No 18. subsequent infeftment of the heir, who is *eadem persoua cum defuncto*, and *jus superveniens auctori accrescit successori*. But the COURT were of opinion, That the *jus superveniens* could not accresce in this case; for a sasine obtained *a non habente*, cannot be cured by any supervening right in the heir.

Fac. Col.

*** This case is No 12. p. 2933. *voce* CONDICTIO INDEBITI

SECT. III.

To which Successor does the Right accresce?

1663. *January* 16.

TENANTS of KILCHATTON *against* LADY KILCHATTON.

No 19.

THE author's right was an infeftment null for want of confirmation, out of which was granted a base infeftment of annualrent to one creditor, and thereafter an apprising led thereof by another, with infeftment. After all, the author's right was confirmed by the King, which was found to accresce to the base infeftment of an annualrent, as being the first completed right *in suo genere*.

Fol. Dic. v. 1. p. 515. Stair.

*** This case is No 1. p. 1259. *voce* BASE INFEFTMENT.

1671. *June* 21. JOHN NEILSON *against* MENZIES of Enoch.

No 20.
An author's infeftment was found to accresce to a tack granted with absolute warrandice, and not to a posterior disposition of the lands; though it was offered to be proved, that the infeftment was procured by the disponee's means; and,

JOHN NIELSON, as assignee constituted by John Crichton, pursues Menzies of Enoch for the rents of certain lands in Enoch, upon this ground, that there was a tack set by James Menzies of Enoch of the said lands, to the said John Crichton for 19 years, for payment of fourscore pounds Scots yearly of tack-duty: Thereafter, by a decreet-arbitral betwixt Enoch and his eldest son Robert, he is decerned to denude himself of the said lands, in favour of Robert, reserving his own liferenr: After which decreet, Robert grants a second tack to Crichton, relating and confirming the first 19 years tack, and setting the land of new again for five merks of tack-duty, instead of the fourscore pounds: After which tack, Robert dispones the land, irredeemably, to Birthwood; but, at that time, Robert was not infeft; but, upon the very same day that the

No 20.
consequently, was taken in order to validate the disposition.

disposition was granted to Birthwood, Robert Menzies is infeft, and Birthwood is also infeft: Birthwood's right, by progress, comes in the person of James Menzies, the defender Robert's brother. The pursuer insisted for the duties of the land, over and above the fourscore pounds, during the life of old James Menzies, and over and above the tack-duty of five merks after his death: For which the defender *alleged* absolvitor; because, he produces a decreet, at his instance, against Crichton the tacksman, decerning him to remove, because he was then resting several terms rent, and failed to pay the same, and to find caution to pay the same in time coming. The pursuer *answered*, That the said decreet was in absence, and was null; because, the defender libelled upon his own infeftment, and upon a tack set to Crichton the tacksman by himself, and there was no such tack produced by him, or could be produced; because the tack, albeit it bear to be set by James Menzies, yet it was only set by James Menzies his father, and not by himself.

THE LORDS found the decreet null by exception.

Whereupon the defender *alleged*, That the decreet, at least, was a colourable title, and he possessed by it *bona fide* till it was found null, *et bonæ fidei possessor facit fructus consumptos suos*. It was *answered*, That a title that needs reduction may be the ground for possession *bona fide*; but this is absolutely null by exception; 2*dly*, The obtainer of the decreet was *in pessima fide*; because, immediately after the obtaining it, it was suspended, and the tacksman was able to instruct that there were no duties resting at that time, and, though protestations were obtained, yet the suspension was never discussed against the tacksman.

THE LORDS repelled this defence also.

