

No. 187. the summons; but allowed some time to the pursuer to purge, and find caution.

Harcarse, No. 1026. p. 292.

* * Sir P. Home's report of this case is No. 64. p. 7234. *voce* IRRITANCY, and No. 288. p. 6076. *voce* HUSBAND AND WIFE.

* * In November, 1683, the Lords found the like between Sir Andrew Dick and Mr. John Burdon, (*infra*)

Harcarse. Ibidem.

No. 188. 1683. *November 30.* MR. JOHN BURDON *against* SIR ANDREW DICK.

In the action of declarator pursued by Mr. John Burdon against Sir Andrew Dick, wherein Burdon concludes, that the back-tack contained in the contract of wadset granted by him to Sir Andrew may be declared null, upon this ground, that Sir Andrew had not made payment of the back-tack duty for three terms; it was alleged by Sir Andrew, That this declarator could not be sustained, there being no irritancy in the back-tack, and that there was no act of Parliament, as in the case of feu-duties, irritating back-tacks. The Lords sustained the declarator, and repelled the defence; but allowed Sir Andrew to purge by payment against Candlemas next.

P. Falconer, No. 72. p. 48.

* * Sir. P Home reports this case :

1684. *March.*—Mr. John Burdon having pursued a declarator against Sir Andrew Dick, for declaring of a back-tack contained in a contract of wadset of the lands of Craighouse, to be declared null, in respect Sir Andrew had failed in the payment of the back-tack duties, for the space of three terms; answered, That the back-tack could not be declared null, because it did not contain a clause irritant, and the act of Parliament declaring that all feuers not paying their feu-duties shall amit and tyne their feus, as if there were a clause irritant in their rights, cannot be extended to back-tacks; acts of Parliament being *stricti juris*, and not to be extended *a casu in casum*. The Lords repelled the defence, and sustained the declarator; but allowed Sir Andrew to purge, by payment, betwixt and the next term.

Sir P. Home MS. v. 1. No. 612.

* * Fountainhall's report of this case is No. 14. p. 7184. *voce* IRRITANCY.

No. 189. 1744. *July 24.* ALEXANDER of Newton *against* JACKSON.

Where a year's rent is due preceding the citation, or even at litiscontestation, it is competent for the master to insist that the tenant pay by-gones, and find

caution in time coming, or remove; but where two years rents are owing, it is an irritancy of the tack, and competent for the master to declare the same void. Though even in that case, where there is no conventional irritancy, the Lords are in use to supersede extract till a time certain, between and which, if the tenant give bond, with a sufficient cautioner, to pay the by-gones at a term, with annual-rent thereafter till payment, and for payment of subsequent crops, &c. in that case, they stop extracting the decree; and they did so in this case.

Fol. Dic. v. 4. p. 328. Kilkerran, No. 3. p. 533.

No. 189.

1758. June 28.

RONALD CRAWFURD, Writer to the Signet, *against* ROBERT MAXWELL and his CREDITORS.

John Hay, writer to the signet, in 1745, granted a tack to Robert Maxwell, his heirs and subtenants, secluding his assignees, of two inclosures, part of his lands of Coatfield, *alias* Restalrig, for nineteen years, commencing at Christmas 1745, at the yearly rent of £.122 10s. Sterling; under a condition, that the lands let should be kept in grass, and used for pasture allenary, excepting the first three years, when he was allowed to cut them for hay.

Those lands became afterwards forfeited to his Majesty, by the attainder of John Hay; and were, in 1753, purchased from the Barons of Exchequer by Ronald Crawford.

Robert Maxwell, the tenant, soon after Mr. Crawford's entry, became insolvent. He was in arrear of rent to Mr. Crawford; and as he could hardly expect to find caution for so considerable a tack-duty, he was in danger of being removed. But, in January 1754, matters were accommodated between the master and tenant. Maxwell granted an obligation to Mr. Crawford, reciting, That his affairs had fallen into disorder, and that his corns and cattle had been sequestrated; but that "Mr. Crawford had allowed him to possess the said lands from Christmas 1753 to Christmas 1755, on his granting the security under-written; therefore he, and John Pringle, as cautioner for him, bound and obliged them to pay the rent for the said two years;" and also to sow up the ground with the crop, and lay it down in grass in a proper manner.

After these two years were elapsed, Maxwell continued in possession as formerly, till the end of the year 1757; when, being imprisoned for debt, he obtained a decret of *cessio bonorum*, after granting a disposition to his creditors of his whole effects; by which he, *inter alia*, "assigned from him and his heirs, &c. to and in favour of his creditors, the aforesaid tack granted to him by John Hay."

Afterwards, the creditors finding that Maxwell had no power to assign his tack, obtained from him, on the 16th of January 1758, a sub-tack to Alexander Macdougall, (a trustee for the creditors); whereby he subset to him, his heirs and

No. 190.

A bankrupt tenant having a tack to him and his subtenants, secluding assignees, may effectually subset his whole possession, if the subtenant find security for the rent payable to the master.