No 121.

case of not payment. Likeas, he having failzied, she did accordingly at Martinmas set the lands to another tenant, which this pursuer has in effect homologated, by accepting a sub-tack of a part from the tacksman. And as to the goods, she intromitted with them by virtue of a disposition thereof, granted by him to her, for security of the said by-run duties. It was *answered*, There was no declarator of the failzie, and she could not enter *brevi manu* without a sentence; and that before Martinmas the pursuer did offer the by-run duties to the defender's factor; and when he took the sub-tack, he protested it was but prejudice of his action against the defender. It was *replied*, That the defender needed not to have declarator, the pursuer having *per expressum* declared, that it should be lawful to the defender, in case of not payment at Martinmas precisely, to use and dispone upon the room; which, if she had not done, it behoved to have lain waste, he having no goods but such as were disponed to the defender: That the offer was long after the term of payment, and did bear no real numeration of money, more or less, but only, that he offered the by-run mails and farms: That there was no consignation used upon the offer, and that the protestation was *contraria facto*, seeing the acceptation of the sub-tack was a clear acknowledgment of the right in the principal tacksman's person.

THE LORDS found the allegeance relevant.

Fol. Dic. v. 2. p. 338. Gilmour, No 11. p. 9.

*** Stair's report of this case is No 6. p. 1816. *voce* BREVI MANU.

1736. *February* 18.

DICKSON of Kilbucco, and DICKSON of Whitslide, *against* MARGARET TWEEDIE JOHN and JAMES JAMESONS, Tenants in Whitslide.

No 122.

An intimation or charge previous to the issue of a tack found necessary, although the tenant had obliged himself to remove, without any warning, intimation or charge. See No 117.

WHITSLIDE having disponed his estate to Kilbucco in trust, he, with Whitslide's consent, set, for the space of nine years, a lease of the houses and lands of Whitslide to the said tenants, in which they oblige themselves to remove at the expiry of the tack, (Whitsunday 1735) without any warning or legal intimation made to them, or process of law against them; towards the end of this lease, (Kilbucco being denuded of his trust) Whitslide signed a precept of warning, which was said to be executed in common form, against Margaret Tweedie, &c.; as also he raised a horning upon the tack, both in his own and Kilbucco's name; in virtue whereof these tenants were charged, on the 15th day of May 1735, to remove from the said lands, &c. at Whitsunday next to come.

The tenants suspended, and *pleaded*, That they had never received any warning, without which, or an intimation, or charge previous to the term, they were not bound to remove, notwithstanding of the stipulation in the tack; for though the case of tenants bound to remove at the issue of their tack without

warning, may not fall under the state 1555, yet some antecedent warning, or charge, is surely necessary, otherwise the design of that excellent law might be frustrated, which was made to provide against tenants being put unawares to seek their habitations at unseasonable times, agreeable so Lord Stair's sentiment, p. 321. (333.) and 624. (646.) Neither can the charge on the 15th day of May be considered as an intimation antecedent to the term; on the contrary, as the term was come before they were charged, they behoved to have the benefit of tacit relocation, more especially as the charge was not given to remove at Whitsunday 1735, but at Whitsunday next to come, which the suspender understood to mean Whitsunday 1736; and indeed a charge, given upon the 15th day of May to remove that day, would have been inept; because the tack, which was the ground thereof, consented only to a charge upon six days notice. No 122.

Replied for the chargers; That, where a tack is set for a certain number of years, the tenant cannot be removed without a warning in terms of the statute, seeing the omission thereof imports, in the construction of law, a new agreement for another year's tack; but, where the tenant is expressly bound to remove, without warning or intimation, it is impossible that the neglecting to use such can imply a renewal of the lease; as the obligation supersedes the necessity thereof, agreeable to what Craig delivers, L. 2. D. 9. § 9. And in Friesland, where they have the like statute with ours, Sande, L. 3. T. 6. *defin.* 1. lays down the same doctrine; so that, unless there was some law annulling such a paction, or that it were *contra bonos mores*, it ought to take effect.

In the next place, granting that some intimation, &c. were necessary, it has been complied with in the present case, for a warning was delivered to them, as they formerly acknowledged. It is true that several objections were made thereto, which were altogether unnecessary; as the chargers did insist upon it as a legal warning, in regard they were not bound to execute a formal one, the stipulation in the tack having superseded the necessity thereof; but still it ought to serve as a sufficient notification to them, that the chargers did not pass from the obligation in the tack whereby they were obliged to remove without warning.

And, as to the pretence, that the charge commands them to remove at Whitsunday next, which, it is alleged, was understood to mean Whitsunday 1736, it is by no means solid; seeing, by the tack, they are bound to remove at Whitsunday 1735, the will of the letters is to remove in terms thereof, and the charge refers to the letters, therefore Whitsunday next must be Whitsunday 1735.

THE LORDS found the letters orderly proceeded, superseding execution till Whitsunday next, and without violent profits.

C, Home, No 20. p. 43.