No 103.

Upon the determination of the tack, Frasers insisted in their claim against Arbuthnot, who called Sir James Colquhoun in an action, concluding that he should be decerned to relieve him of the Frasers' demand, and of the expense he might incur in defending the same; and the processes having been conjoined, the LORD ORDINARY, on the 3d July 1771, pronounced this interlocutor: "Finds the said John Arbuthnot liable in payment to the said John and Donald Frasers of the sum of L. 13: 12s. Sterling, with interest of the same, from the term of Lammas 1771, as the value of the dykes, according to the comprisement of the birlieman, in process, and against which no objection is offered, and decerns: But, in respect that there is no obligation in the tack to build the dykes; that the obligation to pay a sum not exceeding L. 24, for the dykes, when built, depended upon an uncertain event, and that it makes not mention of assignees, the LORD ORDINARY assoilzies Sir James Colquhoun, and decerns." And, by a subsequent interlocutor, November 28th 1771, "In respect that the clause in question, although contained in the contract of tack, is an obligation distinct from the contract of tack, and for the reasons contained in the former interlocutor, refused a representation for Arbuthnot, and adhered to his former interlocutor."

Upon a reclaiming petition, and answers, the Court held that this clause was effectual against a singular successor in the lands, (notwithstanding of the decision, December 17. 1760, M'Dowal of Glen *contra* M'Dowal of Logie, *voce* TACK, cited for the defender,) and therefore,

"THE LORDS altered the LORD ORDINARY's interlocutor, and found Sir James Colquhoun liable in payment."

Act. John Douglas. Alt. *James Colquhoun*

Fol. Dic. v. 4. *p.* 75. *Fac. Col. No* 4. *p.* 5.

1787. *February* 3.

Major WILLIAM MAXWELL MORISON *against* DAVID PATULLO, and Captain DAVID LAIRD.

No 104.
A tenant was by his lease allowed retention of rent on account of a building to be erected on the lands. Not found entitled to it out of rent due to

By a lease of lands granted by Major Maxwell-Morison to Patullo, the latter became bound to erect on the lands a house of certain prescribed dimensions; for which it was stipulated, on the other hand, that he should have an allowance out of the rent of L. 50; a sum inadequate, however, to the value of the building.

Major Maxwell Morison sold the lands to Captain Laird, whose entry to them was to be at Martinmas 1783, and the rent due by the tenant for crop 1783 was not payable before Whitsunday 1784; between which two periods, the building of the house was begun and completed.

No 140.
his landlord, the building not taking place till after the lands were acquired by a purchaser.

Major Maxwell-Morison having brought an action against Patullo, for payment of that year's rent, the latter pleaded retention under the stipulation above mentioned. In this action, Captain Laird was afterwards called as a defender.

Pleaded for the pursuer, The building in question, posterior to the purchaser's right, served no other purpose but to benefit the lands; and of course the counter obligation must fall on the present proprietor, and not on the former, after his connection with them has ceased. It is clearly such an obligation as affects singular successors; and indeed the bargain was highly advantageous for the landlord. The circumstance of the defender's having in his hands a rent belonging to the pursuer is plainly immaterial; so that there is no ground for the plea of retention. Accordingly such was the decision of the Court, in the case of Arbuthnot *contra* Sir James Colquhoun, (*supra.*)

Answered, It is not sufficient that the purchaser was to reap the benefit of the building; this might equally have been said, though it had been prior to his right. The obligation respecting the allowance of deduction from the tenant's rent was personal to the former proprietor, and does not devolve on the present. In conformity to this plea, the Court decided the case of Macdowal *contra* Macdowal, 17th December 1760, *voce* TACK.

The LORD ORDINARY found, "That the defender, David Patullo, had a right to retain the foresaid sum of L. 50 from the rents of the premisses contained in his lease, for building the house in question." But

The Court altered that interlocutor, and repelled the plea of retention.

Lord Ordinary, *Swinton.* Act. *Abercromby.* Alt. *Wight.* Clerk, *Home.*

S. *Fol. Dic. v.* 4. *p.* 75. *Fac. Col. No* 306. *p.* 473.

1789. *January* 29.

No 105.
It is optional to a substitute heir of entail, to avail himself of an irritancy incurred by the heir in possession, so that it is not an adjudgeable faculty, or such as devolves any right to the husband of a female substitute, under the *jus mariti.*

TRUSTEES of ALEXANDER WEDDERBURN *against* Mrs MARGARET COLVILLE.

MRS COLVILLE, a married woman, prevailed in a declarator of irritancy of the right of an heir of entail in possession. During the dependence of that process, which, under her mandate, was carried on by certain creditors of her father's, they entered into an agreement with herself and her husband, by which she engaged to pay to those creditors two-thirds of the rents of the estate, during her incumbency; she, on the other hand, being to enjoy the remaining third, and her husband's *jus mariti* being excluded.

The creditors of the husband having arrested these rents as falling under the *jus mariti*, and raised a process of forthcoming, they

Pleaded, By means of the right arising to Mrs Colville, through the irritancy of the entail being incurred, an estate, the rents of which were to belong to her