

No 33. said reply and possession, which they admitted in this judgment possessory, without prejudice to the defender to reduce upon his anteriority, *prout de jure*.

Act. *Stuart & Hay.*

Alt. *Burnet.*

Clerk, *Hay.*

*Fol. Dic. v. 2. p. 90. Durie, p. 810.*

1636. July 13. BISHOP OF EDINBURGH *against* BROWN.

No 34. A TACK of teinds from an abbot, there having 40 years possession ensued upon it, found sufficient to defend against a spuilzie pursued by the titular, reserving reduction as accords.

*Fol. Dic. v. 2. p. 90. Durie.*

\* \* \* This case is No 39. p. 2719, *voce* COMPETENT.

No 35. 1665. November 25. MR JAMES PETER *against* JOHN MITCHELSON.

MR JAMES PETER minister of Terregh, pursues Mitchelson for a part of his stipend, due out of the defender's lands; who *alleged* no process, till the pursuer produced a title to the defender's teinds, seeing he broke them by a tack.

It was *replied*, he offered him to prove seven years possession, as a part of the stipend of Terregh;

Which the LORDS sustained without any title of possession.

*Fol. Dic. v. 2. p. 90. Stair, v. 1. p. 314.*

No 36. 1672. December 6. JOHN VEATCH *against* WEDDERLIE.

A possessory judgment by several years possession, was found competent in the case of stipend.

THE kirk of Westruther being erected *in anno* 1650, there was a locality not only out of the teinds, but by a bond of the heritors so much localled upon their stock. The minister was accordingly in possession, till of late that Wedderlie one of the heritors suspends on this reason, that there was no decret of locality produced, but only letters of horning. It was *answered*, That ministers being in possession of their stipends for the space of seven years, have the benefit of a possessory judgment, because ordinarily they have no writs, but use of payment of their stipends, and any writs their predecessors had, are ordinarily between hands lost; and this decret of locality had been lost, but the letters of horning contain the whole tenor of it. It was *replied*, that in stipends constituted in teinds, which are ordinary, much might be yeilded to the ministers; but when it affects the stock, as to that they have no privilege.

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.

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

No 36.

1676. December 1.

HUME against SCOT.

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 tacksmann 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 paralleled 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.

A tack clad with 7 years possession will defend the tacksmann in *judicio possessorio*, altho' it flow not from a person infeft.