No. 114. to, to be retained; in which case the tacks would want a tack-duty to the present heritor; but they found the clause, for not removing till the money was paid, but only to be personal, and not effectual against a singular successor.

Fol. Dic. v. 2. p. 423. Stair, v. 1. p. 198.

*** Gilmour reports this case:

James Thomson compriseth from James Sinclair, merchant in Edinburgh, certain tenements, and obtains decreet of mails and duties against the tenants, and namely, against James Reid, gardener, who suspends and intents action of reduction upon this reason, That he hath from the compriser's author a tack for certain terms to run, in which tack he is obliged to pay a tack-duty, and of which tack-duty he has retention *pro tanto* for the annual-rent of 600 merks owing by the compriser's author to him, conform to the tack. To which it was answered, That whatever declaration is contained in the tack anent the retention, it cannot operate against a singular successor, and can only work against the setter so long as he is not denuded, for which some practiques were alleged. Replied, That the tack is anterior to the pursuer's right and clad with possession, and that the defender might have procured a tack for a penny yearly, which would have defended him against any posterior compriser being *bona fide* purchased, and consequently he might as lawfully purchase a tack containing the said declaration, the tack otherwise having all the solemnities and substantials of a tack, viz. entry, ish, and duty; and as to the practiques, none of them do meet.

The Lords found the reason of suspension relevant, and nowise to meet the practiques, for they found the declaration real, and to be more valid than if the tacksman had had a bond obliging the setter to allow the tack-duty *pro tanto* in payment of the annual-rent, the declaration being subjoined to the clause for payment of the tack-duty, and equivalent as if there had been a clause allowing in the fore-end of the tack-duty such charges as he should ware out in repairing the house.

Gilmour, p. 76.

1665. *June* 16. STEVENSON *against* DOBIE.

No. 115. A tack with either ish or duty ineffectual against singular successors. See No. 104. p. 15234.

Margaret Stevenson having apprised from James Stevenson nine acres of land in Dalkeith, pursues James Dobie for the mails and duties thereof. It was alleged for the defender Dobie, that he having lent to the said James Stevenson 340 merks, he bruiks the said acres by virtue of a tack set by the said James Stevenson to him of the same during the not payment of the said sum, and produces the tack. To which it was answered, that the said tack is null, because it hath no ish, neither hath it any tack-duty, and so is but a personal right, and cannot prejudge a compriser; but, 2*do*, The tack is expired, being only for five years, albeit it bear in

the beginning thereof to be set during the not payment of the money. The Lords found the tack null, and decerned Dobie to make payment. No. 115.

Fol. Dic. v. 2. p. 423. Newbyth MS. p. 29.

*** Stair and Gilmour's reports of this case are No. 11. p. 1283. *voce* BASE INFEFTMENT.

*** A similar case is reported by Durie, 5th March, 1629, Ley against Kirkwood, No. 26. p. 7195. *voce* IRRITANCY. See APPENDIX.

1666. *January.* LORD LEE *against* PORTEOUS.

No. 116.
A tack to take place after redemption of a wadset found null.

In anno 1612, John Smeitoun of that ilk wadset the lands of Tintoside to Thomas Porteous, under reversion of 2,000 merks, and a three years tack after the loosing, for payment of 100 merks yearly. The Barony of Smeitoun, with the right of this reversion, comes in the person of the Laird of Lamingtoun, who dispones the same to the Lord Lee, who uses an order of redemption, and pursues a declarator, having consigned the 2,000 merks, and produced the same at the Bar. It was alleged for the defender, That there could be no declarator, unless a three years tack were also produced conform to the reversion. Answered, That by the 19th Act, 6th Parl. King James II. it is statuted, That tacks of wadset lands set after redemption, for half meal, or nearly, should not be kept, unless they were set for the very meal or worth of the lands, or nearly the same; but so it is, that this tack is appointed to be set for 100 merks, the lands being worth 300 merks or nearly; and the time of the wadset, when the money was at ten *per cent*, they could not be less than the annual-rent of the money then lent, which was 2,000 merks, and consequently they behoved to be at least 200 merks yearly, and therefore the tack is null; 2*do*, By the late act of Parliament betwixt debtor and creditor, it is appointed, that the creditor having a proper wadset, and getting security for the annual-rent during the not redemption, he shall either quit the possession, or otherwise if he please to possess, he shall be comptable for the superplus duties more than pays the ordinary annual-rent; and therefore, when the creditor is, by redemption, paid of his principal sum, so that no more annual-rent is to be due, he should have no more use nor advantage of the lands and yearly duties thereof; and therefore *a paritate rationis*, the tack becomes null. To the first it was replied, That the act of Parliament has been in continual desuetude, and tacks of this nature, after the loosing, were always kept and consigned the time of the redemption, as may be instructed in divers cases. It was duplied, That where the law stands clear, no desuetude can be alleged against the same, unless it can be made appear, that this objection has been made against such tacks, and has been repelled.