No. 88.

2dly, A purchaser must not involve his author in warrandice to the tenants of the farms sold to him, in matters that are either contained in tacks, or understood in law; but he has certainly nothing to do with regard to the seller's obligations or warrandice with the tenant of a farm he has not purchased, no more than with any obligation he may lie under to any other extraneous person. Lady Forbes is no doubt liable in warrandice to the pursuer; and she has submitted to it, as she has not defended herself against this action; and as he is safe, there can be no occasion for insisting against the defenders. They saw, by the tacks of the farms they had purchased, that their tenants were bound to perform the services in question during the currency of their leases; and they have submitted to that heavy burden. They had no occasion to make any inquiries about the pursuer's tack, or what bargain might subsist between him and Lady Forbes. The continuance of these burdens upon the farms they purchased, during Lady Forbes's life, was a latent burden *quoad* them; and as that Lady did not think it expedient to entail these oppressive services upon the farms she was to sell, it is clear the defenders must be assoilzied from this process, leaving it to the pursuer to obtain relief from her Ladyship's warrandice, which is indisputably good, and for which he has already obtained decree.

The Lords "sustained the defence, and assoilzied the defenders."

Act. *Blair.* Alt. *P. Murray.* Clerk, *Ross.*

Fol. Dic. v. 4. *p.* 323. *Fac. Coll. No.* 187. *p.* 362.

1785. *November* 30. WILLIAM CAMPBELL *against* ROBERT SILLER.

No. 89.
A lease having been granted of lands which were sequestrated after its date, but before the term of entry, the lessee found entitled to require possession, in implement of the contract.

Sir Thomas Wallace, in 1775, granted to Siller, at a high rent, a lease of a farm, for ninety-nine years, to commence in 1780. In 1778, the creditors of the landlord, some of whom had obtained heritable securities, brought a process of sale of his estate, which was then laid under sequestration. Afterwards, Siller was admitted into possession by the judicial factor, who for several years had continued to receive the rents from him, when an action of reduction of the lease was raised by Mr. Campell, the purchaser, who

Pleaded: Before the term of entry by this lease, the landlord was divested of the administration of his estate. His creditors, already infeft in it, had attained possession by the factor under the sequestration; a thing declared by the uniform style of the judicial proceedings. Now, as a tack not clothed with possession is not effectual against a purchaser whose right has been completed, it must, in the present instance, be equally unavailing, either against the creditors, or against the pursuer, as coming in their place. Such, accordingly, was the decision in the case of Lord Cranston's Creditors *contra* Scott, No. 84. p. 15218.

Nay, though the creditors had been uninfeft, their adjudications alone would be the title of possession by their factor; an effectual right being thus constituted, exclusive of subsequent possession under any lease. If, indeed, the factor has

No. 89. yielded possession to the defender, his act was unauthorised, and consequently void. He had no power to grant such a tack, and as little, of course, to establish or give force to it, while, though granted, it was ineffectual.

Answered: The real securities of creditors are not incompatible with the right of property in their debtor, of which they are only limitations or burdens. At the defender's entry, no other than Sir Thomas Wallace, notwithstanding all the proceedings, was vested with the property; so that the present case is opposite to that of a singular successor infeft. It is true, as the administration of his estate had been taken away from him, he could not then grant leases; but at the date of the present one he lay under no restraint; and as long as he continued undivested of his property, so long this lessee had power to compel implement of his obligation over that property; and therefore the factor did voluntarily that only which, on application to the Court, he must have been ordered to do. In this respect, the same rule obtained as if, prior to the sequestration, the proprietor had entered into the contract of sale; which doubtless the other contracting party might afterwards have completed by infeftment.

It is a mistake to suppose, that, in such circumstances, creditors attain, by the judicial factor, a proper or exclusive possession. He possesses for their behoof indeed, which is the meaning of the clause of style alluded to, but not less for the behoof of every other person interested, and particularly for that of the proprietor, their debtor; the purpose of the sequestration, and of his possessing, being, to preserve the subjects from waste, and by no means to vary or infringe the rights of the parties.

In the case of Lord Cranston's Creditors, it was an essential part of the lease reduced, to constitute to the tenant a real security for a large debt due by the landlord; and therefore it makes nothing against the defender's argument, that when not yet completed by possession, this security was postponed to the real rights of other creditors previously established by sasine; while this argument is supported by the judgment of the House of Lords pronounced in the question between Dr. Threipland and the Creditors of the York-Buildings Company, No. 77. p. 8383. *voce* LITIGIOUS.

The Court were much divided. Some of the Judges thought, that, by the infeftments of the creditors, by the sequestration, and by the possession which the judicial factor had held, the connection between the proprietor and the estate was dissolved, insomuch that no possession could follow on a title thus precluded. But others were clearly of opinion, and this sentiment seemed to prevail, that the defender's argument was rightly deduced, from this consideration, that Sir Thomas Wallace was as truly proprietor after as before sequestration.

It is to be remarked, however, that as the tenant, prior to the sequestration, had got from him his landlord possession of a couple of acres additional to the farm, and which he was to enjoy along with it, this circumstance had weight with some of the Court;—that several other Judges considered a particular article of roup as barring the action;—and that some were moved by an alleged homologation, founded on this, that the factor when examined in the course of the process

of sale, stated the terms of the lease, which was not objected to by the creditors; an argument much insisted on in the papers. No. 89.

The Lord Ordinary "repelled the reasons of reduction, and assoilzied the defender."

On advising, however, a reclaiming petition and answers, the Court "sustained the reasons of reduction."

This judgment being brought under review, the Court pronounced this interlocutor: "Alter the interlocutor reclaimed against, repel the reasons of reduction, and assoilzie the defender."

To this judgment the Court afterwards finally adhered, on advising a reclaiming petition, with answers, &c.

Lord Ordinary, *Braxfield.* Act, *Blair, Mat. Ross.* Alt. *Rolland, W. Miller.* Clerk, *Home.*

S. *Fac. Coll. No. 242. p. 372.*

1799. *June* 1. JOHN CLERK *against* CHARLES FARQUHARSON.

No. 90.
Missives, by which a tenant obtained a lease of an urban tenement for one year, and an obligation on the landlord to grant a lease for seven years, if required, found ineffectual as a lease for seven years against a singular successor.

In 1795, Dr. Charles Farquharson addressed a missive to James Smith, proprietor of a house, offices, and garden, in the town of Nairn, bearing, that, in terms of a previous agreement, he thereby obliged himself to pay £.10 for the subjects, "as the yearly rent, from Whitsunday, 1795, to Whitsunday, 1796." And, after stipulating that Smith should make certain improvements, for part of which the Doctor obliged himself to pay interest on the money expended, it was added, "Let it be understood, that you are to give me a lease of the place, if required, for the space of seven years from and after the term of my entry, I paying you punctually the agreed-on rent."

Smith, in answer, declared his acceptance of the offer; and Farquharson entered to possession.

In 1798, Smith sold the subjects to John Clerk, who brought an action before the Magistrates of Nairn to have Farquharson removed at Whitsunday 1799.

In defence, he founded on the missive and acceptance as equivalent to a lease for seven years.

The Magistrates allowed a proof that the pursuer was informed of them before his purchase.

This was referred to his oath.

The Magistrates found it negative, and decerned in the removing. Farquharson presented a bill of suspension.

The Lord Ordinary on the Bills, after advising with the Lords, ordered memorials to the Court.

The suspender

Pleaded: A lease of an urban tenement, clothed with possession, is effectual against singular successors; Waddel against Brown, No. 117. p. 10309. *voce* PERSONAL AND REAL.