

ney, bearing an assignation to the maills and duties of lands or houses within burgh, aye and while the sum be paid, or a location of land declared to resolve and expire upon the payment, is not regarded as a tack to affect and carry the real right of these lands against one that is a singular successor to the granter; because it wants the formalities of a tack, viz. a certain tack duty, and a definite issue; because it is only personal, and no such real right as a tack is.* And this has been often so found and decided; Dury, 13th July, 1621, Laird of Muckhall, and the cases there. January, 1674, in the case of Peacock *against* Bailie Lauder; and was, in the same year, 1674, so advised by Sir George Lockhart, in a process pursued before the bailies of Edinburgh, by Mr Jo. Forrest, minister at Tilliecoutry *against* Alexander Brownley, tailor in Edinburgh. And yet this same argument and ground of law will militate against back-tacks in wadsets; which is clearly a tack set by the creditor to his debtor *rei propriae, in eventum* of the payment of the principal; see l. 6. p. *ult. D. de Precario*; l. 45. *D. de Regul. Juris, ibique Brouchorstius*, where you have what comes nearest to our back-tacks. If it be alleged, there is a difference, because the back-tack is engrossed and incorporated in the body of the real right, and so makes a part of it; yet, it may be answered, many clauses *in gremio* of real rights, yet are merely personal obligations, and have no force *rem vel fundum afficere* if it pass to singular successors, since they cannot be so easily known, unless they be not only in the disposition, but also in the procuratory of resignation, charter, and seasine following thereon.—See some excellent clauses of tailies, *apud me*; see M'Keinzie's Pleading, Creditors of Annandale and Stormont; see other papers beside me. Yet Sir Jo. Cunynghame thought our practise, in rejecting tacks set aye and while a sum be paid, to be an error deserving amendment; and that the first decision, it is like, has been obtained by moyen: otherwise we must condemn back-tacks also.

Advocates' MS. No. 436, folio 230.

1673 and 1674. General DALZEEL *against* The TENANTS of Caldwell.

1673. *June*.—GENERAL DALZEEL, as donatar to the forfeiture of the Laird of Caldwell, pursues a removing against some of the tenants of these lands; for whom it is alleged, that they bruik by virtue of tacks set by the Laird of Caldwell, before his committing the treason and being in arms at Pentland, for which he was forfeited; and whereof there are sundry years yet to run, and so cannot remove.

REPLIED,—That by the forfeiture, founded on the vassal's treason and rebellion, the fee was opened, and the lands returned as free and unaffected as when they were first given out, unless it were rights consented to or confirmed by the superior, which tacks were not. That tacks could have no more privilege than base infestments unconfirmed, which, though clad with never so long possession, could never defend against a donatar. That tacks cannot sustain against a superior, neither in wards, nonentries, recognitions, disclamations, liferent escheats, nor these other ca-

* In February, 1676, the Lords found, in a case between James Johnston and James Syme, a tack so conceived null, *ope exceptionis*, without necessity of a reduction, or calling the setter. See Dury, 20th March, 1630, Murray *against* M'Keinzie; 18th January, 1633, Earl of Marshall. See Craig, *paginis* 203 and 207. And this they did, though he was twenty years in possession by virtue of his tack.

sualties; and therefore much less should stand against a forfeiture. That else his Majesty's interest might be easily evacuated, by setting tacks at imaginary and incompetent avails before they commit treason. That they are less favourable than heritable alienations where the full price is paid; and yet such alienations become null upon the forfeiture, where not confirmed. Yea, tacks of any duration, as for nineteen years, are reputed as alienations; so Craig, p. 205: and therefore must be in the same case with them.

