

1632. July 17. LADY BORTHWICK *against* TENANTS OF CATKUNE.

IN the cause pursued by the Lady Borthwick against the Tenants of Catkune, found, That a factory granted by the Lord Borthwick to Cuthbert Borthwick, for uplifting his rents, ay and while he were paid of a certain sum owing to him by the Lord Borthwick, was not a real right which might hinder the said Lord to make any disposition of his lands to a third person.

Fol. Dic. v. 1. p. 181. Spottiswood, (FACTOR.) p. 126.

No 53.

A factory to a creditor, to uplift rents till he should be paid, is not good against a singular successor in the lands.

1635. November 28. MORISON *against* TENANTS OF ORCHARDTOUN.

JOHN MORISON pursues the tenants of the lands of Orchardtoun, for payment of the mails and duties thereof to him, by virtue of his infestment and comprising of the lands from the heritor, and they, and certain others of the heritor's creditors compearing, and defending with a tack of the lands set by him to the tenants, for payment of the duties therein exprest; which duties, by the said tack, they were obliged to pay to the particular persons specially enumerated in the said tack, who were the said heritor's creditors, for satisfying of the annualrent of their debt yearly, and so much of their principal sum as the said rents, by and attour these annualrents will extend to; in respect whereof, the creditors foresaid *alleging*, That they ought to be preferred in the duties of the said tack to the compriser, seeing the said tack not only precedes the said comprising, and all other diligence done by the compriser, but also is before the debt whereupon he comprised; and this tack must be repute, as if the same had been set to these creditors themselves *per expressum*, seeing it is expressly set for payment of the duties to them *nominatim*.—And the other *answering*, That his comprising and infestment gives him right to the duties of the tack, he being heritor now and singular successor; and the tack must be esteemed as if the duty thereby had been paid to Orchardtoun himself, *quo casu* he would have been preferred.—THE LORDS repelled this allegiance, and preferred the compriser in the mails and duties of the tack to the creditors, albeit spacially named, to whom, by the tack the duties thereof are appointed to be paid; seeing the author of the tack being denuded of his heritable right by the comprising and infestment, the duty behoved to pertain to the heritor, and could endure no longer to the use of his other creditors, than during the space that the heritable right remained with him who set the tack; but found, That the said tack-duty pertained to the said pursuer's singular successor, by apprising and infestment.

No 54.

A landlord binds his tenants to pay their rents to certain creditors named in their tacks. An appriser of the land found preferable to these creditors.

Clerk, *Scot.*

Fol. Dic. v. 1. p. 181. Durie, p. 780.

. Spottiswood reports the same case:

No 54.

JOHN MORISON having comprised certain lands from the Laird of Orchardton, pursued the tenants for payment of their mails and duties. *Alleged*, That they were tenants to John Brown of Mollance, who, long before the pursuer's comprising, or the debt which was the ground of it, had tack and assedation set to him by Orchardton of the same lands, whereof there were terms to run; and that for payment of certain of Orchardton's creditors of their yearly annualrents, and so much of their principal sums as the rents of the lands would extend to, by and attour the annualrents: conform whereunto he hath been in possession divers years of uplifting the mails and duties, and in paying the creditors so far as they did extend to. *Replied*, Not relevant to exclude the pursuer's right, who must be preferred to all the rest of the creditors, although prior, because of his diligence, having comprised and being infest. *Duplied*, His diligence cannot prejudge the tack that was prior to it, which tack set to Mollance in favours of the creditors, is all one as if it had been set to the creditors themselves; in which case they would have been preferred to the compriser. *Triplid*, The tack is no more in effect than the assignation to the mails and duties, whereunto the assignees can have no more right after the cedent is denuded of the property.—THE LORDS repelled the allegiance, and preferred the compriser to the other creditors.

Spottiswood, (COMPRISING) p. 54.

1662. *January 25.* CUNINGHAME *against* TENANTS OF POMONT.

No 55.

A woman assigned to her creditor, for his security, the arrears of rent which should be due by her tenants at her death. Having afterwards married, her husband claimed those rents *jure mariti*, which requires no intimation. Found, that being liable for his wife's debt, he could not with effect hold this plea.

SIR JAMES CUNINGHAME, servitor to the Lord Chancellor, having a bond of the late Duchess of Hamilton's, whereby she bound herself, her heirs and executors, to pay to him a sum at the first term of Whitsunday or Martinmas after her death; and, for his security, she did assign him to as much of the readiest of her rents pertaining, or that should pertain, to her at her decease, as should pay the samen. The said Sir James did intimate the assignation to her tenants about the time of her death, and called them, and Mr Dalmahoy her husband for his interest for payment. It was *alleged* for John Dalmahoy, That the obligation *incipit ab herede*, and the sum of money payable, not till after her death, and consequently the rents which, the time of, and before her death, did belong to her husband *jure mariti*, and as *dominus bonorum*, cannot be made furthcoming for this debt. It was *answered*, That the obligation *incipit a debitore*, by which she has obliged herself, her heirs, and executors; and though the term had been 20 years after her death, yet *cedit dies*, it is a debt upon her *a die obligationis*; and seeing the husband has no right to the wife's moveables or rents, but *cum onere debitorum*, the rents assigned (and which assignation the husband cannot