No. 84.

The Lords found, 28th February, 1755, That the bygone rents preceding the sequestration did not fall under the factory; but that the rents in time coming, since the sequestration, did fall under it.

And having afterwards heard counsel upon the validity of the tack, Found, That the tack was not good against creditors, in respect the tacksman did not attain the possession of the lands set, by virtue of the tack quarrelled, prior to the dates of the infeftments in favour of the real creditors, or prior to the adjudications obtained at the instance of the personal creditors; and that the said creditors themselves did first attain the possession by their factor, after a judicial sequestration of the estate; and therefore sustained the reasons of reduction, in so far as concerned the interest of the said creditors; reserving action to the said Thomas Scot against the Lord Cranston upon the personal obligement as accords."

For the creditors, *Wallace, senior, Lockhart.* Alt. *Johnstone, Ferguson.* Clerk, *Forbes.*

W. J. *Fol. Dic. v.* 4. *p.* 324. *Fac. Coll. No.* 3. *p.* 4.

1757. *July* 2.

CREDITORS of DOUGLAS of DORNOCK, *against* ROBERT and JOHN CARLYLES.

No. 85.
The same subject.

In July, 1729, Douglas of Dornock having borrowed a sum from Robert and John Carlyles, granted them a lease of certain lands, at a rent equal to the interest of their money, to continue for twenty-one years, with a power of retaining the rent for payment of their interest.

The lease contained a clause, by which it was prorogated from year to year after the elapse of the term stipulated, "ay and while the principal sum in the bond remained unpaid."

The estate of Mr. Douglas was sequestrated at the suit of heritable creditors and adjudgers in July 1759, after the twenty-one years specified in the lease were elapsed. But the tenants insisted, That, in virtue of the prorogation, they were intitled to continue in the farm till their debt was paid.

Argued for the credtiors of Dornock, That though tacks are, by the law of Scotland, real rights from the time possession has followed upon them; yet prorogation of tacks do not become real till possession has commenced upon the prorogation; and if a preferable right intervenes before such possession commences, the tack cannot be effectual: That the prorogation in this case is from year to year: and therefore possession had not followed upon the prorogation for the year 1757, before the sequestration intervened at the suit of heritable creditors and adjudgers in July 1756, by which the creditors came to have a preferable real right to the whole estate, and to the management of it under the direction of the Court: That this point of law had been decided by the Court, Thomas Scot against the Creditors of Lord Cranston, (*supra*), although a contrary decision had formerly been given, Richard against Lindsay, No. 83. p. 15217.

No. 85.

where it was found, that possession upon a former subsisting tack was sufficient to render a prorogation real, though the term of entry upon the prorogation was not come.

"The Lords found, That the tack could not subsist by virtue of the annual prorogation, after the estate was sequestrated."

Act. *Johnstone.* Alt. *H. Dalrymple.* Clerk, *Forbes.*

W. J. *Fol. Dic. v.* 4. *p.* 323. *Fac. Coll. No.* 32. *p.* 55.

1769. *November* 30. SCOT *against* GRAHAM and Others.

No. 86.

Certain tacks, granted by John Rae of Castlebank, to commence after the expiry of the leases subsisting at the time, were found reducible, at the instance of his real creditors, in respect the creditors were "infeft in the lands let before the tenants obtained possession thereof, in virtue of those tacks."

It was pleaded for the tenants; That so long as the proprietor continued in possession, he could grant tacks with effect; and it has never been imagined, that tenants were bound to search the records for incumbrances, before they ventured to enter into a lease.

Answered; The tacks in question would have been good against the heir of the proprietor; they might perhaps have been good against a voluntary purchaser; but they cannot be sustained against onerous creditors, who stand in a very different situation, and against whom the prorogation of a tack has not, in any instance, been sustained.

Act. *Crosbie.* Alt. *Armstrong.*

G. F. *Fac. Coll. No.* 100. *p.* 356.

1772. *February* 5. ARBUTHNOT *against* SIR JAMES COLQUHOUN.

No. 87.

Arbuthnot, proprietor of the lands of Finart, in a tack granted to Frasers, inserted the following clause: "In case the said Frasers shall think proper to inclose any of the grounds, with sufficient dikes, they shall, at their removal, on leaving them sufficient, be paid a comprised price for the same, not exceeding a year's rent." The estate being brought to judicial sale, and purchased by Sir James Colquhoun, Frasers brought an action, some years before the expiry of the tack, against the representatives of Arbuthnot, for payment of a year's rent, to be laid out by them in building dikes. The Lords assoilzied *in hoc statu*, reserving action for the value of the dikes, at the expiry of the tack, against the defender or his representatives, in case the same should not be allowed by Sir James Colquhoun, or the proprietor of the lands for the time. On the expiry of the tack, Frasers insisted in their claim against the representative of Arbuthnot,