No. 191.
a person who had thereafter acquired another tack from the same heritor, although the first tacksman 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 allegeance 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*

of throwing up the tack, the defender showed the same *animus* by apprehending the possession. The Lords found, That the pursuer's relinquishing the possession, and not claiming the same for several years, is relevant to exclude her from being re-possessed. See APPENDIX. No. 193.

Fol. Dic. v. 2. p. 426.

1802. *December* 1. EARL of DALHOUSIE *against* WILSON.

No. 194.
A tenant whose lease excludes assignees and sub-tenants, forfeits it, if he leave the kingdom, and commit the management of his farm to another.

William Wilson possessed the farm of Millholm, under a missive of lease from the Earl of Dalhousie; to endure for nineteen years from Whitsunday 1788. He died in 1793, and was succeeded by his son Charles, a boy of fifteen years of age. In 1797, the missive was extended into a regular lease, by which Lord Dalhousie set " to the defender Charles Wilson, and his heirs, secluding assignees and sub-tenants, without the proprietor's consent in writing, all and whole the mill and mill-lands of Millholm."

Soon after, Wilson became in arrear; and the Earl having brought a process of removing before the Sheriff, Charles Wilson, senior, became cautioner, in terms of the act of sederunt The tenant afterwards assigned to John Wilson, son of Charles Wilson, senior, the crop and stock on the farm of Millholm; " and farther, I hereby nominate, constitute, and appoint the said John Wilson and his foresaids, in trust, as aforesaid, my stewarts, managers, or overseers of the said farm, and mill of Millholm." This deed of assignation contained a variety of provisions; that John Wilson was to give an account of his intromissions; that the proceeds of the farm should be applied in the first place, for payment of the rent and public burdens, afterwards for expense of management, and to discharge a debt due to the tenant's two sisters, and that the residue was to be paid to him, his heirs and successors.

About this time Charles Wilson joined a regiment of militia, and left the management of the farm to John Wilson, who did not reside on the lands, but employed a servant or manager. Wilson afterwards left the militia, and went to the Island of Jamaica; upon which the Earl brought an action of removing, concluding, that the lease to Charles Wilson was at an end, as he himself deserted the farm, and was not entitled to sub-set the lands, or to assign his lease.

The Lord Ordinary reported the cause. The Earl

Pleaded: A landlord's interest is not merely confined to the payment of rent. In every lease there is a *delectus personæ*; and as the rights of tenants are strictly interpreted, a lease cannot be assigned or conveyed in any shape by a tenant, unless an expres power for this purpose be granted by the landlord; Stair, B. 2. Tit. 9. § 26; Bankton, B. 2. Tit. 9. § 11; Erskine, B. 2. Tit. 6. § 31; Dirleton, p. 196. While such is the law, a tenant will not be allowed to defeat it, by mak-