

No 248.

the room, being fiar and proprietor after the liferentrix's death ; *2do*, To found the prescription, it must be five years after the tenant's removal and leaving the ground, which cannot be pretended in this case ; for, after the expiring of the liferent by her death, he continued still in possession as heritor, and so is not in the words and letter of the act, having never removed. *Replied*, The act makes no distinction whether the tenant be rich or poor, whether he be in the natural possession as a *colonus*, or only in the civil, by uplifting the rent ; and though he was a tacksman, yet, *quoad* the Lady, he was no more than her tenant. And, as to the *second*, of his never having removed, It is but a sophistical quibble ; for he being under a double capacity, both as tenant and heritor, when she died, he ceased to be any more *qua* tacksman, and sat still to possess as proprietor ; so the act does not require a corporal removing and evacuation of the ground, but only the ceasing of the first title of his possession ; and if a tenant should buy his own room, he needed not remove ; but *fictione brevis manus* a virtual removing suffices, and after five years, his former rent would prescribe *quoad modum probandi*.—THE LORDS, by plurality, found him not in the case of the act of Parliament ; and so the debt was not prescribed ; but seemed to go more on the ground of his not being properly a tenant, than that of his not having removed off the ground.

Against this interlocutor Mortonhall gave in an appeal, on the 5th January 1710. See APPENDIX.

*Fountainhall, v. 2. p. 539.*

1710. December 29.

MR JAMES DAES of Coldingknows *against* JEAN SCOUGAL and ROBERT SEMPLE of Fulwood, her Husband.

No 249.

Some of several partners of a paper mill, assigned their interest in the tack and materials to one of their number, he obliging himself to relieve them of the rent, and pay them each a surplus sum. Found to fall under the act 1669, relative to quinquennial prescription.

MR JAMES HUME, merchant in Edinburgh, Archibald Hume, Alexander Daes, and others, *in anno* 1672, took a 19 years tack of Dalry mills from Susanna Lockhart, relict of Gabriel Weir, for a certain tack-duty, to carry on a paper manufacture ; and, in the year 1682, Alexander Daes and Archibald Hume, by contract, assigned their interest in the tack, and in the instruments, materials, and trading stock, to Mr James Hume, for which he obliged himself not only to relieve them of the tack-duty payable to Susanna Lockhart, but also to pay to each of them 333 merks yearly for their shares of profit, and to leave the instruments, materials, and trading stock, in the same condition. Mr James Daes, as donatar of the single and liferent escheats of Alexander Daes his brother, pursued the Lady Fulwood, as representing Mr James Hume, her first husband, for payment of the 333 merks of superplus tack-duty, for several years preceding the 1688.

*Alleged* for the defender ; The action is prescribed, *quoad modum probandi*, by the act of Parliament 1669, not being pursued within five years after the tacksman's removal.

*Replied* for the pursuer ; The prestations due by Mr James Hume to his co-partners fall not either under the letter or reason of the said statute, which was introduced only to favour the rusticity of tenants and labourers of the ground. And though it may be extended to mills set with and subservient to lands, and to coal-houses or mines which are *partes fundi*, it can never be extended to this case, where the additional duty was not payable for the mill, (seeing the proprietor got the tack-duty thereof,) but only for the use of the instruments, materials, and trading stock, provided for the paper manufacture ; the assignment whereof was not properly a tack or subtack, but only a method taken by the society, for the better expeding their design by the original contract entered into for making paper ; *2do*, *Esto* this communication of profits for a yearly price were a formal subtack, as it is not, it being neither a subtack of land, or any thing annexed to land, the act of prescription, which speaks only of tenants in lands, cannot be applied thereto, more than a tack of brewing looms, set together with a stock of victual, for a yearly duty, could fall under the quinquennial prescription.

*Duplied* for the defender ; By Archibald Hume and Alexander Daes' transferring their interest in the tack to Mr James Hume, any former co-partnery betwixt them was dissolved, since the cedents did no longer run any hazard of loss and gain ; *2do*, The pretence, that it is *locatio mobilium*, is of no moment ; for these *mobilia* being only *instrumenta fundi*, accessory to the mill, which is a *fundus* or *prædium rusticum*, must be reckoned of the nature of the principal subject set, and regulated accordingly : For, otherwise, it might be pleaded, that the subsetting lands with steelbow, nolt, sheep, or straw, for a high tack-duty, that were first set without steelbow, &c. for a lesser duty, would alter the rule of prescription, which is not to be thought.

*Triplied* for the pursuer ; The manufacture materials, which are of far greater value than the mill, can be no more reckoned accessories thereof, than a picture can be reckoned *accessorium tabulæ* ; the mill being set only as subservient to carry on the work ; *2do*, Steelbow, set for a separate rent from lands, could not fall under the act of Parliament, and we are not in the case of a tack of lands with steelbow for a joint duty ; the rent of the mill being payable to the proprietor, and the additional duty to the pursuer. Besides, steelbow being *instrumenta fundi*, subservient to tenants, as labourers of the ground, for whose sake the act of prescription was made, no consequence can be drawn thence to the utensils and materials of a paper-work.

THE LORDS found, that the annual prestations due by Mr James Hume to Archibald Hume and Alexander Daes, his other co-partners, fall under the act of Parliament 1669, anent the quinquennial prescription.