

No. 210. courts against the vassals, to pay to my Lady and the Chamberlain, or that the Earl had received accounts, containing these feu-duties as particular articles, or that by his knowledge the same were applied to his use, and his knowledge must be presumed by his Lady's or his Chamberlain's receiving the feu-duties, for three subsequent years, from these vassals, they being many in number.

The Lords found, That the receiving of the feu-duties for terms after the warning by my Lady or the Chamberlain for several years, without offer to return the same, did put the feuers *in bona fide*, to continue their possession, notwithstanding of the warning, and did free them from paying any more for the said years; but found the same not to import a passing from the warning, unless the same had been done by the Earl's special warrant or approbation by decret in his own courts, by his warrant, or in his presence, or by allowing in his accounts particular articles in the charge, bearing the receipts of these feu-duties, for applying them to his use, with his knowledge; but that they might be decerned to remove at Whitsunday next without a new warning.

Stair, v. 2. p. 698.

1682. *March.* M'BRAIR of Netherwood *against* MR. THOMAS ROMES.

No. 211. Found, that a summons intented after expiring of a tack, for payment of a greater duty than is therein contained, doth interrupt tacit relocation.

Fol. Dic. v. 2. p. 426. Harcarse, No. 950. p. 268.

P. Falconer reports this case :

In an action of count and reckoning, pursued by M'Brair of Netherwood against Romes, for extinguishing a comprising, as being satisfied within the years of the legal; the Lords found, That tacit relocation was interrupted after the expiring of a tack, by a pursuit for greater mails and duties than were contained in the tack, in regard the summons bore payment of the duty in time coming; and therefore the compriser was found accountable for the ordinary worth of the lands, as it was proved after citation upon the said summons

P. Falconer, p. 35.

1705. *February 1.*

The CREDITORS of DUNFERMLINE *against* The OFFICERS OF STATE.

No. 212.

Tacit relocation competent to the tacksmen of

The late Earl of Dunfermline's predecessors having a tack of the teinds and feu-duties of the lordship of Dunfermline from the King, and being in possession at the time of his forefaulture in the year 1695; the estate hath been under se.

questration ever since, upon application of the creditors, who were not prejudged by the forefaulture, conform to the act of the meeting of the estates, and the 33d act, Parl. 1690.

The tack of the said teind and feu-duties having expired in the year 1695, there arises a competition betwixt the creditors and Officers of State for the same since the expiration of the tack ; the creditors alleging, that the Earl being in possession the time of the forefaulture, they came in his place preferable to the Fisk, and had not only the benefit of the tack, but also of tacit relocation after expiration thereof, in the same way as the Earl of Dunfermline would have had, if he had not been forefaulted.

It was alleged for the Officers of State : *1mo*, Tacit relocation is only competent to the immediate and natural possessors, but nowise to the tacksmen of the teinds and feu-duties of other men's lands, of which the tacksman neither had nor could have any natural possession ; for it was only introduced in favours of tenants and labourers of the ground ; and so it is both by the civil law and ours, L. 13. § 2. L. 14. D. Locati, which laws mention only *colonus* ; and, by the 139th act, Parl. 6. Q. Mary, warnings are only to be used to take off tacit relocation against tenants, and Laird of Lag against the Parishioners of Linton, No. 202. p. 15315. In both these cases, it was found, that the natural possessor had only the benefit of tacit relocation.

It was answered for the creditors : That tacit relocation might have its rise from the presumed will and consent of the setter, especially in favours of tenants ; but it was now further extended and established by law and custom even against pupils who could not consent ; and where a tack is of itself quarrelled, yet tacit relocation takes place ; and as to the decisions, they have specialties ; and it was otherwise found, Whiteford against Johnston, No. 44. p. 13809. *voce* REMOVING, where the sub-tenant or immediate possessor was not found removeable, unless the principal tacksman had been warned, though his tack was expired ; and other men's teinds are the ordinary subjects of tacks, and many and bad consequences might follow, if it were otherwise found.

“ The Lords found that the tacksmen of the teinds or feu-duties of other men's lands might have the benefit of tacit relocation.”

It was further alleged for the Officers of State, that tacit relocation could take no place in this case, because by the forefaulture the property returned to the King ; though the creditors by the late acts might affect the estate belonging to their creditor for securing their debts, yet that could not be further extended than to what did belong to the forefaulted person ; for forefaulture took off all pretence of tacit relocation.

2do, Whatever might have been alleged by a real creditor appriser, attaining possession before expiration of the tacks, yet that is not the case here ; for the creditors have no possession but upon the forefaulture. The Treasury named a Chamberlain, and some of the creditors having affected the rents by arrestments and otherwise, applied to the Lords of Session, representing their claim ; upon

No. 212.
other men's
teinds, but
the Fisk pre-
ferred to the
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No. 212. which they claimed preference to the public, and, lest the rents might perish, desired a sequestration, upon security to be forthcoming to all parties having interest ; so that the King having claimed the intronission with the rents as his right, and thereupon sequestration arising, the creditors had no possession that could afford this benefit ; and the subject of the question is yet *in medio* in the hands of the Chamberlains or debtors ; and generally tacit relocation is a defence competent to possessors pursued to remove, but was never an active title to claim or obtain preference in a competition.

It was answered for the creditors : That their debts and diligences state them in the same case, as the Earl would have been if not forefaulted ; and the Fisk has no interest till their debts be purged and paid ; and the factors' or sequestrators' possession is theirs ; and there is no ground of competition with the Fisk, except by quarrelling their debts ; and the sequestration continued only because of the number of creditors, and that the Fisk had always the reversion.

“ The Lords found, that the rents being sequestrated for the behoof of all parties having interest, the creditors had not the benefit of tacit relocation.

Fol. Dic. v. 2. p. 426. Dalrymple, No. 57. p. 72.

1741. *June 22. and 1742. January 28.*

EARL of DARNLEY *against* CAMPBELL of Shawfield.

No. 213.

Found that tacit relocation takes place in a tack of feu-duties ; as well as in a tack of lands.

Kilkerran, No. 1. p. 532.

Lord Kames reports this case :

1740. *Nov. 25.*—In 1706, Edward Hyde, eldest son to Lord Cornbury, obtained from Q. Anne a lease for three nineteen years of the feu-duties of the Isle of Ilay, of value £.500 Sterling yearly, for an annual payment of £.500 Scots to the Crown. Campbell of Shawfield, as proprietor of the island, being liable personally for these feu-duties, obtained from the Earl of Darnley, in the right of the said Edward Hyde, tacks of the feu-duties for payment of £.300 Sterling to the Earl, and relieving him of the yearly sum of £.500 Scots, payable to the Crown. The last tack was granted in May 1737, to endure from Whitsunday 1737 to Whitsunday 1738. The tack-duties were regularly paid for that year ; after which there was an interruption for two years, the Earl having gone abroad without leaving powers to call for his rent. At the next counting, the Earl insisted for the full feu-duties, payable by Shawfield as proprietor. Shawfield answered, That he had the benefit of tacit relocation, and was liable only for the rent contained in his tack. This