The defender further *alleged*, That albeit he would make no opposition against the first tack, yet the second tack could have no effect against him; because, before it was clothed with possession, Robert Menzies, setter thereof, was denuded in favour of Birthwood, from whom the defender has right; and it is unquestionable, that a tack, not attaining possession, is no real right, and that a singular successor, infeft before possession on it, will exclude it; 2*dly*, As the tack was not clothed with possession, so Robert, who set it, had no real right in his person when he set it, but only the decreet-arbitral. The pursuer *answered* to the *first*, That he opponed his new tack, which contained not only a ratification of the old tack, but a new tack *de præsenti*, for five merks, and so was like a charter by a superior, with a *novodamus*, whereby the tacksman might ascribe his possession to any of the tacks he pleased; and, if this tack had borne expressly a reservation of the father's liferent, for eighty pounds yearly, it would have been unquestionably a valid tack from the date, and payment to the father, by the reservation, would be by virtue of the new tack, as well as of the old: So likewise the tacksman might renounce the old tack, and retain the new; or, if the new tack had been taken, without mention of the old, the same would have been clothed with possession, albeit it

No 20. could not effectually exclude the payment of fourscore pounds to the father, during his life, as having a better right by the reservation. As to the second allegeance, albeit Robert, who set the tack, was not infeft when he set it; yet Robert being thereafter infeft, his right accresced to the tacksman, in the same manner as if he had been infeft before, *fictione juris*. It was *answered* to the *first*, That the new tack did not bear a reservation of the old; but the tacksman having two tacks in his person at once, although he might quit either of them, or declare to which of them he ascribed his possession, before the interest of any other party; yet not having so done, he must be held to possess by the first, because he continued to pay the tack-duty of the first, and never paid the tack-duty of the second, till the setter was denuded. To this it was *answered*, That the payment to the liferenter, who had a better right, did not import the possessing by the first tack, and the tacksman needed not declare his option till he was put to it; but law presumes that he possessed by that right, which was most convenient for him.

As to this point, the LORDS found, that the tacksman might ascribe his possession to either of the tacks he pleased, both of them being set for a distinct tack-duty, and that *agibatur* by the second tack, that the father's liferent should be reserved.

As to the other point, the defender *alleged*, That the infeftment of Robert, who set the tack, could not accresce to the tacksman; because, the same day Robert was infeft, he was denuded in favour of Birthwood, and he infeft; so that it must be presumed, that he was only infeft to that effect, that Birthwood's right might be valid; 2*dly*, It was offered to be proved, that Birthwood procured Robert's infeftment by his own means; and so it cannot accresce to any other in his prejudice. It was *answered*, That whoever procured the infeftment of the common author, the fiction of law did draw it back to all the deeds done by that author, that might arise from that infeftment, which cannot be divided or altered, by the acting or declaration of either, or both parties.

Which the LORDS found relevant, and found the infeftment did accresce to the tacksman in the first place, whose tack was prior, with absolute warrandice.—*See* TACK.

Fol. Dic. v. 1. *p.* 515. *Stair v.* 1. *p.* 736.

*** Gosford reports this case.

IN *anno* 1656, Menzies, elder of Enoch, having set a tack of some of his lands to John Crichton, for 19 years to run, for payment of fourscore pounds of tack-duty; long thereafter, Robert Menzies, eldest son to the said James, and apparent heir, did grant a ratification of the said tack, with a continuation thereof for other 19 years, for payment of five merks only, after expiration of the first tack; which Robert, upon the contract of marriage, providing him to

