

No. 14. 1748, Feb. 11. CREDITORS OF AUCHINBRECK *against* M'LACHLAN.

SIR JAMES CAMPBELL in 1729 borrowed 4000 merks from M'Lachlan and gave him a tack of lands for five years and thereafter till the money were repaid, at 200 merks rent, and certain casualties of butter, wedders, poultry, &c. allowing him to retain the 200 merk in giving annually a discharge of annualrents. In 1739 the estate was sequestrated, but the tenant suffered to possess, and after Martinmas 1742 the factor took a Baron-court decree against M'Lachlan for the full rents; which he suspended; but it lay over till 1746, when the factor insisted on discussing the suspension. Kilkerran found the letters orderly proceeded; but we sustained the reason of suspension until he was interpellated by the decret; and suspended as to proceedings, but found him liable for rent crop 1743 and in time coming. Arniston was against the first part of the interlocutor, but after it was carried, he was for suspending also for the rents after the decret; and I own so was I against this last part and Minto. But as such of the Lords as spoke were for finding him liable from the interpellation, and differed as to the time, I who was in the chair put the question, Whether liable from the decret or not? and it carried liable.

No. 15. 1749, Nov. 24. HALY *against* SANDS.

A FARM of a minor was let by roup by the tutors, and Sands was preferred as highest offerer. He had signed his offer. But the articles of roup nor roup itself were not signed by either the infant or the tutor, or even the Judge, so that there was nothing in writing under their hands. One of the tutors acted as clerk. However Sands was put in possession. But Haly, one of the tutors, wanting the farm to himself, the tutors pursued a removing. The defence was on the roup. Reply, there was no written tack, therefore only good for one year. I own I had great difficulty. However the Lords sustained the defence upon the roup, and assoilzied from the removing, and found the pursuer liable in expenses, and that the pupil ought not to be charged with any of the expenses of the process.

No. 16. 1750, Nov. 28. JOHN WATSON *against* DAVID THOMSON.

THE question was, Whether a tack of a salt-pan for 15 years without mention of heirs, the tacksman dying during the tack, if it descends to his heir, his son? 2dly, The son continuing some years and paying the rent, whether the receiving the rent alters the case? As to the first sundry authorities are quoted against the heir, viz. two decisions quoted in Colvil, and Haddington, 2. Craigie Wallace, *Repertorium juris*, Dirleton, and Craig; on the other hand, Stewart. But this coming before us by a bill of suspension of a decret of removing against the heir, which two different Ordinaries had refused, we thought the question deserved more deliberate consideration, and therefore passed the bill.

No. 17. 1751, Jan. 4. WALLACE *against* CAMPBELL of Inverasraggan.

ARCHIBALD CAMPBELL in Inveraray having a tack of three nineteen years, built a house, which run him in several debts. His brother Inverasraggan was a considerable cre-

ditor, and took from him an assignation to his tack, but set him a sub-tack, obliging him to relieve him of the tack-duty to the Duke of Argyle, and to pay him L.12 of additional duty. Wallace an anterior creditor who had used personal diligence challenged this disposition on several grounds; among the rest on the ground that the disposition of the tack was not clothed with possession. And Wallace has now adjudged the tack. Answered: The disposition was completed by the tack to the common debtor who was already in possession. We appointed a hearing in presence. We remitted to the Ordinary to enquire and report whether any payments had been made of the sub-tack duties, 10th January 1750.

(The case was ultimately decided in favour of the adjudger, the assignee not having attained possession in any way. It appeared he had received no sub-tack duties prior to the adjudication.)

No. 18. 1752, Feb. 13. THE PURCHASER AND CREDITORS OF JORDANHILL *against* THE EARL OF CRAWFORD, VISCOUNT GARNOCK.

IN 1701 the Earl's predecessor Crawford of Kilbirnie gave Jordanhill a tack for 400 years of a parcel of meadow ground, the tack-duty to be a proportion of the rent of the tenement, to be settled by the tacksman and a friend of Kilbirnie's, the Lord Boyle. In 1708 he sold Jordanhill the whole tenement for a price to be paid and other prestations, particularly thirling Jordanhill's estate to Kilbirnie's, then Viscount of Garnock's, mill. Jordanhill's affairs went into disorder, and the creditors, among the rest adjudged this part of his estate whereof he had not attained possession. But we reduced the minute of sale, not only because the estate of Garnock was entailed, but chiefly because the sale was on Jordanhill's part become imprestable. But he still continued to possess the bit of meadow, at least the factors did, although no rent was paid to Garnock. This bit of meadow was included in the proven rental of the estate and so purchased by Mr Houston the purchaser. But then Earl Crawford (formerly Garnock) claimed the meadow as his property; which brought on different questions. Houston claimed it as a part of his purchase, otherwise to be free of a part of the price. The creditors insisted on the 400 years tack as equal to property; and the Earl objected to the tack so as against law creating in effect a feu and conveying the property without infeftment; 2dly as contrary to the entail; 3dly, without a tack-duty. This was one of the cases reported by Lord Kames as Lord Probationer, though not decided till this day. We all agreed that the tack would not be effectual against singular successors, and that the act of Parliament was only to be understood of tacks of ordinary endurance, otherwise it would render our records of no use. But then we thought it was good against the granter and his heirs, and I thought he might compel them to give him a precept of sasine. As to the third, we thought that where the tack-duty was referred to this *arbitrium tertii* that was no nullity, though he is dead, and that it resolved now *in arbitrium boni viri*, and the judgment of the Court. As to the second, though there was no clause prohibiting tacks, we thought it fell under the clause prohibiting alienations; but then it was objected that the irritant and resolute clauses were not inserted in the titles of the setter of the tack but by reference to the original tailzie, and that the heirs were bound;—and therefore sustained the tack, but thought