No 33. Samuel to Collington not being produced. This reason was not sustained, because of this answer; that albeit the pursuer had nothing but a naked comprising, yet it being for a lawful debt, long prior to the bond of provision granted to the said Mary by her father, whereupon they might reduce her bond and comprising, she could not quarrel Collington's infeftment. The *second* reason was, That the comprising was for more than was due, in so far as Mr Samuel had comprised, not only for his own debt, but as assignee by Ingliston, to whom John Aiton was bound for relief of a debt paid by him, they being conjunct cautioners; whereas there being a mutual clause of relief, Ingliston could only seek his relief for the half of the sum. This reason was likewise repelled, the pursuer offering to restrict to the half of the sum, and declaring the legal reversion of the comprising not to be expired.

Gosford, MS. No 42. p. 15.

*** See Stair's report of this case, No 77. p. 958, *voce* BANKRUPT.

1669. *January* 19. EARL of ATHOL *against* ROBERTSON of STRUAN.

No 34.
An heritor being pursued for his teinds upon a tack let by a parson, it was found competent for him to plead that the tack wanted the patron's consent.

MR WALTER STUART, as parson of the kirk of Blair in Athole, whereof Tullibairn was patron, gave a tack to Tullibairn's brother of the whole teinds of the parish; which tack he (within a few days) assigned to Tullibairn, the patron himself. Tullibairn's escheat and liferent having fallen, the Viscount of Stormont obtained the gift thereof, and as donatar assigned the right of this tack to the Earl of Athole, who now pursues Robertson of Struan for the teinds of his lands for many more than 40 years from the date of the tack. The defender *alleged, first*, That the tack is null, being set for more nor three years without consent of the patron, contrary to the act of Parliament 1594. The pursuer *answered*, That the allegeance was *jus tertii* to the defender, and was only competent to the pursuer, or some deriving right from him, for the defender being liable for his whole teind, had no interest to quarrel the pursuer's tack. *2dly*, Albeit the consent of the patron be necessary, yet it is not necessary to be in the very tack itself, but a subsequent consent is sufficient; and here the patron has given a subsequent consent, in so far as within a few days after the granting of the tack, he accepted an assignation thereof himself, and did obtain a decreet of prorogation of the same. The defender *answered*, That the patron's consent being a solemnity requisite in law, behoved to be in the tack itself; and not being then adhibited, the tack of itself was null *ab initio*, and a subsequent consent, not by subscription, but by acceptance or homologation, was not sufficient, and the defender had good interest to propone the nullity, not being founded *super jure tertii*, but simply *exclusive juris agentis*, as wanting the essential solemnities, and also because the defender has paid the mini-

ster the accustomed teind-duty for all years bygone, and having his discharge of the whole teind duty due by him *eatenus* he is in the minister's place. No 34.

THE LORDS found the defender to have sufficient interest to allege the nullity upon the discharges, but the patron's acceptance of a right to the tack, a sufficient consent to validate the same, and that it required no consent expressly by subscription of the tack.

The defender further *alleged*, absolvitor, because this tack never having attained possession, nor no action following thereupon for more than 40 years, it is prescribed and void, and so likewise is the decreet of prorogation, being more than 40 years since. The pursuer *answered*, That the defender having no right to his teinds, had no interest to quarrel his right. *2dly*, That a tack being but a right to an annual prestation, it is all one, as if a right had been granted to every year a part, in which case 39 years would be entire, and the pursuer insists for no further. The defender *answered*, That prescription being a total extinction of the right, and not a transmission thereof, by virtue of an other right, it is not *jus tertii* to the defender to allege the same, and to exclude any from troubling him, upon a null and prescribed right, and he is liable only to the minister to whom he has made payment, and obtained his discharge for bygones and for time coming; likeas, it is better to be in the hands of an ecclesiastical person, than in the hand of a powerful secular person. To the *second*, That there are not here granted distinct tacks of several years, but one individual tack for many years, all which years are expired; but it subsists only by prorogation; and albeit it be true, that if the tack had been once clad with possession, and so become a real right, the defender would only have been freed of the duties before 40 years, but the very tack itself being never clad with possession, is singly expired and void.

THE LORDS found the defense relevant and competent to the defender, to liberate him of all bygones paid to the minister, but not to exclude the pursuer for time coming, in respect that, by the decreet of provision, and prorogation of the tack, the benefice is no more a parsonage, but the minister is a stipendiary, and is in possession by virtue of a modified stipend, the right of the teinds remaining by the tack and prorogation foresaid in the tacksman and in his successors.

