a ranking and sale of the estate was raised. But I think the thing is otherwise clear upon the principles of law; for the new tack, till it was clothed with possession, was no more than a personal obligement, which could not be effectual either against a purchaser, or against creditors entering into possession. There might have been some more doubt, if the tenant had renounced his old tack and taken a new one for nineteen years; but I should have been of the same opinion even in that case: and there I think the principles the Lords went upon will very well apply to an extraordinary act of administration, which Sir John could not exercise while his creditors were *in cursu diligentiæ*, to get the estate sequestrated.

1766. *March* 4. SPENSER BOYD *against* ———.

THIS case was before the Court 22d January last, and this day the Lords adhered. Lords Pitfour and Coalston gave it as their opinion that a personal right to lands was affectable by every personal obligation relative to the lands; yet, if it was intended that the proprietor should be debarred from alienating or contracting debts, it must be done in the form of prohibitory, irritant, and resolutive clauses; because, although the Act of Parliament 1685 does not relate to such personal rights to lands, yet, by the common law, before that Act was made, a proprietor could not be restrained from the free use of his property except in that form, and it would be unjust that a man's debts should not affect his estate, and yet that he should be allowed to enjoy it. The only difference, therefore, in this matter betwixt a personal and a real right to lands, is, that, where the right is real, there must be two registrations, both of the tailyie and of the sasine, whereas in the case of a personal right there is no occasion for any recording at all.

1766. *June* 13. DODDS *against* ———.

THE question here was about lands purchased by a wife, the disposition bearing that the price was paid by her, though it did not appear that she had any money of her own. These lands she afterwards sold, and the husband now comes and claims them from the purchaser, upon this ground, that the money with which they were bought was the husband's, which the wife had either stolen, or the husband had given her it. Lord Pitfour said, that in either case the singular successor was safe, for, having purchased the lands upon the faith of the records, he was not concerned how the money was got with which his author bought the lands; and the case is quite different from that where the lands themselves are gifted by the husband to the wife; for, in that case, no doubt, the husband, by revoking the donation, annuls the sale, and can evict the lands from any purchaser from the wife. Lord Kaimes went so far as to say, that even the husband could not have action against the wife

for the lands themselves, but only for the money which he had given her, or which she had taken from him. But I should think that the lands would be a *surrogatum* in place of the money, with respect to the wife, who certainly was debtor in the money, but not with respect to the purchaser, who never was debtor to the husband in the money.

The Lords sustained the purchase.

1766. *June* 17. WILLIAM BAILLIE *against* MRS CHATTO.

[*Fac. Coll. IV.* No. 39.]

IN this case the Lords found that an estate being devised to A and his heirs; whom failing, to B and his heirs, and assignees; whom failing, to the donor's heirs whatsoever;—that by A's heirs were meant only the heirs of his body, and therefore, these having failed, they gave the estate to B., *dissent. tantum* Barjarg.

1766. *June* 17. PORTERFIELD *against* FALL.

[*Fac. Coll., IV.* 374.]

ONE merchant was owing money to another, which he desired payment of by an order upon Edinburgh; and accordingly a bill was sent him by the debtor on a merchant in Edinburgh, indorsed by the debtor to the creditor. This bill the creditor acknowledged the receipt of, adding, " that when paid it should be noted accordingly." This bill was not duly negotiated, and the question was, Whether, nevertheless, the creditor had recourse against the indorser?

It was said for the creditor, that these words, " when paid," plainly denoted that the bill was not taken either in payment or for value given, but in security of a debt, and therefore that he was bound to do no diligence upon it, because it is an established rule, that, when a debt is assigned in security, the assignee is bound to do no diligence, but only to impute the money, when he gets it, in payment of his debt;—and so it was decided in the very case of a bill betwixt merchants, *9th January* 1758, *Alexander* against *Cuming*. But, on the other side, a later decision was quoted, *6th February* 1762, *Walter Grosset* against *Receiver-General*, where the like judgment was given by this Court, but it was reversed in the Houso ef Lords.

My Lord Alemore said, by this last mentioned decision of the House of Lords, and by the judgment in the case of *Brebner* against *Haliburton*, where the decree of this Court was likewise reversed by the House of Peers, he understood it to be established law, that when one merchant indorses a bill to another, in the way of commerce, whether for value received, for payment, or for security of a debt, or by way of commission, in order to recover payment of it for behoof of the in-