No. 116. Answered, That such tacks were never controverted, and so never objected against; and who can know after so long a time, whether or not objections were founded against the said act, and what the reason has been to repel them, if they have been proponed; whether the act was interpreted to extend only to wadsets and tacks dated before the act, and not to after wadsets and transactions? To the second, answered, That the act betwixt debtor and creditor speaks nothing of the case of a tack after loosing, and so cannot be extended *a paritate rationis*.

The Lords found the tack null upon the act King James the Second, though some were of the judgment it should have been found not upon that act, but upon the late act betwixt debtor and creditor.

Gilmour, No. 182. *p.* 132.

1673. *July* 8.

MONTGOMERY *against* PARISHIONERS of KIRK-MICHAEL.

No. 117.
Sub-tacks of teinds granted to heritors by the principal tacksman, for sums received, for five years, and till the sums were repaid, were found null as to singular successors for all years after the first five.

The Bishop of Galloway having set the teinds of Kirk-Michael to Neil Montgomery of Langshaw, he sets sub-tacks to several of the heritors, bearing special sums received, for which he sets their teinds, one of them for five years, and thereafter during the non-payment of that sum, and the tack-duty is the annual-rent of the sum; the other is for three years, and from three years to three years during the non-payment of the sum. Neil Montgomery, son to Longshaw, having right by apprising, pursues the heritors for their teinds. They except upon the tacks. The pursuer replied, That the tacks were null, except as to the first five years, or three years, long since past, because they wanted a determinate ish, which is an essential of a tack; and it hath been oftentimes decided, that tacks of lands to endure till a sum were paid, were null as to singular successors. It was duplied, That decisions had not been constant in this point, even as to lands, but the case was far different as to teinds; for lands requiring for their right infeftment, it was against the interest both of superiors and purchasers, that tacks for sums ay and while they be paid, should be valid rights, which could be found in no register; and therefore the motive of that custom is, that tacks might not be perpetuated; but teinds being rights, and tacks thereof being rights that require no infeftment, but are assignable, and any words expressing a communication of the right, if it were but a general disposition of all right of land and teind, it would carry the right of the tack, if it were clad with possession; and in the same manner in a tack of life-rent that requires no infeftment, but especially in the case of a sub-tack, which cannot be a perpetual right, because it is determined with the ish of the principal tack, and if it were an assignation to the principal tack, it would be unquestionably good.

The Lords found the tacks null as wanting an ish.

Fol. Dic. v. 2. *p.* 423. *Stair, v.* 2. *p.* 206.

*** Gosford reports this case: No. 117.

In a pursuit at the instance of the said Neil, as having comprised the right of the teinds of the said parish from the Laird of Langshaw, who was principal tacksman thereof; it was alleged for some of the heritors, That the comprising could give him no right, because, long before the deducing thereof, they had sub-tacks of their own teinds, which were not yet expired. It was replied, That the said tacks could be no ground of a defence, because they were *ipso jure* null, having neither a duty nor ish; but being granted only for security of a sum of money and retention of their teinds until payment, both law and the constant practice of the Lords hath found them null, that they cannot prejudge a singular successor who hath acquired a valid right. It was duplied, That law and practice had only found tacks null where they were granted for the property of lands, without any certain duty or ish when the same should expire; but the defenders being in the case of the tack of teinds granted by a principal tacksman by way of sub-tack, which is most ordinary, they are not in the case of a tack of the property of lands; the reason of disparity being clear; for, if the right of property, being transmissible only by charter and sasine of a principal tack, should be sustained without any ish or years when the same should expire, then, upon private latent deeds, one who acquires the heritable and irredeemable right of lands might be debarred *in æternum* from the possession, and none could be assured of his right, albeit settled conform to the laws of the Kingdom; whereas, those who acquire a right from a principal tacksman, or comprises from him, cannot but know, that by a naked assignation or sub-tack, he may be denuded of his right during the whole years of his principal tack, which must regulate the continuance of the sub-tacksman or assignee, seeing he can confer no right but such as he himself hath. The Lords did declare the sub-tack void and null, as having no certain ish but that which depended upon the redemption of the sub-tacksman; which seems hard, not only because a tack of teinds differs from that of property, and was never by any practique declared null upon that ground, but, because a sub-tack doth certainly terminate when the principal tack expires, and that a posterior compriser hath it in his power to redeem and extinguish the sub-tack whensoever he pleases; or, if he shall think fit not to redeem them when the years of the principal tack wear out, he may enter to the possession of the teinds without payment of any thing to the sub-tacksman, who does not look to his own security, and seeing in law *potest uti jure auctoris*, who might give a valid right for the whole years in his tack, and that it is far more ordinary to grant sub-tacks than assignations to the heritors of their own teinds; it is against all reason and equity that a sub-tack should not defend, as well as an assignation, during the years of the principal tack; likeas, being granted for security of a sum of money, they cannot be said to want a certain duty and ish, seeing the annual-rent of the money effeiring to the principal is a certain duty, and the ish of the principal tack doth certainly terminate the sub-tack in this cause. It was likewise alleged, that the sub-tacksman could have no retention for the an-

No. 117. nuities which he had paid out of the said teinds, seeing he was possessor thereof, and the principal tacksman was not obliged to relieve him. It was answered, That albeit where a tacksman of teinds having right thereto for an usual duty, may be liable for the annuities, yet in this lease, where the sub-tacksman hath in effect a wadset of the teinds for a sum of money, and is nowise obliged to relieve the principal tacksman, if he be forced to pay the same; as possessor, he ought to be relieved, or retain his right until he be paid. The Lords did find the sub-tacksman was not liable to the annuities, and having paid the sum, that he should be relieved, or have retention.

Gosford MS. p. 357.

*** See 13th November, 1679, SETON *against* WHITE, No. 19. p. 15173.

1674. *June* 27. PEACOCK *against* LAWDER.

No. 118. Found in conformity with Thomson against Reid, No. 114. p. 15239.

There was a tack of some tenements in Edinburgh granted to Peacock to this effect, that for security of 1,000 merks due to Peacock, the tenement was set for seven years, for payment of four pennies yearly, the tacksman giving discharges yearly of the annual-rent, so long as he remained in possession of the tenement; whereupon he pursues declarator against certain apprisers of the tenement, for declaring that this tack was a valid right against singular successors till the money were paid.

The Lords found that the tack was only valid for seven years, and not for the subsequent years.

Fol. Dic. v. 2. p. 423. Stair, v. 2. p. 274.

*** Gosford reports this case:

In a declarator at George Peacock's instance against John Lawder, as compriser of a tenement from Alexander Eleis, to hear and see it found and declared, that he had a tack of the tenement prior to the comprising, and by virtue thereof in possession; in which tack he had right to the mails and duties by the space of seven years, and thereafter was obliged to accept of the rent of the tenement in satisfaction of the annual-rent due to him by Eleis; whereupon he concluded, that he being obliged as said is, it was equivalent as if the tack had been, that it should continue ay and until he was paid of his principal sum, and so ought to be preferred to the compriser, having a prior real right clad with a possession. It was answered, That the tack being expressly for seven years only, which were long since past, and albeit it could be interpreted of the nature of a tack, yet having no special issue, it was null, and could not prejudge a singular successor, as hath been