No. 228. the common measure of the place, and not with the Linlithgow measure. The Lords found, That the victual is payable to the charger with the common measure, and therefore found the letters orderly proceeded, without prejudice to the heritor to apply to the Commission for rectification of the locality as accords.

Sir P. Home MS.

1696. *February* 25. TREASURER of EDINBURGH *against* FEUERS.

No. 229.

Vassals being in use, past memory of man, instead of their feu-duty in victual, to pay the fiars, viz. 20*s*. Scots or so *per* boll, this was not found to bar the superior from claiming the *ipsa corpora* in time coming.

Fol. Dic. v. 2. *p.* 427. *Fountainhall.*

*** This case is No. 6. p. 4188. *voce* FEU-DUTIES.

1697. *July* 7. MALCOLM *against* IRVINE.

No. 230.

A Minister insisting for a certain sum in money, and offering to prove *decennalem et triennalem possessionem*, though the decreet of valuation carried only a certain number of bolls that were not *communibus annis* worth that sum, the Lords found it enough for the Minister to prove seven years use of payment in money to make the heritor liable in bygones, till the valuation in a declarator were made the rule in time coming.

Fol. Dic. v. 2. *p.* 428. *Fountainhall.*

*** This case is No. 15. p. 14791. *voce* STIPEND.

1712. *December* 4.

No. 231.

Use of payment for 40 years, of a certain proportion of the dues of an office, by the Clerks to their principal, less than due, exempted them from a demand for by-gones.

ALEXANDER HORSEBURGH, of that Ilk, Commissary of Peebles, *against* THOMAS CRANSTOUNS, elder and younger, Commissary Clerks thereof.

Alexander Horseburgh pursued his Clerks for count reckoning and payment to him of all the profits emoluments and casualities of the Commissariot of Peebles, belonging to him as Commissary, since the date of his commission, August 12, 1707, according to the Tweny-fifth Article of the King's Instructions to the Commissaries, recorded in the books of Session, February 20, 1666, appointing all the profits to be divided into three parts, whereof two should belong to the Commissary, and a third to the Clerk, with the burden of paper, ink, wax, and writing-chamber; and that it might be declared accordingly.

Answered for the defenders: The regulation of the fees and profits in the above Instructions never took place, but they have always been local and consuetudinary; every Court observing its own rules. And if the defenders have uplifted more than according to forty years constant custom of the Court, they are ready to count; but are no otherwise liable, either as to by-gones, or in time coming. Whatever regard may be had to the Instructions 1666, they have not the force of a law, and the regulation of fees thereby is not so effectual as what is made by acts of Parliament; nor have these Instructions the force of an act of sederunt, the Lords not having ordained them to be observed, but simply appointed them to be recorded, under protestation that the recording should nowise prejudice their Lordships' jurisdiction or privilege. Now, the regulation of fees by the Instructions 1666 never took effect in any Commissariot in Scotland, so that it is gone in desuetude, or rather was never in observance. Hardly are the fees in any act of Parliament since King Charles Second's time now in use; much more may simple Instructions transmitted from the Throne as expediencies lose their force, in whole or in part, by long contrary custom; and though these, being articulate, have been observed in some articles, they might run in desuetude as to other. No. 231.

Replied for the pursuer: Albeit the Instructions had not been appointed by the Bishops, (who had the disposal of all offices of Court), and authorized by the Sovereign, yet the Lords of Session may regulate all inferior Courts; and the recording the Instructions in their Lordships' books was an interposing of their authority to them, and gave them the force of an act of sederunt. As to the allegeance, That the Instructions were recorded under protestation, the pursuer finds no such protestation; and it would have been needless, seeing the Lords of Session are the supreme consistory who can suspend or reduce decreets of Commissaries, and give what new instructions to them they please; *2do*, If the two parts of the dues to the Commissary had not been exacted at all, but passed from to ease the lieges, something might be pretended against exacting the same after so long a desuetude and forbearance; but the Clerk (who collects the Judge's dues and his own) having uplifted the whole from the lieges, cannot be exempted from counting for that which, by law, belongs to another, even for all by-gones within forty years, which he was *in mala fide* to retain; seeing none can prescribe right to a thing without some title, and far less contrary to his own right and title, viz. his office, to which, by the Twenty-fifth Article of the Instructions, a third only of the dues doth belong. Had the Judge and Clerk right to their offices, with the casualties and emoluments belonging thereto in general, use and custom might have increased or diminished their respective dues; but here, where every one's proportion of the dues is determined, it is impossible that desuetude by the Judge's not exacting his part from the Clerk, (who is collector), can entitle the Clerk to the Judge's part; more than one who hath a bounding charter and infeftment can acquire, by never so long possession, right to lands without the limits of his charter; or a Minister's neglect for forty years to uplift some part of his modified stipend could prejudice his successor in office. What is a Com-

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-