

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*.

No. 122. ment of the sum was an indefinite ish, if so be the rent of the land set did no more than pay the annual-rent of the sum, in which case, they would not sustain it as a valid tack ; but if there were a superplus, that by intromission within such a space of years, it would pay the whole, then it would subsist as a good tack, and ordained the value to be tried. See Peacock against Lauder, No. 118. p. 15244. Oliphant against Currie ; No. 120. p. 15245. If such tacks were too far extended, then wadsets and heritable rights would be disused, which by the intimation given by their registration are more secure to the other lieges.

Fol. Dic. v. 2. p. 422. Fountainhall, v. 1. p. 822.

1748. February 11.

FACTOR on the Sequestrated Estate of AUCHINBRECK against MACLAUGHLAN.

No. 123.

Effect of a tack let to endure till a sum lent by the tenant to the proprietor be repaid.

In February 1729, Kenneth M'Lauchlan obtained, from Sir James Campbell of Auchinbreck, a tack of the lands of Dupin for five years from and after the Whitsunday following, at the yearly rent of 200 merks in money, 2 stones butter, 4 wedders, and 1 dozen of poultry, &c. and containing in the end the following clause, " And in regard Sir James has at this date borrowed 4000 merks from the said Kenneth, it is agreed, that notwithstanding the tack-duty is payable to Sir James and his foresaids, the said Kenneth is yearly to retain the interest of the said 4000 merks, a discharge whereof is to be received as payment of so much of the tack-duty ; and it is further declared, That the tack, though but for five years, is to continue ay and while the foresaid sum of 4000 merks is paid."

The estate of Auchinbreck was sequestrated in 1739, and the tenant continued to retain his annual-rent, as he had done before the sequestration till, in November 1742, the factor took a baron-decree for the rent of that year, and preceding years since the sequestration, and in time coming, the terms of payment being come and bygone ; which the tenant suspended.

After this, the matter lay over till now, when the suspension coming to be discussed, the Lords " Found the letters orderly proceeded for the rents fallen due since obtaining the decret, but suspended the letters as to preceding years."

As the tack was set for the definite space of five years, and the tenant to retain his annual-rent out of the tack-duty, they considered the after clause, that it was to continue till the sum was paid, to be personal, and that the decree was a sufficient interpellation of the tenant's *bona fides* ; though in many cases such clauses have been found effectual, where the tack was set to the creditor till he should be paid of his money, and where there was an excresce of tack-duty over the annual-rent. But the judgment here given will, it is thought, be followed in time coming.

Fol. Dic. v. 4. p. 323. Kilkerran, No. 6. p. 534.

* * * D. Falconer's report of this case is No. 16. p. 1736. *voce* BONA FIDE CONSUMPTION.