

found by many several decisions both of old and of late. The Lords did find, that the tack whereupon declarator was founded being expired after seven years, and the subsequent clause bearing no continuation of the former tack, but a personal obligation to accept of the mails of the tenement in satisfaction of the annual-rent, could not prejudge a singular successor; as likewise, if it had been a continuation of the tack without a certain issue, that it was null, and could not defend against an expired comprising, conform to the many practiques alleged upon.

No. 118.

Gosford MS. p. 418. No. 699.

1679. November 13. SETON *against* WHITE.

No. 119.

Where a tack contains a definite ish, it is good against singular successors, though the tack-duty be wholly allocated for payment of the annual-rents of a sum owing by the setter to the tacksman.

Fol. Dic. v. 2. p. 422. Fountainhall MS.

* * * This case is No. 19. p. 15137.

1677. December 11. OLIPHANT *against* CURRIE.

No. 120.

About the tack decided where Craig is cited, p. 205. (Edition 1655.) a tack got for an imaginary duty found not quarrelable *in jure*.

Fountainhall MS. p. 37.

* * * Stair reports this case:

Charles Oliphant pursues James Currie for the mails and duties of the lands of Nether-Mordingtoun and Edrington, being 1300 merks yearly, with two dozen of kain fowls, conform to a tack set by the master of Mordingtoun to the defender; who alleged absolvitor, because by the same tack, albeit it be 1300 merks of tack-duty, yet it is provided and declared, that it should not be due or paid to the master of Mordingtoun, but shall be retained in satisfaction of the like quantity of annual-rent due by the master to the defender. The pursuer answered, That the tack-duty being *per expressum* 1300 merks to be paid yearly and termly to the master, the same was now due to this pursuer as heritor of the lands, being infeft therein in fee by the master's disposition; and albeit the tack contains a clause of retention, yet that is merely personal, and no more than an assignation to the tack-duty, in satisfaction of the annual-rent; yea, though there had been in the tack an express discharge of the tack-duty, which is *debitum annuale*, it would be effectual no longer than the discharger was heritor, which hath been oftentimes found in discharges of feu-duties, that they could reach no further than the discharger had right. The defender replied, That by express act of Parliament in favours of

A tack for definite years bearing a certain sum to be paid for the tacksman's annual-rent, was found valid against a singular successor infeft, there being a small *superplus* of tack-duty.

No. 120. tenants, they are secured against all buyers, and all singular successors, Parl. 1449, Cap. 18. that the same shall remain with the takers with sicklike mail as they took them for; and here the mail for which the defender took these lands, is for satisfaction of his annual-rent, and payment of two dozen of poultry, relief of teind and public burden, so that if the tack-duty had been service, or any other fact, as giving a discharge of the annual-rent, the defender could be obliged only to pay sick-like duty as he paid to the setter; and the case here is not like to feu-duties, which are *debita fundi*, nor of a simple discharge of the tack-duty, but a clause of retention of a part of the tack-duty for the annual-rent, there remaining a tack-duty, which alone would have made a tack valid against a singular successor; for it is undeniable, that if the tack-duty had been a plack, though it had been for nineteen years or more, it would have defended the tacksman against any singular successor, much more here, where there is the payment of two dozen of fowls, teind, and public burden, besides the retention of the annual-rent; and if the tack had been conceived in these terms, That because the master was addebted to the Provost in such a sum, and had superseded the payment thereof, and had discharged the annual-rent for nineteen years, therefore the master had set these lands to the Provost for two dozen of capons, and relief of teind and feu-duty, it cannot be controverted but the tack was valid; but here the same thing is done, though not in the same words, as to which there is no fixed form of tacks, but they and all personal rights are not regulated by special tenors; but wherever the substantial do appear, they are valid, though less formal; and here all the substantial of a tack are, viz. a definite ish of nineteen years, retention of the annual-rent, and the kain fowls and relief aforesaid. It was duplied, That if this kind of tenors be sustained, all acts of Parliament for securing singular successors would be elided, unless there were a register of tacks as well as sasines, and this pursuer is not quarrelling the tack, but the tack-duty, as now becoming heritor; and it cannot be denied, but if the clause of retention or assignation to the tack-duty in satisfaction of the annual-rent, or a discharge of the tack-duty, were apart, they could have no effect against a singular successor; and though they were in the bodies of the tacks, there is no reason of the difference. The defender triplied, That there was a competent remeed for purchasers, without a register of tacks, because they should inquire into the rental, and take the tenants judicially acted for the rental given up, which would exclude any latent tack, and they ought to inquire, whether tenants are immediate tenants to the seller or sub-tenants, till they find out the true tack-duties; so that the case is not alike where there are discharges or assignations apart, which cannot be found out, as when they are in the body of the tack, by inspection whereof they may be seen; and even in that case, if the discharge or assignation did exhaust the tack-duty, that nothing should remain to the singular successors, the tack would become null for want of a tack-duty; but tacks of this tenor are ordinary securities for sums, and have been oftentimes sustained by the Lords, as upon the 15th day of June, 1664, Thomson, No. 114. p. 15239. where an appriser pursuing for the tack-duty of a tack, bearing

such a duty in money for so many years, with a clause retaining the annual-rent out of the tack-duty, and not to be removed till the principal was paid, the Lords sustained the tack against the apprising, as to the definite years and retention, seeing there remained a *superplus* of the tack-duty, but not as to the clause not to remove, &c. which they found personal; and a tack of seven years for four pennies yearly, and discharging the annual-rent of a sum till the principal was paid, was sustained against singular successors for the seven years, No. 118. p. 15244.— The Lords found, that Currie's tack having a definite ish of nineteen years, a retention of the annual-rent, and a remaining *superplus* duty, that the same was valid against the singular successor by infertment, and that the defender was obliged to pay no more to him than his author, viz. the *superplus*, the two dozen of fowls, the relief of teind and public burden.

No. 120.

Fol. Dic. v. 2. p. 422. Stair, v. 2. p. 574.

1682. January. SIR ALEXANDER HUME against MR. PATRICK, his Brother.

No. 121.

The Lord Renton having, for payment of his debt, set a tack of his whole lands and casualties, to Sir Patrick Hume his son, reserving the kain fowls to his Lady and his son Sir Alexander, the apparent heir; after his lady's decease Sir Alexander claimed the whole kains *jure accrescendi*, his mother and he being *nomine et re conjuncti* in the clause of reservation.

Answered for Sir Patrick: By the civil law *jus accrescendi* took no place in contracts *inter vivos*.

The Lords waved the point of *jus accrescendi*; but found, That the kain fowls did not fall under Sir Patrick's tack; and therefore belonged to the heir.

Harcarse, No. 949. p. 267.

1698. February 10.

COCKBURN, DARLING, and other Creditors of MR. THOMAS DUNCE of Revel-dykes, against ROBERT SAMPSON.

No. 122.

In a competition between Cockburn, Darling, and other creditors of Mr. Thomas Dunce of Reveldykes, who being resting to Robert Sampson 400 merks, he give him a tack of some acres; against which the other objected, that it was null, being only a personal obligation, and assignation to the rents ay and while he were paid of his money, which never stood against singular successors, and wanted all the essentials of a true tack, (which, by the 18th act 1449, is declared a real right,) neither having tack duty nor ish. Answered, The tack was formal; seeing it expired on payment of the sum, which was its termination; and had a shearer and teinds paid yearly for a tack-duty. The Lords considered the pay-

Found in conformity with No. 120. *supra*.