

ment did not prejudice the heritor ; neither could the payment of the defender's author prejudice him, who had possessed by the space of 24 years, and had never acknowledged the said valuation by payment of the valued duty.

The Lords did sustain this defence likewise, and assoilyied the defender, notwithstanding of any payment made by his author before the reduction ; and found that payment, in obedience of a decret, whereupon they might be charged, was not voluntary ; and so no homologation.

Page 161.

1671. *February 21.* ALEXANDER SMITH, Tenant in Waughton, *against* The LAIRDS of SMEATOUN and BEANSTOUN.

THERE being a decret of multiplepointing *in anno* 1658, preferring the creditors to the Laird of Waughton, according to their diligence ;—Thereafter, *in anno* 1662, Smeatoun and Beanstoun did obtain decret against Waughton himself, and the said Alexander, his tenant, for the duties of the Mains of Waughton ; wherein the tenant being holden as confessed as to the quantity, he was reponed by suspension, and did declare, that he was only liable conform to two tacks,—one set to him by the Laird of Waughton, in the year 1655, which continued until the year 1666 ; and a new tack then set to him, bearing a conversion of 80 bolls wheat to bear and oats ; conform to which he was content to count.

It was ALLEGED for the chargers, That he ought to count conform to the first tack ; and could not crave the benefit of the conversion in the new tack ; because Waughton being denuded by an infestment made to the chargers, whereupon they had obtained two decreets, whereof the last was against the tenant as well as the master, he was thereby put *in mala fide* to accept of a new tack for a less duty : neither had Waughton power to grant the same ; and therefore his possession ought to be understood to have been *per tacitam relocationem*, unless he had renounced the same to Smeatoun and Beanstoun, who had only power to grant a new tack.

It was ANSWERED for the tenant, That he ought to have the benefit of the new tack, and conversion, notwithstanding ; because the chargers having gotten only decreets, as creditors, for the annualrents effeiring to the principal sums due to them ; and thereupon never having warned the tenant to remove, but suffering him to possess, by virtue of the tacks granted by Waughton : and, that the conversion of the victual was, in effect, no prejudice, seeing it was known to themselves, who were neighbours ;—that the Mains was not able to pay the old duty ; and that there was a necessity, either to grant an abatement or a conversion, which, as to the qualities of victual, was in effect no less ; the prices, these years bygone, being almost alike in all ; and that the tenant had offered to renounce, and take instruments thereon at the expiring of the first tack.

The Lords did find, by their interlocutor, that the tenant ought only to account according to the conversion ; the prejudice not being considerable.

Page 161.