No. 231. missary concerned whether his predecessor called his Clerk to a full account for his dues or not?

The Lords found the defence of possession relevant to assoilzie from by-gones preceding the date of this decreet; but repelled the said defence as to the emoluments in time coming, and declared accordingly.

Fol. Dic. v. 2. p. 428. Forbes, p. 640.

1733. *July* 19. SIR WILLIAM KER of Greenhead *against* HOG of Harcarse.

No. 232.
Effect of use of payment of a silver duty in name of teind *in cumulo* for a whole estate.

An heritor, who was in use to pay to the titular a silver duty in name of teind *in cumulo* for his whole estate, brought an action against his predecessor's relict, who had a life-rent locality of a part of the lands, as intromitter with the teinds of that part; and the question occurred, Whether she was liable to him for the true worth and value of the teinds, or only for a proportion of the silver duty paid by him to the titular? It was pleaded for the pursuer, That he being in possession of the teinds by tacit relocation, and paying a certain duty to the titular, in place of the *ipsa corpora*, this was a separate subject, which was not disponed to the life-rentrix, and to which, therefore, she could pretend no right, more than if there were a current tack in the pursuer's person. It was answered, That there is a very wide difference betwixt tacit relocation and a standing tack: The last is personal, whoever be the proprietor. Tacit relocation follows the property, and must do so from the very nature of the thing, because it is truly no right or title to the teinds, as a tack is, upon which a claim may be founded for the teind: It is no more but a restriction or limitation upon the titular, in virtue of which the proprietor, who was liable to pay the teind *ipsa corpora*, can free himself, by paying the usual silver duty in place of it. The defender, therefore, who is proprietor of the lands for life, must of course have the benefit of the tacit relocation; and the pursuer, who is not titular of the teinds, nor has any other right in his person to the teinds, can insist in no other shape than as a *negotiorum gestor* for the silver duty he paid to the titular upon her account, and which she was bound to pay, by tacit relocation, in place of the *ipsa corpora*. The Lords found the defender no further liable than for what the pursuer instructs he actually paid to the titular upon account of the life-rent lands. See APPENDIX.

Fol. Dic. v. 2. p. 429.

1737. *July* 26.

ANNUITANTS of the YORK BUILDINGS COMPANY *against* SIR ARCHIBALD GRANT, &c.

No. 233.
Import of a clause in a tack to pay

By a tack which the said Company set to Sir Archibald, &c. the lessees were bound to pay to the Governor and Company a yearly tack duty of £.4000 Ster-

No. 233.
the tack-duty free of certain burdens particularly therein specified, and all other deductions whatsomever.

ling, "free of cesses, ministers' stipends, poor's money, and all other public burdens, and other deductions whatsomever, imposed, or to be imposed, &c."

The tacksmen having paid certain feu-duties and ground annuals, payable out of the estates that fell under the lease, this question occurred, Whether, notwithstanding the above clause, they could have allowance thereof out of their rent?

For Sir Archibald, it was pleaded: That the words in the tack, *other deductions*, must be understood of such deductions only as are of the nature of cesses, ministers, and school-masters' stipends, &c. specified in the preceding part of the clause; *i. e.* of such casual burdens as from time to time might be charged upon the estates, and not of feu-duties or ground annuals, which are constant and certain, and are rather a reserved rent to the superior, than burdens upon the remaining rent belonging to the vassal, in consequence of his property; which construction of the clause is further confirmed by the words "imposed or to be imposed" immediately subsequent to "public burdens, and other deductions whatsomever," as it could not, with any propriety, be said, that feu-duties are a burden imposed: Nay, if a contrary construction were to take place, it might be pretended, that even payments made to creditors of the setter, who had infeftments of annuity or annualrent on the lands, ought not to be allowed as part of the tack-duty; because the tacksmen are bound to pay it, without any deduction, which would be too gross to maintain; and, although payment to the creditors of the setter may be said to be the same as payment to himself; yet it is also true, that all payments, made to those who have a right to claim them out of the lands, are equal to payments made to the setter.

Answered for the annuitants (who had come in place of the Company:) The words of the clause are obvious, as well as the intention and meaning of the parties, viz. That the neat tack-duty agreed upon should be paid into the Company, without retaining any part of it, upon acconnt of public burdens, or any other deduction whatsomever; therefore they are not bound to take notice what may be the cause or occasion why the tacksmen pretend to this deduction; by the acceptance of the tack, they have renounced all such deductions as might any ways stop or hinder the payment of the tack-duty; *2do*, It is not so obvious, for what reason the tacksmen should limit the import of the word *deductions*, to be no other but such as are of the nature of those in the preceding clause; if such had been the meaning, it had been sufficient that the clause bore "cesses, ministers' and school-masters' stipends, poor's money, and all other public burdens;" but there is added, "and all other deductions whatsomever," to show that something more was intended than such casual burdens, and to these burdens, particularly specified, the words "imposed or to be imposed" may properly be referred; though, were it necessary, these words should be applicable to other deductions, as they are not, a feu-duty, constituted before the tack, might well be said to be imposed, and to affect the rents as much as ministers' stipends, &c.; more especially, considering the tacksmen behoved to know some prestation was due to the superior, and that the lands might be subjected to servitudes of multures and pasturage, which could no more properly be said to be imposed than a feu-duty;

No. 233. but, upon account whereof, it is certain there could be no claim for deductions, as the tack stands.

The Lords found, That the clause, " and other deductions whatsomever, &c. does not preclude the tacksmen from being allowed the payments made by them of feu-duties and ground annuals, in their articles of discharge.

C. Home, No. 72. p. 122.

No. 234.

1737. *December 15.* WALLACE *against* FERGUSON.

A vassal who was bound by the *reddendo* of his charter to pay yearly a certain quantity of capons and poultry, having, past memory of man, been in use and wont of paying no more but eight pennies over head for the same; in a charge for the *ipsa corpora*, this converted price was found to be the rule for by-gones, but not in time coming. See APPENDIX.

Fol. Dic. v. 2. p. 427.

No. 235.

Tacksmen cannot free subtenants from services due for their possessions to third parties.

1751. *February 5.* The EARL of PANMUIR *against* JAMES MORGAN.

Margaret Countess of Panmuir obtained a tack, 24th April, 1724, from the York-Buildings Company, of the manor-place of Panmuir, with the services payable by the seven cottars of Guildie, being the old town of Panmuir, and the nine pendiclers of the new town of Panmuir; the right to which tack came into the person of William Earl of Panmuir.

Garden of Troup, in 1728, obtained a tack of part of the estate, including the cot-town and new town, with exception from the warrandice of the services and carriages payable by the possessors of these towns; and, 30th December, 1747, subset the lands of Balhill, belonging to the new town, to James Morgan, who, besides his rent, became bound to " perform such services, vicarage, local bolls, multure, knaveship, or other dues whatever, payable to minister, schoolmaster, kirk, mill, ground-officer, and smith, or others, as the lands set had heretofore been in use of."

The Earl of Panmuir obtained decreet against Morgan, before the Sheriff of Forfar, for service of carriage used to be performed for his possession to the manor-place; and a bill of suspension was refused by the Lord Ordinary.

Pleaded, in a reclaiming bill: By an act 20. Geo. II. tenants are liable for no further services than are expressed in their tacks.

Answered: Setters of tacks cannot free their tenants from services due for their possessions to third parties.

The Lords adhered.

Act. *H. Home.* Alt. *T. Hay.* Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No. 191. p. 229.