to pay the duty which she has not only paid during all the years of the tack, but divers years after the expiring thereof; and before the years acclaimed she paid the same duty; and her son, who was apparent heir to his father in the right of the wadset: And it being duplied, that, by the express condition of the tack, it was provided, that, after the expiring thereof, none of the parties' rights should be prejudged; so that thereby the heir's right of wadset must convalesce; and the payment made by the apparent heir of the wadsetter, after the expiring of the tack, cannot astrict this defender the relict, who left the room whereof the apparent heir became in possession by right of his father's wadset; and who, if any possession she now has, it is as having tolerance of another son, the apparent heir to his father; that son being deceased who was in possession and is alleged to have paid a year's duty to the pursuer after the expiring of the tack; whose deed cannot now prejudge this apparent heir, who succeeds to his father's wadset, and not to his deceased brother who was never infeft; and consequently cannot prejudge the mother bruiking by her son's tolerance, after she had left the room; which interrupts tacit relocation; specially there being a more sovereign right standing in the person of her son thereby to bruik, which takes away all tacit relocation: and it being provided in that tack, that both parties should return, after the ish of the tack, to their several rights, as said is; by the which clause the wadset revives, and the pursuer can never convene them, as bruiking *per tacitam relocationem.* Notwithstanding whereof the exception and duply were repelled, and the defenders were found, as bruiking *per tacitam relocationem,* still debtors in payment of the said duty acclaimed; for the tacit relocation was not found interrupted by her son's intervening possession; seeing she had acquired the possession again, after her son's decease, who, while he lived, paid the same duty; and so she, entering thereby, became debtor of the same duty as possessor *per tacitam relocationem*; wherein she must be reputed to have continued, seeing she never renounced her possession which she had by the prior tack, as she ought to have done.

Act. ———. *Alt.* Nicolson and Baird. Hay, *Clerk.*

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1633. *July* 20. BLACK *against* The LAIRD of PITMEDDEN.

ONE Black, a compriser, charges Pitmedden to enter him to the comprised lands; and he craving a year's duty; the compriser answering that he had possessed the lands comprised, himself, a whole year since the time of the charge given by him to the superior to receive him, which he was content to allow to him for the year's duty now acclaimed for his entry; and the other answering that the year's duty ought not to be allowed for the year due to him in law, for his entering of the compriser, because he had an undoubted heritable right to the lands, by virtue whereof he intromitted; and if this compriser may evict that year's rent of the lands from him, by virtue of the comprising, he shall refund the same; but there is no reason that, upon that pretext, he should quit his lands, and receive a compriser, unless he pay the ordinary usual duty, done by all comprisers to the superior for receiving of a vassal in lands comprised; and

if he can make him, in the ordinary pursuit moved thereanent, to be liable in law for any intromission with the duties of the lands, whereto the compriser may claim right, he shall make answer in its own time and place thereto; but it is not proper to be handled in this place, where, in law, the year's duty is justly acclaimed and payable by the vassal. The Lords found, nevertheless, that,—seeing the superior had intromitted with a year's duty of the land since the charge given by the compriser, and that after the parties had disputed upon their rights, which either of them might claim to that year's duty,—that the same was due to the compriser, and not to the superior; albeit he was, that year and many other preceding years, in possession of the lands by the space of 20 or 30 years preceding, by virtue of an heritable disposition made to him of the lands; and therefore the same being due to the compriser, seeing he allowed that year's intromission to the superior, they found it should compense for the year's duty acclaimed for entering of the compriser, and that they would not astrict the compriser to pay a year's duty, and reserve his action against the superior for his intromission; but found that the one should compense the other;—and therefore ordained the superior to enter the compriser without paying of any other new duty.

Act. Stuart. *Alt.* Nicolson and Baird. Hay, *Clerk.* *Vid.* 18th July 1633, Branden Baird and the cases there.

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1634. *February* 1. HORN *against* POW.

JOHN Horn, notary, in his testament leaves his writs and registers to one Pow, and ordains the said Pow to pay to his son, George Horn, therefore, 100 merks; which Pow promised to do: in this testament umquhile John Horn gives up a debt of ———, owing by him to George Grieve, which George had paid as cautioner for the said John; and, after the said John Horn's decease, George Grieve arrests this 100 merks in Pow's hands for satisfying of that debt, and obtains decreet against him therefore; and by virtue thereof recovers payment. Thereafter John Horn's son convenes Pow for payment of the said sum; who, excepting upon the said decreet and payment, the Lords repelled the exception, and found that the said sum was not arrestable for the debt owing by umquhile John Horn to his creditors, being promised to be paid to the son, and never being *in bonis defuncti*, whereby it could be subject to his debt; and it was not respected that the party alleged that the money was promised to be paid for a legacy of writs left by the defunct, who could never leave any legacy effectually, which could not be subject to his debts; specially seeing, in this same testament, which bore the writs to be left for this sum, the defunct acknowledged this debt, and so he could leave no legacy in prejudice thereof. Which was repelled, and the sum found due to the son, according to the promise made by the defender, and not to the creditor, who, as he could not arrest the writs left to Pow, no more could he arrest the money promised therefore.

Act. ———. *Alt.* Craig.

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