

1704. February 18.

BROWN of Bishopton against MARION PATERSON.

THE Bishop of Edinburgh having set a tack of the mill and salmon-fishing of Newabbey, a part of the revenue and patrimony of his bishoprick, to the said Marion, and one Mitchelson for seven years, and taken them bound conjunctly and severally, for the 720 merks of yearly tack-duty, they possess a year or two *per tacitam relocationem* after the expiration of the tack; and the Bishop having assigned the tack to Robert Brown of Bishopton, and he having charged the said Marion Paterson for the tack-duty of the years after the tack ran out, she suspended, on this reason, That she was content to pay for her own proportion and possession, but not for her neighbour's; and though they were bound conjunctly and severally for the tack-duty, yet that obligation was only for the seven years of the tack, and can extend no farther, nor perpetuate the obligation to pay *in solidum* upon her. Answered, She must be liable for the whole, because the Bishop set it to them *pro indiviso*; and if they divide it amongst themselves, he is not concerned; for as he can seek no more from them than what is contained in the tack for their possessing after the tack, so the tenant can offer him no less than what they were formerly obliged to pay during the standing of the tack, and they must be *eodem modo* liable for the subsequent years that they were for the preceding; and if you did not resolve to stand bound for the whole, you should have renounced and given over. Replied, My obligation as *correus debendi* expires with the task, and I possessed no more but my own share and proportion; and the most I can be construed is only as cautioner for the other, which fidejussorial obligation falls with the tack, as is evident from the common law, L. 13. § 11. *D. Locati conducti*; and Perezius *ad dict. Tit. Cod. Num. 14.* where he says, *Fidejussor in tacita relocatione non tenetur, nisi de novo iterum se obliget.* The Lords thought, that in equity she was free, but seeing the tack was set to them both *pro indiviso*, without distinguishing their shares of the possession, the obligation was indivisible, and continued during the years of their possessing *per tacitam relocationem*, reserving her relief against the heirs of the other conjunct tenant as accords. And the Lords thought the law cited, and Perezius, related to the case where one had possessed the whole, and found a cautioner for the tack-duty; there the cautioner, after the elapsing of the years of the tack, would be free; even as if a tack were set to a man and a wife, and the longest liver, and a cautioner for the rent, though he would continue bound for the survivor, yet not for their heirs possessing *per tacitam relocationem*.

*Fol. Dic. v. 2. p. 378. Fountainhall, v 2. p. 224.*

No. 6.

Two persons had a lease *pro indiviso*. After its expiry they possessed *per tacitam relocationem*. Found to continue each liable *in solidum*.