But because the pursuer alleged minority and lesion, the defender proponed a third defence, viz. that he had made payment *bona fide* to the minister, and had received a discharge for his whole teind-duty, and could be liable for no further for bygones, till his use of payment was interrupted by citation or inhibition. The pursuer *answered*, That any payment the defender made, was but an inconsiderable duty allocated out of his teinds, by virtue of the same decreet of modication and locality; and albeit the minister had discharged his whole teind, yet as to the superplus, which is the tacksman's part, the discharge was merely gratuitous, and was not upon payment made, and the pur-

No 34. suer was willing to allow what he truly paid. The defender *answered*, that in all benefices and tacks, use of payment importing a verbal tack, is sufficient *per tacitam relocationem*, till it be interrupted, so that if the minister had granted a tack in writ but for one year, and the defender had continued in posssession *per tacitam relocationem*, he was *bona fide* possessor, *et facit fructus consumptos suos*, even albeit the minister had no right; so his use of payment for so long a time must work the same effect; neither can it be made appear, that the defender or his predecessors paid more than what they now pay.

THE LORDS sustained the defense, and found the defender only liable for use of payment, until citation or inhibition. *See* QUOD AB INITIO VITIOSUM.—TACK.

Fol. Dic. v. 1. *p.* 518. *Stair, v.* 1. *p.* 582.

*** Gosford reports this case:

1669. *January* 19.—THE Earl of Athole as having right by progress to a tack of the teinds of the parish of Blair Athole, did pursue the Laird of Struan for the teinds parsonage and vicarage of his lands for 20 years bygone, and in time coming. It was *alleged* for the defender, That the tack was null by the act 203d Parliament 1594, being set for more than three years, without consent of the patron the Earl of Tullibardin. This was repelled, the tack being set to Tullibardin's brother for his behoof, and to whom the tack was immediately assigned, and so needed not his consent, it coming in his person by assignation which was equivalent, and from whom the pursuer derived his right. 2*do*, It was *alleged*, That the tack was prescribed, not being clad with possession by the space of 40 years, and the defender having paid constant duty for his whole teinds, amounting to L. 30 yearly, he could be no farther liable. This defense was likewise repelled, the defender proponing upon no right of his own; but the LORDS assoilzied him for bygones for all years preceding the inhibition served by the pursuer, whereby his constant use and custom was interrupted.

1669. *January* 21.—IN the foresaid action at Athole's instance, for the teinds, it was further *alleged* for Struan, That Athole's right, being an assignation from Mungo Viscount Stormont, as donatar to the single escheat of the Earl of Tullibardin, the said tack of the teinds set by the minister could not fall under the single escheat, because it was a tack set by the minister during his lifetime. Likeas, thereafter it was prorogate for the space of five 19 years, which must be interpreted to be of the nature of a liferent tack. THE LORDS repelled the defense upon this reply, that, by the act of Parliament, liferent tacks are only declared to fall under liferent escheat of the receivers of the tack, and not where it was conceived for the lifetime of the granter; as like-

wise that the Earl of Tullibardin, by whose rebellion the tack fell, was only assignee to the tack; and did not find that the prorogation of tacks, which were not liferent tacks, as said is, did make them fall under liferent escheat. No 34.

Gosford, MS. No 84. p. 30. & No 89. p. 32.

1675. *January* 5. BALLANTINE *against* EDGAR.

THE Laird of Empsfield having granted bond to James Ballantine and his spouse, the longest liver of them two in conjunct fee and liferent, and after their decease, to ——— Ballantine, their son; the father in his own time used inhibition, and now John Ballantine his son pursues reduction of all rights granted by the Laird of Empsfield after the inhibition, and insists against Margaret Edgar who had a liferent-right from her husband, and he a right from Empsfield after the inhibition. It was *alleged* for the defender, That the reason of reduction could not militate against her at the instance of this pursuer, because he neither hath nor could have right to this bond or inhibition; for the bond being granted to James Ballantine and ——— Ballantine his son, albeit the pursuer's name be now filled up in the blank, yet it could not belong to him, because he was not born at that time; and it is visible by the inhibition, that the son's name was blank in the inhibition, and John his name is filled up with another hand, and therefore the execution of the inhibition is only at the instance of the father, without mention of the son, who being only liferenter, the inhibition could extend no further but as to his liferent-right. It was *answered*, That the father was not liferenter but fiar, and the son a substitute, and therefore the father might assign the bond, or dispose of it at his pleasure; and albeit this son had not been then born, the father might fill up his name when he pleased, so that the inhibition used at the father's instance is effectual to his heirs of line or provision by substitution, or to his assignees; and this defender hath no interest to debate how his name came in the bond, that being *jus tertii*, seeing there is no other heir or child pretending right.

No 35.
A person took a bond payable to himself, and after his death, to —— his son. The name of a son, who was born after the date of the bond, was afterwards inserted in it. Found that it was *jus tertii* to the debtor, to debate how that name came into the bond, there being no other person pretending right.

THE LORDS sustained the inhibition as being done at the instance of the father as fiar, and found process at the instance of the son as substitute.

The defender further *alleged*, That the bond was satisfied in whole or in part, in so far as the inhibition thereupon affecting the whole estate of Empsfield, which was transmitted to many singular successors, after the inhibition they paid the whole or a part of the sum of the bond for clearing their lands of the inhibition. It was *answered*, That if it were alleged that they had given sums in payment and satisfaction of this debt, relevant, but if it was only a transaction with the inhibiter to restrict the inhibition to other lands, and pass from