No 29. recalling thereof, he was to be considered in the same case as if he had never accepted it.

Act. *H. Home.* Alt. *Lockhart.* Clerk, *Forbes.*

D. Falconer, v. 1. p. 76.

1746. *June* 13.

CREDITORS of Sir ALEXANDER MURRAY *against* The DUKE of NORFOLK.

No 30.
An heritor let his mines to a company, in which he himself purchased a share, and they subset them. The heritor pursued the company for damages, by the undue working of their subtacksman; but it was found he, as a partner, having joined in the subtack, could not, as an heritor, insist against the company.

SIR ALEXANDER MURRAY of Stanhope granted a lease of his lead mines to the Duke of Norfolk and others, in certain shares, with this proviso, 'That it should be lawful to him to inspect the working of the mines, and where any neglect or undue working should appear, that upon notice to the proprietors of the said mines, and their refusing or neglect to work the same in a mineral manner, he should and might re-enter, possess, and enjoy the said mines to his own use.'

New tacksmen were admitted, and alterations made in the extent of the shares, by conveyances from the lessees; and Sir Alexander was, by this means, become proprietor of a sixteenth-part of the lease, when they subset it to the York-Buildings Company, for the original tack-duty to the heritor, and a considerable sum of advance to be paid to the tacksmen.

The Creditors of Sir Alexander, and Mr Charles Murray his disponee in the subject, having affected this estate, raised a declarator of irritancy both of the principal and subtack, and an action of damages for undue working by the York-Buildings Company and the tacksmen; at the same time insisted against the Company for relief; which processes were conjoined, and it was found by interlocutor of the Ordinary, 28th November 1741, 'That Sir Alexander Murray, as proprietor of the mines, was entitled to insist in the process, notwithstanding his being a partner in the original lease, and that the irritancy was incurred.' This was finally adhered to.

The Creditors insisted in their conclusion of damages, and the Ordinary, 13th July 1744, 'Found it competent to Sir Alexander Murray and Charles Murray, and their creditors, to insist for damages against the Duke of Norfolk and his partners, as well as against the York-Buildings Company.'

Pleaded in a reclaiming bill; That Sir Alexander having consented to the sub-lease, he, nor his creditors in his right, could not insist for damages against the original tacksmen for the malversations of the Company; and the case was similar to that of a superior granting a charter to a new vassal on a resignation; for though he might still insist for any forfeiture incurred upon the first charter, yet for the *reddendo*, or on account of any new irregularities, action lay only against the present vassal.

No 30.

Answered; That this was precisely the argument insisted on to save from the irritancy of the tack, which was repelled; and the error lay in not adverting to the several capacities of Sir Alexander, for that his consent, as one of the lessees, could not preclude him from insisting as heritor of the mines.

At advising, the case was compared to a tack of land, and it was said, that though a landlord, consenting to a subtack, would retain the first tenant bound for the rent, yet he could not make him liable for any damages arising from the unskilful labouring of the subtenant.

The Lords found it not competent to the Creditors of Sir Alexander and Mr Charles Murray to insist for damages against the petitioners, in respect of Sir Alexander Murray's consent, as one of the principal lessees, to the sub-lease made by them to the York-Buildings Company, by whom the damage in question was done.

Act. *Lockhart.* Alt. *R. Craigie.* Clerk, *Gibson.*

D. Falconer, v. 1. *No* 84. *p.* 137.

1746. *July* 9.

Janet Young *against* The Representatives of Charles Fall.

No 31.
A merchant having advised the manner of remitting a small sum, designed for the subsistence of an indigent woman by her son, it was found he could not arrest it on any debt due by her to himself.

Richard Inglis, mariner, wrote from London to Janet Young, his mother, at Dunbar, that he intended to remit to her six guineas, if he knew of a proper method to do it; and she having thereupon advised with Charles Fall, merchant in Dunbar, Inglis, upon that advice, paid the money to Claud Johnston, Mr Fall's correspondent, either upon his draught on Mr Fall, payable to Janet Young, or upon a receipt.

Janet Young coming to demand the money, was told that she was debtor to Mr Fall and Company for house rents by decreet, which behoved to compense her claim.

Some objections were made to the decreet; but the point on which the Lords determined the cause was, that Mr Fall having advised the remitting the money this way, which was acknowledged by a petition in process, and which money was intended by the son for his mother's support, he was *in mala fide* to oppone the compensation.

The Lords repelled the defence.

Reporter, *Drummore.* Act. *H. Home.* Alt. *Hay.* Clerk, *Gibson.*

D. Falconer, v. 1. *No* 129, *p.* 155.