singular successor pursued.

Act. *Hope.*Alt. *Miller.*Clerk, *Gibson.*

Fol. Dic. v. 2. p. 418. Durie, p. 186.

1626. *March 11.* L. CORSHILL *against* WILSON.

No. 46.

An obligation in a tack to receive the tenant's children as kindly tenants found effectual.

In an action betwixt Wilson defender and the Laird of Corshill, for removing from lands, the defender alleged, that this same pursuer had set a tack of the lands libelled to his umquhile father for his life-time, in the end of which tack the pursuer had obliged himself, to accept the bairns of the said tacksmen, kindly tacksmen to him before all others ; and this defender being the eldest son of his umquhile father who was tacksmen, this bond ought to defend him against this pursuer, granter of the bond. This allegiance being considered by the Lords, they found, that this bond ought to work against the pursuer, to cause him give to the defender a tack upon the like conditions, to be done therefore by the defender, as are in use to be done to the pursuer by others his tenants and tacksmen of the like lands in quality and quantity, answerable proportionally to the lands libelled ; and therefore, if the defender subsumed in his exception, and offered to perform this duty to the pursuer for a tack, as others do for the like ; they sustained this exception upon the bond, to the effect that a tack might be presently perfected to the expient ; and for that end they ordained the pursuer to condescend upon the conditions, which others his tacksmen paid for the like lands ; which being condescended, they found, that they would admit the same to the pursuer's probation, that after the end of the probation, the like conditions being performed to him by this

defender, the pursuer might perfect to him a tack of the like nature, containing the like duty and space of endurance, as he is in use to grant to others his tenants for the like conditions ; which conditions, if the defender, after probation as said is, should not perform, the Lords found that the bond could not furnish a defence against the removing, seeing thereby the tenant was bound to do the same in effect, if he claimed a tack to be set thereby to him ; otherwise the defender might ever clothe himself with that bond, and never seek a tack, which was against all reason that the tenement should ever bruik the land in respect of the bond, and should pay nothing for the same ; but this bond was found could not defend, if the pursuit had been made by a singular successor to the pursuer's right ; and this was found as said is, albeit the pursuer alleged, that the clause of the bond being adjected to a tack which expired, should not furnish any ground of defence, because it neither contained time of entry nor term of endurance, nor duty, and was no real right ; and if a tack, albeit it had been given to him, yet wanting time of entry, ish, and duty, it could not defend him, far less such a bond ; which was repelled by the Lords, and interlocutor given *ut supra*.

Act. *Cunningham*.Alt. *Hope*.Clerk, *Scot*.*Fol. Dic. v. 2. p. 420. Durie, p. 191.*

1627. *January 26.* AGNEW against EARL of CASSILIS.

A rental given by Gilbert Earl of Cassilis 1567 to one Agnew, bearing that he rented him and his children kindly tenants to him in his five-merk land of N. was found by the Lords should be extended only during the father's life-time, and his eldest son's after him, and go no further.

Fol. Dic. v. 2. p. 420. Spottiswood, p. 290.

* * Durie reports this case :

In a reduction of a decret of removing, pursued at the instance of Agnew against the Earl of Cassilis, founded upon a rental of the lands libelled, given by this Earl of Cassilis' goodsir, to this reducer's father, by the which the said umquhile Earl received the said pursuer's father and his bairns, tenants to him in the said lands, for payment of a certain duty particularly expressed in the said rental ; and the said umquhile Earl obliged himself never to remove the said ——— Agnew, who was this reducer's father as said is, nor his bairns, from the said lands, and obliged him to warrant the same to them, for this was the tenor of the writ ; and in the end of the same it bears these words, " By this letter of tack subscribed with my hand ;" whereby he called the same a tack, albeit the body was conceived in the words and tenor of a rental, receiving the party and his bairns kindly tenants, &c. in respect of the which rental, the pursuer, who was a bairn, and the eldest son of the receiver of the said rental, alleged that he could not have been decerned to remove. The defender alleged, that the rental