DUPLIED,—Tacks, by act of Parliament, James Second, (Act 18, in 1449, contrary to the civil law, l. 9. C. *Locati*;) are ordained to stand secure against all singular successors; *ergo*, also against the donatars to forfeiture. That it is the interest of heritors, and of the poor labourers of the ground, and for the policy of the kingdom, to have it so, for improvement of lands. That the act 202, Parliament 14, James Sixth, in 1594, (see the laws there cited on the margin,) annulling deeds done by persons forfeited, speaks only of such as are done by them after the commission of the crime; and though, in the narrative, it mentions tacks set after the crime perpetrated, yet, in the dispositive part, there is not one word of them; whereas, if the law had meant any such cruel and devouring extension, that was the alone proper place, but is *ex proposito* omitted, for *ubi lex non loquitur nec nos*, &c. But Craig, p. 206, is most positive that tacks are not prejudged by forfeitures; yea, Maitland of Leidington, (17th March, 1569, folio 58,) hath an express practise at the year 1570, between Home of Manderston, and the tenants of Auldhamstocks, where the Lords found, tacks set before the crime a good and sufficient right to defend on against the forfeiture; and wherein this very debate, and the instance of base infeftments, was fully urged and repelled; and he also tells of another case, wherein the same was found by the Lords of before. Craig, *Feud.* p. 206, is express, *valet assedatio, licet ex post facto forisfactus sit is qui locationem fecerit*. See act 37, Parliament 1571; but that is rescinded by the act 201, in 1594. *Vide supra*, No. 122, the Earl of Argyle *contra* George Campbell. That tacks set before the crime would be preferred to any public infeftment, or base infeftment confirmed between the commission of the crime and the forfeiture; but, *ita est*, any of these infeftments, as more preferable, would seclude this donatar to the forfeiture; *ergo*, much more must the tacks do it, *per regulam, Si vinco vincentem te, tunc te vinco*; l. 14. p. 3. D. *de Diversis Tetemporalibus Præscriptionibus*. *Vide Everhardum Præsidentem, in locis legalibus, loco primo ad ultimum*, p. 658. As for the argument drawn from base infeftments, the same is of no moment or weight: Because, *1mo*, The one is a perpetual, the other only a temporary exclusion. *2do*, The one has little or no profit with it; the other pays near the avail of the land. *3tio*, The one tends to the melioration of the fee; whereas the other dilapidates, lessens, and dissipates the same. And as for the argument drawn from wards, it is most inconsequent; for there the effect of the tacks is only suspended, interrupted, and laid asleep for a time; whereas here, the design of this donatar is to extinguish them for ever. As for the argument drawn from recognition, liferent-escheat, and the other feudal delinquencies founded upon presumptive contempt, as if tacks cannot defend against them; it is wondered to hear so absurd an assertion pretended, seeing it is most consonant to law that they should defend against all these calamities: neither is the contrary ever decided. And setting of tacks for just duties is a mere act of administration, even competent to those who are not proprietors; Craig, p. 204; *videlicet*, to all *qui habent plenam puram et debitam feudi administrationem*; and so differs extremely from heritable alienations; l. 8. D. *de Juris et Facti Ignorantia*. And if *ignorantia juris*, where

it is dubious, be very excusable, especially in *rusticis ubi certant de damno vitando*, then much more must *defectus juris* be such; but, *ita est*, there is no style, no practice, nor precedent known, for confirming tacks, and saving them from the danger of forfeiture, if they be not valid rights, secure from these after-claps of themselves. And if any such thing seem convenient to be introduced now, the same cannot reach such who have acted *bona fide*, according to the custom and law now known; and it needs *constitutione Imperatoria*: and the l. 10. D. *de Jure Fiscii*, would be considered, *quod in dubiis questionibus non errat qui contra fiscum responderit*; and that of Plinius to Trajan, in *panegyrico*, *Causa fiscii nunquam mala est nisi sub principe bono*.

See a very learned triply to all this in the informations beside me.

Advocates' MS. No. 406, folio 219.

1674. *January 28th*.—IN the debate largely marked *supra*, General Dalzell against the Tenants of Caldwell, *num. 406*, [June, 1673,] the Lords having advised it, they found, tacks set to a competent and adequate avail, as thir questioned were, good and sufficient to defend against a forfeiture; but not where the duty was unanswerable, elusory, imaginary, or within the true avail; and this decision was grounded on the 18th and 19th acts of Parliament in 1449.

Vide infra, No. 446. [Earl of Aboyne, February, 1674.]—See 27th January, 1680, thir same parties.

Advocates' MS. No. 437, folio 231.

1671 and 1674. The EARL OF LOUTHIAN, and the MINISTERS OF THE PRESBYTERY OF JEDBURGH, against the TOWN OF EDINBURGH.

1671, *November 4*.—THE Lady Yester, in *anno 1645*, enters into a contract with the Provost and Bailies of Edinburgh for the time, by which she lends to them 5000 merks; the interest whereof is granted to the town during her lifetime; and after the same, she destines and mortifies the said sum to the poor of the parishes of Jedburgh, Oxnam, Hoprigg, and Sprouston; and other pious uses mentioned in the said contract. For the payment of the sum there is a requisition made; which not being obeyed, there is a summons raised at the instance of the Earl of Louthian, as now heritor of the forsaid parishes, by being come in the place of the Lord Jedburgh, and so patron of this sum; with consent and concurrence of the ministers, elders, and deacons of the said parishes; against the good town, for making payment of the forsaid sum, that it may be employed conform to the destination contained in the contract.

It was ALLEGED by the town, *Imo*, No process; because all that they produce to instruct that they are debtors in the said sum, is allenary a copy or attested double, under Robert Adamson and David Peter their hands, being two under-servants in the Town-Clerk's chamber; which double, unless the principal contract were produced, can never make faith against the defenders, nor bind this debt upon them. *2do*, They offered to prove the sum was paid to the Earl of Louthian. *3tio*, Offer to prove the haill bygone annualrents are paid to the pursuers, or others having their warrant.