

the two years immediately subsequent after the decease of the setter of the said tack, because the first entry of the tack to the first three years thereof was appointed to be at Lammas, and so forth to continue, during the space therein contained; and the setter dying before the Lammas, which behoved to be the tacksmen's entry for these three years, set after the decease of the setter, they found that the said tack therefore could not be sustained to defend by virtue thereof against the spuilzie of any year after the setter's decease, he dying before the entry to that three years tack; which behoved to be ruled by the time of the entry first appointed to the first space of the tack, notwithstanding that the tacksmen was ever in possession, during the setter's life-time, from the date thereof, who survived thereafter a great space.

Act. *Oliphant.*Alt. *Lawrie.*Clerk, *Hay.**Durie, p. 4.*

No. 76.

1622. July 20.

MAKCARRO against ———.

The Lords found, that in a removing pursued by one ——— against Makcarro, that a tenant who had a tack to him *in anno* 1614, to enter at the expiry of the other tack, to be a sufficient defence against the pursuer, who warned upon his infeftment granted to him by their common author *in anno* 1613, long before the date of the defender's tack.

No. 77.

Fol. Dic. v. 2. p. 421. Haddington MS. No. 2655.

* * Durie reports this case :

An exception being admitted to probation against a removing pursued by M'Carro against ——— excipient, bearing, That the excipient had tacks to run for terms the time of the warning; and for proving thereof, two tacks being produced, one whereof the last year of it was expired that year of the warning, and another tack set some years after the first tack, for certain years therein contained, whereof the entry was appointed to begin at the expiring of the other former tack, and which posterior tack was dated by the space of two years preceding the pursuer's right; against which tack it was objected by the pursuer, that the same could not prove the exception, because, albeit the same preceded the pursuer's heritable right, yet seeing the time of the entry thereof was deferred to the time of the expiring of the first tack, before the expiring whereof the pursuer had acquired the heritable right of the lands, and so he was infeft before the time of the defender's entry; and the intervening of that heritable right in his person, who was singular successor in the right of the lands, was a lawful impediment why the second tack, which was a several and distinct right from the first, and not inserted in one body, and to the which the excipient could not be heard to ascribe his possession, in respect of the first tack, at that time standing unexpired, could not be

- No. 77. obtruded to take effect against the pursuer's heritable right foresaid, he being singular successor, as said is; and the said tack against him could not be respected, as cohering with the former tack, but only ought to be respected, as if it had been set, appointing the entry thereof to begin at the year after the warning specified; for in effect it is so conferred; and if it had been so set, it would not have defended against the pursuer's heritable right, but might have produced warrandice against the setter;—this allegiance proponed against the tacks was repelled by the Lords, and the tacks sustained, seeing they were lawfully set *ab initio* before the pursuer's right.

Act. *Hope and Miller.*Alt. *Nicolson, younger.*Clerk, *Sir William Scot.**Durie, p. 32.*

No. 78.

1629. *June 18.*DUNBAR *against* TURNER.

A tack set by a tacksman who is only life-renter of his benefice, may not have the entry thereof conferred thereafter the decease of the setter, but tacks set by heritors may be conferred after their decease.

Auchinleck MS. p. 233.

* * Durie reports this case :

One being tacksman of lands for certain years, and by virtue whereof coming in possession, and the setter of this tack thereafter set another tack to another person, to begin at the expiring of the first tack; the posterior tacksman pursuing removing after the expiring of the first tack, against the first tacksman, the setter being deceased before the first tack expired; and the said prior tacksman alleging, that the setter had no right to the lands, and that he might maintain his possession while he were removed by one having right to the lands; it was found, that he ought to remove at the second tacksman's instance, and that he could not allege that the setter had no right, himself having taken a right from him, and having apprehended possession by virtue of that right; which possession he ought to render again to the second tacksman, who represented the setter, and came in the setter's place, sicklike as he behoved to render the same to the setter's self, if he had been on life, and pursuing him therefore, whose possession he could not invert, nor oppone to his right; neither was it respected, that this pursuer's tack took not beginning nor entry in the life-time of the setter, for it was not thereby found to be null as conferred *in tempus introitus indebitum*, seeing it was a tack set by a laick person in temporal lands, not by an ecclesiastick or beneficed person wherein that holds.

Act. *Nicolson.*Alt. *Belcher.*Clerk, *Scot.**Durie, p. 446.*