

1677. *January 16.* CUNNINGHAM *against* HALYBURTON.

No. 186.

The Lords found, That a tacksman of lands, within burgh, may be removed, if he be behind in payment of his duty, unless he find caution as to the future; in the same manner as tacksmen of land in the country.

Reporter, *Forret.*

Clerk, *Gibson.*

*Fol. Dic. v. 2. p. 425. Dirleton, No. 429. p. 212.*

\* \* Stair and Gosford's reports of this case are No. 34. p. 13801. *voce* REMOVING.

1682. *November 7.* MARGARET PHIN *against* JEAN DUNCAN and DAVID PHIN.

No. 187.

Margaret Phin having a wadset right from David Phin of Whitelaw, affected with a back-tack, and the back-tack duty being resting for several years, the said Margaret intended a declarator of the nullity of the back-tack, for not payment of the back-tack duty; wherein there was a conclusion likewise, That Jean Duncan, the relict of the granter of the wadset, and David Phin, his son, may be decerned personally for payment. And this defence being proponed, That there was no irritancy in the back-tack, and therefore the same could not be declared null for not payment of the back-tack duty; and it being replied, That the back-tack was of the nature of a tack, and that it was ordinary to masters to pursue removings against their tenants, albeit there was no irritancy in the tacks, in which case, the tenants will be liable in payment of by-gones, and in finding caution for time coming;—the Lords found, That, by the common law, this declarator might be sustained; and therefore decerned; but superseded extract till Candlemas next, at which time the defenders might purge, by payment of by-gones, and finding caution in time coming.

*P. Falconer, No. 25. p. 13.*

\* \* Harcarse reports this case :

In a declarator of extinction of a back-tack, set by a wadsetter, for not-payment of the back-tack duties for some years,

Alleged for the defender, That there was no irritancy in the back-tack.

The Lords found, That as a tack might be declared void by the act of sederunt, for the not-payment of the duty, unless the tacksman would pay by-gones, and find caution in time coming, so a back-tack, though containing no irritancy, might be declared void; and therefore they declared conform to

No. 187. the summons; but allowed some time to the pursuer to purge, and find caution.

*Harcarse, No. 1026. p. 292.*

\* \* Sir P. Home's report of this case is No. 64. p. 7234. *voce* IRRITANCY, and No. 288. p. 6076. *voce* HUSBAND AND WIFE.

\* \* In November, 1683, the Lords found the like between Sir Andrew Dick and Mr. John Burdon, (*infra.*)

*Harcarse. Ibidem.*

No. 188.

1683. *November 30.* MR. JOHN BURDON *against* SIR ANDREW DICK.

In the action of declarator pursued by Mr. John Burdon against Sir Andrew Dick, wherein Burdon concludes, that the back-tack contained in the contract of wadset granted by him to Sir Andrew may be declared null, upon this ground, that Sir Andrew had not made payment of the back-tack duty for three terms; it was alleged by Sir Andrew, That this declarator could not be sustained, there being no irritancy in the back-tack, and that there was no act of Parliament, as in the case of feu-duties, irritating back-tacks. The Lords sustained the declarator, and repelled the defence; but allowed Sir Andrew to purge by payment against Candlemas next.

*P. Falconer, No. 72. p. 48.*

\* \* Sir. P Home reports this case :

1684. *March.*—Mr. John Burdon having pursued a declarator against Sir Andrew Dick, for declaring of a back-tack contained in a contract of wadset of the lands of Craighouse, to be declared null, in respect Sir Andrew had failed in the payment of the back-tack duties, for the space of three terms; answered, That the back-tack could not be declared null, because it did not contain a clause irritant, and the act of Parliament declaring that all feuers not paying their feu-duties shall amit and tyne their feus, as if there were a clause irritant in their rights, cannot be extended to back-tacks; acts of Parliament being *stricti juris*, and not to be extended *a casu in casum*. The Lords repelled the defence, and sustained the declarator; but allowed Sir Andrew to purge, by payment, betwixt and the next term.

*Sir P. Home MS. v. 1. No. 612.*

\* \* Fountainhall's report of this case is No. 14. p. 7184. *voce* IRRITANCY.

No. 189.

1744. *July 24.* ALEXANDER of Newton *against* JACKSON.

Where a year's rent is due preceding the citation, or even at litiscontestation, it is competent for the master to insist that the tenant pay by-gones, and find