

The Lords found the factor liable for annual-rent, conform to the Act of Sederunt.

No. 32, page 40.

1715. July 20. SIR THOMAS WALLACE of Craigie, *against* The TACKSMEN of his Salt-pans.

SIR THOMAS WALLACE set his salt-pans for twenty-one years, with a provision, that either party should be free at the end of ilk seven years, upon forty days premonition before the last term of the freedom; and the entry to the tack was at Martinmas 1708.

Sir Thomas premonishes the tacksmen, upon the 28th of April 1715, that they should remove at Martinmas thereafter, and thereupon pursues a removing.

The defenders ALLEGED,—That they ought to have been warned forty days preceding Whitsunday, conform to the act of Parliament 1555.

It was ANSWERED,—*Imo*, That act is introduced only in favours of labourers of the ground. *2do*, The entry was at Martinmas, and the tack provides premonition to be forty days preceding the term of freedom, that is, the term at which each party was to be free.

The Lords repelled the defence.

The defender further ALLEGED,—That the tack contained another clause, in these words:—"That, in case at the first, or any other freedom during the said tack, Sir Thomas should not incline to keep the tack in the terms above mentioned, that he obliged himself to stand to the determination of two indifferent men, mutually to be chosen by him and the tacksmen, as to what augmentation or tack-duty they should be obliged to give during the space of the next freedom; and in case of variance betwixt the arbitrators, an oversman was to be chosen by them."

From this clause it was ALLEGED,—That though the warning were sustained, the tacksmen could not be removed, but they were only obliged to submit to arbiters, what further tack-duty they should be obliged to pay till the next freedom.

It was ANSWERED,—The clause can never be interpreted to enervate the former, by which it is expressly provided, that either party shall be free at the end of seven years. And it can never be the meaning of a clause in the same paper, that Sir Thomas shall not be free, but only bound to submit what augmentation shall be granted; which submission again would come to nothing, for the defender can name such arbiters as will never comply, either in the decision or the choice of an oversman. *2do*, It were very unjust and an unequal clause, that the tacksmen should be always free, and the setter stand bound to his tacksmen; and, therefore, the clause must receive any interpretation, rather than be reckoned inconsistent with the former clause, and with equity. And the clause is capable of this sense, viz. That Sir Thomas might take the tack in his own hand, and manage it by his own servants; but that, if he think fit to grant a tack of that subject, the tacksmen shall have the first offer, to which he agrees.

than a competent stipend. And further, the right of superiority being annexed to the crown, the patrons had reserved to them the feu-farms, and feu-mails of the

It was REPLIED,—*Posteriora derogant prioribus*. And it happens very often, that clauses in contracts which are very express, are qualified, and sometimes quite altered by posterior clauses. And here the words are very express, that if the pursuer be not pleased to keep the tack, he is bound to name an arbiter; and the defenders are willing to name on their part: so the import of the clause is, that the tack shall indeed continue, but the tacksmen shall be liable to such a farther tack-duty as equity may require, which is not inconsistent with the former; and though it were, yet the words being express, the Lords are to judge accordingly. *2do*, It is very ordinary to allow a freedom to the tacksmen when the setter is bound; and sometimes the tacksmen will be bound, and the setter free, at a period of the tack. *3tio*, The submission will not be elusory; for the Lords, *ex nobili officio*, may limit a time betwixt and which both parties shall name arbiters, with power to choose an oversman, and may limit a time in which they shall pronounce their decreet-arbitral; or the Lords may come in place of arbiters, and determine *secundum arbitrium boni viri*. *4to*, The clause will not bear the sense that is put upon it, viz. that the pursuer may take the tack in his own hand; for the words run thus:—"That if the said Sir Thomas shall not incline to keep "the tack upon the terms above mentioned," &c. The terms above mentioned are the terms of the tack; and in that case he cannot remove, but must submit what further tack-duty shall be payable.

The Lords found, that the defenders could not be removed by virtue of the said first clause of the tack, but that the defenders being willing to submit to a further tack-duty, and name an arbiter, the pursuer was also bound to name another; and the Lords did limit a time for the parties to name their arbiters, and a further time to pronounce their decreet-arbitral; and superseded to determine in the removing, till both terms were elapsed.

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1716. December 5. The MINISTER OF LETHINDIE, *against* The OFFICERS OF STATE.

THE minister of Lethindie pursues a modification and locality; and insists that certain feu-duties, whereof he and his predecessors had been in possession for many years, may be a part of his locality.

It was ANSWERED for the Officers of State,—That these feu-duties, whereof the minister alleges he was in possession, do not belong to the minister of Lethindie as minister; but, in time of episcopacy, the minister of Lethindie was chancellor of the bishoprick of Dunkeld, and enjoyed these feu-duties as such; which appears by a presentation granted to Mr. Young, his predecessor, some time before the abolition of episcopacy; and the said feu-duties pass under the designation of chancery-duties to this day.

It was ANSWERED,—That the pursuer and his predecessors were *decennales et triennales possessores*, and, as such, had right to the chancery-duties, in as far as, by the 23d Act Parl. 1690, concerning patronages, whereby, in lieu of the right of presentation, the patron got the superplus benefit of the teinds of the parish more