1748 *February* 11. M'TAVISH *against* M'LAUCHLAN.

No 16.
A tenant had been allowed to retain his rent, in lieu of intereſt of money. The eſtate was ſequeſtrated. Purſued by the factor for rents ſubſequent to a ſequeſtration, he was found in *bona fide* to impute the rents in payment of the intereſt, till interpelled by the citation.

SIR JAMES CAMPBELL of Auchinbreck borrowed upon bond, 15th February 1729, from Kenneth M'Lauchlan of Killinuchanach, 4000 merks Scots, and of the ſame date granted him a tack of certain lands, for five years from the Whitſunday following, for the tack-duty of 200 merks money, and two ſtones butter, four wedders, and one dozen poultry, and relieving the heritor of all public burdens; declaring, 'That notwithſtanding the tack-duty was payable to Sir James 'as above expreſſed, yet it was agreed and concerted, that Kenneth M'Lauchlan 'was yearly to retain the intereſt of the above ſum; a diſcharge of which in-'tereſt being always to be received as payment of ſo much of the tack-duty.' And further, that the tack, though but for five years, was to continue ay and while the foreſaid ſum was paid.

The eſtate of Auchinbreck was ſequeſtrated 1739, after which Mr M'Lauchlan continued to retain the tack-duty for the intereſt of his ſum; but he did not allege, and it is probable he did not from that time deliver to Sir James any diſcharge, as he had formerly done; but Dougal M'Taviſh the factor having, 30th November 1742, obtained decreet againſt him for the rents ſince the ſequeſtration, and in time coming, he ſuſpended on the condition of his tack; contending, that while he continued his poſſeſſion, he could only be liable in the ſuperplus preſtations, and was entitled to compenſe the money-rent with the intereſt due to him; but did not diſpute whether the five years, for which the tack was determinately ſet, being expired, he was not liable to be removed, notwithſtanding the other clauſe in his favour.

THE LORD ORDINARY, 26th December 1747, 'found that the eſtate of Auchinbreck being ſequeſtrated by authority of the Lords, without excepting the ſuſpender's poſſeſſion, it was not competent for him to judge of reaſons of ſuſpenſion, which in effect reſolved in exeeming the ſuſpender's poſſeſſion from the ſequeſtration, and therefore *hoc ſtatu* found the letters orderly proceeded, but prejudice to the ſuſpender to apply to the Lords to have his poſſeſſion ſtruck out of the ſequeſtration,'

Pleaded in a reclaiming bill, That ſuch clauſes were effectual in favour of tenants, who could not be obliged to perform more to ſingular ſucceſſors than they had bound themſelves to by their tack, to wit, to grant diſcharges of the intereſt due to them, eſpecially where there was a ſuperplus duty; ſo that it could not be ſaid the tack was without a duty payable to the ſucceſſor, and ſo had been often found, as 22d January 1625, Ronald againſt Strang, Durie, p. 158. *voce* TACK; 15th June 1664, Thomſon againſt Reid, Stair, v. 1. p. 198. IBIDEM; 11th December 1677, Oliphant againſt Currie, Stair, v. 2. p. 574. IBIDEM.

The caſe had been more dubious where the tenant retained his whole duty, and there the Lords had varied, finding againſt him, 20th June 1629, Keith againſt Ogilvie, Durie, p. 448. IBIDEM; and for him, 13th November 1679, Seton

againſt White, Fount. MS. IBIDEM: But both theſe caſes concerned the queſtion of removing; and it was never found the tenant, while allowed to continue his poſſeſſion, was liable to more than the preſtations in this tack. No 16.

Answered, That by act 18th, Parl. 6th, Ja. II. tenants were entitled to the poſſeſſion of their tacks againſt ſucceſſors, *for sicklike mail as they took them for*; and therefore, this tenant was not entitled to retain his farm-duty for his intereſt, becauſe that was not paying to the creditors the mail for which he took the farm; though it was really paying it to Sir James: That in ſome caſes, indeed, ſuch clauſes had been ſuſtained in favour of the tenant, during the currency of the particular number of years for which the tack was ſet; but after expiration thereof, had always been found ineffectual, as in the cited caſe, Thomſon againſt Reid; 16th June 1665, Dobie againſt Stephenſon, Newbyth, MS. *voce* TACK; Montgomery againſt the Pariſhioners of Kirkmichael, Stair, v. 2. p. 206. IBIDEM; 27th June 1674, Peacock againſt Lauder, Stair, v. 2. p. 274. IBIDEM.

Argued on the Bench, That the diſtinction was not ſolid betwixt the caſes of a ſuperplus duty and none; for the retainable ſum, as well as the ſuperplus, was the rent, and the ſetter could not enable the tackſman to retain from his ſucceſſor a part thereof, more than the whole. It was further argued, on the ſuppoſition that the whole rent was exigible, whether the tenant was not in *bona fide* to impute it to the payment of his intereſt, until he was interpelled.

THE LORDS ſuſtained the reaſons of ſuſpenſion as to all the money-rents falling due before the decreet of the 30th November 1742; but found the petitioner liable for the ſaid rents for all the years and terms after the ſaid decreet.

Act. Lockhart. *Alt. Hay.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 3. p. 95. D. Falconer, v. 1. No 240. p. 325.

SECT. V.

Poſſeſſion upon a right good *ex facie*, although liable to objections.

1624. *February* 17. THOMSON *againſt* LAW.

No 17.
An incumbent granted a liferent commiſſion to an office. The ſucceeding incumbent appointed another. The liferent

JOHN THOMSON being provided to the office of procurator-fiſcal of the commiſſariot of Glaſgow, by John Archbiſhop of Glaſgow, during all the days of his lifetime; he is thereafter deprived from that office, by James Archbiſhop of Glaſgow, and Mr James Law provided thereto, who ſerved in the office for the ſpace of three or four years; after the which, the ſaid John obtains a ſentence againſt the ſaid James Archbiſhop, and alſo againſt the ſaid Mr James Law, reducing the ſaid deprivation *ab initio*; after the which, he purſues Mr