the fee of the lands, and upon a decreet-arbitral against the father, for aliment, did charge him to enter him to the said lands, and assigned his right to Birthwood, who did obtain the said Robert infeft, as likewise himself, upon the disposition; and thereafter did dispone the right of the lands to old Enoch, who disponed the same to the said Robert's brother, James; and thereupon the said James did pursue for mails and duties. It was *alleged* for Neilson, who had right from the tacksman, That he ought to be preferred; because he had right, not only by the foresaid tack, which continued during old Enoch's lifetime, setter thereof, but likewise by the new tack, and ratification granted by Robert, which yet had many years to run. It was *replied* for the said James Menzies, That he had right by progress from the said Robert, his brother, granter of the new tack, and thereupon was infeft; and the said new tack not being to begin so long after the said James's right, it could not prejudge his real infeftment, it being conferred *in tempus indebitum*, and not taking effect by succession, before the said James's infeftment. It was *duplied*, That the said new tack being a ratification of the old, and a continuation thereof, for two 19 years, the tacksman having both these rights in his person, might ascribe his possession to either of them, as an heritor may do, who hath several rights of lands, which are constant. THE LORDS did prefer Neilson, having right to the said two tacks; and found, that the second tack was real, and clothed with possession, from the date thereof; which was hard, seeing the tack-duty of fourscore pounds was only due during the whole years of the first tack, and that the second tack being for the tack-duty of five merks only, was payable only after expiring of the 19 years of the first; and the tacksman could not crave the benefit of the second tack, he being wholly liable in payment of the whole duty of the first tack, which was ratified in the whole heads and clauses thereof; and so they were in effect two distinct tacks. Thereafter, it was *alleged*, That the second tack was only granted by Robert, when he was an apparent heir, and not infeft; and so was *a non habente potestatem*. It was *answered* for Robert, granter of the tack, being thereafter infeft, his right did accresce to the tacksman *jure accretionis*. It was *replied*, That his infeftment was procured by Birthwood, to whom he had disponed the right of the fee, who, in that same confirmation obtained from the superior, had likewise confirmed his own disposition, which ought to have been profitable to himself, but no other person, who might debar him, as in the case of creditors, who had a prior disposition. THE LORDS did find, that Robert being infeft, who was author to Birthwood, and granter of the tack, albeit, by Birthwood's money and expenses, his right did accresce to the prior tacksman, as well as himself; for they found a great difference betwixt infeftments made and flowing upon legal diligence, such as adjudications upon renunciations, or upon hornings executed against the granters of dispositions, and rights flowing upon voluntary deeds, and procuratories of resignation, such as Birthwood's infeft-

No 20.

No 20.

ment; and, therefore, that behoved to accresce to all real rights granted by the common author.

Gosford, MS. No. 354. p. 171.

No 21.
An adjudication led without a special charge, was not rendered effectual by the subsequent infeftment of the apparent heir.

1699. *January* 11. WILLIAM DUNCAN *against* JAMES NICOLSON.

PHESDO reported William Duncan, and James Nicolson, late Dean of Guild in Edinburgh. It was a competition, as creditors to John Aikenhead; and it was *objected*, That Mr William Walker's adjudication, to which the Dean of Guild had right, was null, wanting a special charge. *Answered*, A special charge being only a fiction, introduced by law, to supply the want of an infeftment, it was sufficient that Aikenhead, the apparent heir, was afterwards served heir and infeft, (as *de facto* he was,) which must accresce to validate the said adjudication, and to supply the want of a special charge, seeing *jus superveniens auctori accrescit successori*. *Replied*, Whatever this right of accrescing might do in the case of two voluntary dispositions, granted by an apparent heir, yet that does not hold in the case of a legal diligence by adjudication, which being once null, can never be supplied, according to *l.* 29. *D. De reg. jur. Quod ab initio non valet, id tractu temporis convalescere non debet*; 2*do*, The serving and infefting the heir was done by Duncan, to complete his own security; and it were absurd, that his infefting Aikenhead, to validate and perfect the disposition he had got from him, should accresce to a third party, to be detorted to his prejudice; for, *actus agentium non operantur ultra eorum intentionem*, much less *contra eorum intentionem*. *Duplied*, Duncan's right was a gratuitous disposition *omnium bonorum*, and ought not to compete with a lawful creditor; and the rule, *quod ab initio vitiosum est*, has many exceptions, as *l.* 85. § 1. and *l.* 201. *D. De reg. jur. Non est novum ut ea durent, licet ille casus extiterit a quo initium capere non potuerunt*; 2*do*, Seeing it is acknowledged, that the subsequent infeftment would complete a prior voluntary right, why not also a legal one, there being no disparity, and diligences being more favourable than conventional rights. See Stair, 21st July 1671, Neilson against Menzies, No 20. p. 7768.; and in his Institutes, tit. Dispositions. And the intention of law is more to be regarded here than the intention of parties. THE LORDS thought the case new; and ordained it to be debated in their own presence.

This subtile point being advised by the Lords, 7th February 1699, they found the adjudger, having omitted to charge the apparent heir to enter, he cannot, on his own neglect, plead the benefit of the subsequent service and infeftment; and, therefore, preferred the disposition. Sundry of the Lords thought the service so far retrotracted, as to make the adjudication subsist for