

No 4. the King, was reduced, and decerned to make no faith, yet that he might have defended his possession with the base infeftment holden of his author, or that he was tenant to him, his author's infeftment being good in itself; for that sentence of reduction would appear to prejudge him no more than if the defender had renounced that public infeftment, *quo casu* he could not have been hindered to return the other, or to allege himself tenant to his master, who had a right. But the LORDS found the contrary, that the public infeftment made the base to cease.

Act. Hope.

Alt. Aiton et. Oliphant.

Clerk, Scot.

Fol. Dic. v. 1. p. 200. Durie, p. 136.

1628. March 12.

E. DUMFERMLINE against COUNTESS.

No 5. A TACKSMAN acquiring the property of the lands from the letter of the tack, may, after the infeftment is taken out of the way, recur to his tack to defend himself against a third party. See No 2. p. 3082.

Fol. Dic. v. 1. p. 200.

\* \* See This case voce TACK.

1634. December 11.

L. LESMORE against HUTCHESON.

No 6.  
A tacksman acquired a wadset of the lands. His right of wadset was set aside. He was found entitled to defend himself upon his tack against the donatar of the letter's liferent escheat, who had reduced his infeftment as granted in *cursum rebellio- nis*.

L. LESMORE, younger, being constitute assignee, by the L. Caprington, donatar to old L. Lesmore's liferent escheat; after general declarator, in an action of special declarator, he pursues one called Hutcheson for payment of the mails and duties of the lands of ——— pertaining to the rebel; and the defender defending himself with a tack of the lands, set to him by the rebel before his rebellion, the pursuer replied, that he had passed from that tack, in so far as, since the date thereof, he had accepted an heritable infeftment of these lands from the rebel, he then being rebel unrelaxed, whereby the tack became extinct, so that he cannot have recourse thereto; and therefore the heritable right being acquired thereafter, at the which time he being rebel, and not relaxed within the year, he could not dispoise the lands within the year, the rebellion being *in cursu*; so that whenever the year of his author's rebellion expired, his liferent of the lands must belong to the superior, and the same cannot be excluded by returning to the tack, which was absorbed by the heritable posterior wadset. And the defender *duplying*, That seeing the wadset is not a valid right to him, whereby to bruik, he may lawfully return to that right whereby he did bruik; for if his heritable infeftment were reduced, or that another had acquired a better right, which would give him preference to the lands before the excipient's right, *hiscasibus* his heritable right falling, he might return to his tack, and

could not be prejudged therein : Even so in this case, the LORDS sustained the exception, notwithstanding of the reply, and found that the excipient might return and clothe himself with the foresaid tack, notwithstanding of the acceptance of the said heritable right ; albeit the rebel, who was the defender's author of his heritable right, was at the horn the time of the acquiring of the said heritable right, and that he was never relaxed within the year ; for, seeing he could not bruik by virtue of that heritable right, in respect of the said rebellion, it was found that it could not extinguish the prior tack, but that he might return and clothe himself therewith. This decision wants not its own doubt ; for it appears, that it is hard to make the tack convalesce, for that reason, that he could not bruik by virtue of the wadset ; for, if the heritable right be good and valid in law, there is no reason wherefore he should return to the tack again ; and albeit the author thereof was then rebel, yet that makes not the heritable right to fall, but suspends the same during his lifetime, by reason of the rebellion, which, in effect, is a confirmation of the heritable right to this excipient, and not an everting of that heritable right, for they might subsist together, viz. that the liferent should pertain to the donatar, and the fee to the excipient ; whereas the tack and the heritable right cannot both subsist in one person ; and if the defender should take him to the tack, now after he had purchased an heritable right, it may appear that thereby he passes from the heritable right, by using a more base and ignoble right, and so cannot return to a more noble right thereafter, having made choice to bruik by a definite temporal right. Likeas it is his own fault that he obtained not his author relaxed, whereby he might validly have obtained from him that heritable right, *et sic non debet lucrari ex sua culpa*, and to the prejudice of the King, who, by his vassals annual rebellion, cannot be prejudged of the casualty of the liferent escheat thereby accrescing to him, *et sic reus sibi imputat*, who provided not better for his own security ; and it may be, and is very probable that it was so, that when the defender acquired the heritable right, the parties agreed, that, upon consideration of the tack, the wadset was granted upon more easy conditions, and that there was allowance given to the excipient in the said wadset, in regard of the tack, whereby it is in effect extinguished ; and as the tack could not be obtruded to the setter's self, after the heritable right, albeit the heritable right had not given him a valid title to the land, far less can it be obtruded to the King and his donatars ; and as if either the tack had been directly *et specificce* renounced by the tacksman, or that there never had been a tack set, the liferent would have fallen ; even so in this case, as it now stands, where in effect, by the posterior wadset, the tack, if not *per expressum*, yet *tacite* is renounced, and passed from ; but it was decided *ut supra*, and these arguments were not proponed.