THE LORDS found, that the minister's possession ought not to be interrupted, until the suspender by a reduction and declarator should call the same in question, which they reserved, and in which they would consider, whether the minister was *decennalis et triennalis* possessor, and how far that would operate. No 36.

Stair, *v.* 2. *p.* 129.

1676. *December* 1. HUME *against* SCOT.

No 37.
A tack clad with 7 years possession will defend the tacksman *in judicio possessorio*, altho' it flow not from a person infeft.

MR. PATRICK HUME pursues the tenants of Brouns-bank for mails and duties, and also Sir Laurence Scot, and one Brown his author. It was *alleged* for Sir Laurence, That he brooks by a tack from Brown, by virtue whereof he hath been seven years in possession, and thereby hath the benefit of a possessory judgement. It was *answered*, *Non relevat*, unless it were alleged, that Brown setter of the tack was infeft; for a possessory judgment is only competent to a person having *jus standi*. But a tack is but a personal right of location; and though the act of Parliament secures it against purchasers, yet there is no ground thence to give it the benefit of a possessory judgment, which is never competent to an assignation of the duties, upon a disposition or apprising without infeftment, neither upon an infeftment of annualrent, much less upon a tack, unless the tacksman allege that the setter had attained a possessory judgment by infeftment, which therefore behoved to defend his tack. It was *replied*, That the benefit of a possessory judgment cannot be founded upon possession even with a title, as by the interdict *uti possidetis*. But it is a defence peculiar to this kingdom, that any party possessing without interruption seven years, either by virtue of infeftment or tack, cannot be quarrelled but by reduction, and so secure, not only for all bygones, but until his author be called to produce his rights, and until the defender's right be reduced as *a non habente potestatem*, which is never sustained by reply; and therefore, though the defender's author be here called, yet not being by way of reduction, the defender is secure, and the same reason that secures possession upon infeftment, though flowing from him, who had no pretence of right, and frees him from the whole duties, should much more free a tenant from paying any more than his tack-duty, till his tack be reduced. Neither is a tack to be parallelled to an assignation to mails and duties, or any incomplete right, a tack being complete *suo genere*, and established by act of Parliament against singular successors; and therefore, though the author being called, if he had no defence, might be decerned for the full duties, yet the tenant can be decerned for no more but his tack-duty, till his tack be reduced. And therefore, the common stile of this defence having always been, that the defender hath possessed seven years by infeftment or tack, without being put to add by tack from one infeft, the same ought to be sustained relevant in the same case and the same terms: For albeit the pursuer cites a decision observed by Hope, in the case of Drumkilbo,

No 37. (*See* REMOVING.) "That a tack could not defend in a removing, unless it were alleged that the setter had been infeft, which doth also run in common stile;" yet there is nothing there of seven year's possession, which is wholly a distinct defence.

THE LORDS found, that the tack hath the benefit of a possessory judgment by seven years possession, without necessity to allege that the setter was infeft, and that the tenant is liable for no more but his tack-duty, till his tack be reduced, where the tack bears to be granted by the setter as heritable proprietor.

Fol. Dic. v. 2. p. 90. Stair, v. 2. p. 470.

*** Dirleton reports this case:

IN a process for mails and duties, it was *alleged*, That one of the defenders was in possession by the space of seven years, by virtue of a tack, and had the benefit of a possessory judgment: And it being *replied*, That he ought to say, that he had a tack from a person having right; nevertheless, the LORDS found, that it was sufficient to allege that he had a tack, and by virtue thereof in so long possession.

This decision seemed to some of the Lords to be hard, in respect a tenant is not properly in possession, but *detinet* to the behoof of the setter; so that he could be in no better case than his master, who, notwithstanding of his possession, either in his own person or in the person of his tenant, cannot plead the benefit of a possessory judgment, unless he had or should allege upon some right; and if the master were called, as *de facto* he was in the said process, it were inconsistent that his tenant should have the benefit of a possessory judgment, and not himself.

Dirleton, No 393. p. 192.

*** Gosford also reports this case:

IN an action for mails and duties at Mr Patrick Home's instance, as tacksman made by his father of the lands and mill of Burnsbank, against Sir Laurence, both for bygone since he possessed, and in the time coming; it was *alleged*, Absolvitor; because Sir Laurence had a tack from one Brown, and by virtue thereof had been many years in possession, and ought to defend them in the possessory judgment ay and while the tack be reduced. It was *replied*, That a tack being but a personal right, unless it were instructed that the tacksman's right flowed from a person infeft, it could never be sustained, either in an action of removing, or for mails and duties. The Lords finding difficulties in this case, did ordain both parties to look out and produce such practicks whereupon they did found; and accordingly, there was produced one for the pursuer, of Hope's, in *anno* 1616, betwixt Drumkilbo and one Steven Biggingally, (*See* REMOVING.) where a tack was not found sufficient to remove a tenant, unless it was instruct-

ed his author was infeft. THE LORDS having considered these practicks as not meeting directly with the case in question, they did determine by their interlocutor, that a tack clad with seven year's possession without any interruption, was a sufficient title to defend in an action for mails and duties, ay and while it were reduced, and so assoilzied the defender in this possessory judgment; but withall, declared the tenants liable for all mails and duties resting in their hands unpaid to the tacksman, and in time coming while the tack be reduced. No 37.

Gosford, MS. No 912. *p.* 589.

1681. *February* 4. ROBERTSON *against* ARBUTHNOT

No 38.
Found in conformity with Home against Scot, No 37. *supra.*

MR THOMAS ROBERTSON, minister at Longside, having obtained decreet against Arbuthnot of Carugal for the vicarage of his land, which being turned into a libel, the defender *alleged*, No process; because the pursuer had neither locality nor possession, and his presentation is limited to the possession of his predecessor. It was *answered*, That the pursuer hath sufficient title by his presentation, and is founded in *jure communi*, that *decimæ debentur parocho*, either parsonage to a parson or vicarage to a vicar. THE LORDS sustained the pursuer's title. The defender further *alleged*, That these vicarage teinds were a part of the patrimony of the abbacy of Deer, erected in favours of the Earl of Marischal, from whom the defender and his predecessors had tacks for terms to run, and by virtue thereof have been seven years in possession, and thereby are secure till the tack be reduced, and have also been forty years in possession, and thereby all action against his tack is prescribed, albeit the setter had had no right, and cannot be questioned till the years of its endurance be ended.

THE LORDS found both these defences relevant *separatim*.

Fol. Dic. v. 2. *p.* 90. *Stair, v.* 2. *p.* 855.

1683. *January* 17. CANT *against* AIKMAN.

No 39.

CANT having pursued a poinding of the ground of the lands of Thurstane, for payment of an annualrent wherein he stood infeft; and Aikman having *alleged*, That he ought to have the benefit of a possessory judgment, being infeft in the property of the saids lands, and seven years in possession; the LORDS found, that a possessory judgment was only competent in the competition betwixt two rights of property; but that it was not competent to be proponed against a right of annualrent, that being a right of another nature, and which was compatible with a right of property and possession by virtue thereof: But