

of declarator, in which case all parties having interest, should have been called at the market cross, but a voluntary redemption, albeit upon an order. No. 14.

The Lords sustained the defence, notwithstanding of the reply.

Stair, v. 1. p. 303.

1666. February 15. MY LORD LEY *against* PORTEOUS.

My Lord Ley, having right by progress to the reversion of an old wadset, uses an order, and pursues declarator thereupon. The defender alleged no declarator, because by the reversion there is a tack to be granted, to begin after redemption, and to continue for so many years. It was answered, That tack was null and invalid, not only by common law, as an usury paction, giving the wadsetter more than his ordinary annual-rent, but by a special act of Parliament, James II. Parl. 1449. Cap. 19. whereby such tacks taken in wadsets, to endure long time after the redemption, for the half mail, or near thereby, shall not be kept; and as by the late act of Parliament, between debtor and creditor, it is provided, that where old wadsets were granted before 1650, when annual was at ten for each hundred, the wadsetter may, upon offer of caution for the annual-rent, take possession, unless the wadsetter offered himself to be countable for what exceeds his annual-rent. It was answered for the defender, That his defence stands yet relevant, notwithstanding the answer; for as to the old act of Parliament, it is in desuetude, and it hath been the common custom to grant such tacks in reversions, which have still been observed, and was never quarrelled; neither are they usury, seeing the tacksman has the hazard of the fruits, and all burdens; so his tack-duty, however small, unless it were elusory, can be no usury paction, more than taking lands in a proper wadset, which pay more than the true annual-rent, which was never found usury; *2dly*, This wadset is granted since that old act, whereby the benefit thereof is totally past from; as to the new act, the clause bears expressly, that during the non-redemption, or non-requisition, the conditions therein shall take place, which cannot be extended to a tack, to be granted after redemption. It was answered, That the first act bears, not only a regulation of wadsets already then granted, but to be granted, bearing expressly, who takes or has taken lands in wadsets, &c. and there is nothing in the wadset to renounce the benefit thereof; as for the custom, acts of Parliament are not derogated by custom of private parties, acquiescing in their agreements, but the custom of the Lords by current decisions; as to the last act, it ought to be drawn, *ad pares casus*, and the lands are not effectually redeemed till the tack be ended.

The Lords found the last act no ground for annulling such tacks, but found the first act a good ground, if it were subsumed according to it, that the lands were set for half mail or thereby.

Stair, v. 1. p. 356.

No. 15.
Tacks to endure after redemption reducible.