

was not thereby divested of the right; and consequently he might still exercise the powers competent to him by the tack. No. 190.

2do, The power of subsetting is unlimited by the tack itself; and therefore it cannot be restrained upon argument or implication.

3tio, Though the bankruptcy might be a ground of reducing a tack, or any other mutual contract, yet it does not void it *ipso facto*; and neither can it be relevant to reduce the tack, when the master is nevertheless sufficiently secured; which is the case here, as the defenders have stocked the farm, and are willing to find caution to the master for the payment of the rents. When that is done, the master will be absolutely secured; nor will there remain any ground in equity, more than in law, for depriving the lawful creditors of the tenant of a right, which was the most beneficial part of his estate and property. And,

4to, The obligation granted by Maxwell to Mr. Crawford, in 1754, contained no renunciation of the subsisting tack, but only respected a method of using the grounds, different from that stipulated in the tack. Maxwell's being allowed to continue several years in possession after the expiry of the two years mentioned in that obligation, shews, that the tack was still held to be subsisting by both parties.

“ The Lords sustained the sub-tack granted to Alexander Macdougall, he finding caution to Ronald Crawford for payment of the rent during the tack.”

Act. *D. Ross, T. Miller, J. Ferguson.*

Alt. *J. Montgomery.*

R. D.

Fol. Dic. v. 4. p. 329. Fac. Coll. No. 112. p. 200.

* * The like was found, 6th July, 1791, Ogilvie against Creditors of Fullarton; see APPENDIX.

SECT. XII.

Tacksman deserting his Possession.

1628. February 7. L. BALVENY against L. INNES.

In an action betwixt Balveny and Innes, for payment of the duty of certain lands, set in tack by the Earl of Murray, heritor of the lands, to the pursuer, and for which the defender, as possessor of the lands, was convened for the crop 1623, and ever since; the Lords sustained this action against the defender, albeit

VOL. XXXV.

83 O

No. 191.

Action sustained at the instance of a tacksman for the rent of lands, against

No. 191.
a person who had thereafter acquired another tack from the same heritor, although the first tackman had left his possession, and the lands had been possessed by the heritor for five years before the granting of the second tack.

he alleged, that he could not be pursued therefor, seeing he had acquired a tack of the same lands from the pursuer's author, viz. the Earl of Murray, by virtue whereof he hath been in possession these eight or nine years by-past; and although the pursuer's tack be anterior to his tack, yet he cannot be found to be an unjust possessor, nor *in mala fide* to bruik and continue his possession by virtue of his tack, seeing the Earl of Murray, their common author, being heritor of the land, was five years in possession of the same lands immediately preceding the setting of the defender's tack, and was never interrupted therein by the pursuer; and so the heritor being in possession when he set him the tack, he ought to be maintained in his possession and right; and the pursuer cannot repeat the duties by virtue of his anterior tack, never shewing any deed *quomodo desiit possidere* so long;—this allegiance was repelled, in respect that the pursuer's tack was anterior, and that he offered to prove that it was clad with real possession for the space of ten years together, and that he needed not condescend *quomodo desiit possidere*, for neither the Earl of Murray's nor this defender's possession could be found lawful within the years to run of the pursuer's tack.

Act. Hope & Gibson.

Alt. Hay.

Clerk, Gibson.

Fol. Dic. v. 2. p. 425. Durie, p. 340.

1715. June 14.

DOWNIE against GRAHAM.

No. 192.

A tenant having deserted his possession at Whitsunday, but, at harvest, having offered payment of all his arrears, under form of instrument, and required liberty to cut down the corns, the Lords found the master who refused the offer, and caused reap and inbring them himself, liable in a spuilzie.

Fol. Dic. v. 2. p. 425. Bruce.

* * This case is No. 13. p. 14729. *voce* SPUILZIE.

1728. November 28.

ELIZABETH TAYLOR against SIR WILLIAM MAXWELL of Sprinkell.

No. 193.

A tenant, who had a tack for many years to run, becoming bankrupt, deserted his possession, and left the country. The master thereupon apprehended possession *brevi manu*, without using any legal order. The tenant returning before the expiration of the tack, insisted in an action against her master for re-possession, contending, That the tack was still a subsisting deed, since the master had never insisted in a declarator of any of the irritancies incurred by forsaking the possession, and neglecting to pay the tack-duty. Answered, *Unumquodque dissolvitur eodem modo quo colligatum fuit*: The pursuer, by deserting her possession, had shown her *animus*