AUCHINLECK. The watchmaker business is different from the smith trade. If I could see that the hammermen had ever debarred watchmakers from working unless they entered with the incorporation, there would be more difficulty. A man may be admitted a member of an incorporation in order to have a vote at an election, but he cannot be forced into the corporation when his trade is different from that of all the members of the incorporation.

ALEMORE. Who is it that must try the qualifications of the watchmaker?—"they who cannot so much as spell the name of the essay-piece!"

KAIMES. A man may *choose* to be taken into a corporation: But, here, no proof that he can be *obliged* to enter.

COALSTON. Corporations may be established by usage as well as by grant: When by usage, it must be proved. If multitudes are conjoined in an incorporation, and no proof that any acted without being so received, usage will be held proved. But here there are not examples sufficient to establish such usage.

KENNET. Here all the proof of possession that can be had; for it is proved that the watchmakers in Stirling have, past memory, entered with the hammermen.

PRESIDENT. It is incumbent on the suspender to show, that watchmakers have ever acted in Stirling without being of the incorporation of hammermen.

Diss. Kennet; President.

1766. *July* 18. WILLIAM STEWART, King's Remembrancer in the Court of Exchequer in Scotland; WILLIAM HAY, Writer to the Signet, &c. Creditors of Sir John Douglas of Kelhead, together with THOMAS CARLYLE, Factor, appointed by the Court of Session, upon the Sequestrated Estate of the said Sir John Douglas, *against* GEORGE LOWTHER, Tenant of the lands of Tod-holes, part of the said Sequestrated Estate.

LITIGIOUS.

A Ranking and Sale, without Sequestration, does not bar Ordinary Acts of Management, but bars Extraordinary Acts, such as the granting of a new lease during the currency of a previous one.

[*Sel. Dec. No.* 242; *Dictionary*, 8380.]

THE deceased Sir William Douglas purchased the lands of Tod-holes, and was infeft therein. He executed an entail of his estate, comprehending Tod-holes, in favour of Sir John his eldest son, &c. Upon the death of Sir William, his eldest son Sir John made up titles to the estate of Kelhead, by charter and seasine, but he possessed Tod-holes upon his right of apparency, without making up any feudal titles. In February 1749, Sir John Douglas granted a lease of Tod-holes to George Lowther and William Irvine, for fifteen years. The entry was at Candlemas 1749 to the arable lands, and at Whitsunday

1749 to the houses and grass. The rent was £30 sterling, and £3 of stipend to the minister. The tenant was farther taken bound to pay the land-tax, and other public burdens. Sir John contracted great debts, and in particular borrowed L.7000 sterling from Mr William Stewart, for which he granted him two heritable bonds, with infeftment over the estate of Kelhead. The infeftment did not reach Tod-holes, in which Sir John himself was not infeft. Sir John became, to all appearance, in bankrupt circumstances. His creditors did diligence, and, in particular, Mr William Stewart deduced adjudication of his whole estate for the accumulated sum of L.9230 sterling. In 1756, a ranking of his Creditors, and an action for sale of his estate, was brought by Mr William Stewart. During the dependance of this ranking and sale, Sir John Douglas granted another lease of Tod-holes, concerning the validity of which the present question occurred. In January 1758, he granted to George Lowther, Irvine,—the other tenant being dead,—a new lease of Tod-holes, for fifteen years, from Candlemas and Whitsunday 1764, as to the arable and grass lands *respective*, for the rent of L.40 sterling, in full of all prestations. Thus the new lease was granted during the currency of the former one, and the entry to it was not for six years after the time of the bargain. In July 1758, Sir John's estate was sequestrated, and, in August 1758, Thomas Carlyle was appointed by the Court factor thereon. In 1765, Mr Stewart, and other creditors, together with Thomas Carlyle, the factor, insisted in a reduction of this new lease, and concluding for the removal of Lowther. Lord Pitfour, Ordinary, took the debate to report.

ARGUMENT FOR THE DEFENDER:

Observed that the summons of reduction was originally brought in the name of Mr Stewart and Thomas Carlyle: that other names had been afterwards added as the names of pursuers: that this he apprehended was unwarrantable for the reasons by him offered. He therefore endeavoured to show that neither Mr Stewart nor Thomas Carlyle had any title to reduce his new lease, or to remove him from his possession. With respect to Mr Stewart, he pleaded, that his infeftment did not reach over the estate of Tod-holes, in which his author, Sir John Douglas, was not infeft, and his adjudication contains only the lands contained in his infeftment. With respect to Thomas Carlyle, the factor, it was pleaded for the defender, that the factor on a sequestrated estate has no power to insist in a removing of tenants, or in the reduction of their tacks, or to do any other thing relative to the adminstration of such estate. Thomas Carlyle has a special power to remove Sir John Douglas "from such parts of the estate as he possesseth;" he has general powers to levy the rents, and his factory is also granted with the usual powers, and "particularly to remove the tenants of Sir John Douglas, the common debtor, from such parts of the estate as he possesses:" But the factor has no power to remove tenants at large from off the whole estate. By the sequestration, the whole right to the estate devolves upon the Court, and the Court is in the interim the absolute proprietor. The Court might have communicated, to its factor, that part of a proprietor's power which consists in removing tenants; but this it has not done. And, as the factor was not specially authorised to remove tenants, such as the defender, he ought to have applied to the Court for directions. But, *2dly*, Upon the merits of the ques-

tion, the defender pleads that the lease is valid in law. It was a deed which Sir John Douglas could grant, being a lease for a moderate term of endurance and for an adequate rent; and the defender was in possession in virtue of the new tack, before the present challenge was brought. No infeftment, nor charge, against the superior, has followed upon any of the adjudications; so that unless the creditors can subsume, upon the statute 1621, that the lease was fraudulent, they cannot reduce it. The reason is this,—an adjudication does not of itself vest an estate in the adjudger, until infeftment follows; it is no more than a personal right, importing a legal assignation to the rent, and authorising an action of maills and duties; but it divests not the proprietor of the fee of the estate, or of his power of administration. Until infeftment follow, an adjudication is no proper title for an action of warning: it is not sufficient for founding a reduction of a real right over lands; and, as leases clothed with possession are real rights *in suo genere*, it is not sufficient for founding a reduction of such lease. These adjudications, therefore, without infeftment, could not hinder Sir John Douglas from granting leases, nor tenants from accepting leases from him. His power, and their *bona fides*, endured until the time at which the estate was sequestrated by the Court. Neither can it make any difference that the new lease was granted before the expiry of the old one; for, to a tenant in possession, there is no difference between a prorogation of a lease to take instant effect, or, as in this case, after four years. What Sir John granted was equivalent to a new lease for nineteen years; but, instead of taking a renunciation of the old lease, he granted a new one for 15 years, to take effect after the four years of the old lease had run out. This was an ordinary act of administration; for it is what prudent proprietors often do, in order to prevent tenants from neglecting their grounds, as they are apt to do towards the expiry of their leases. But further, the defender is secured, by the Act 1449, which provides that "the tackers sall remaine with their tackes unto the ishew of their termes quhois hands that ever thair lands may cum to." And so it has been found by three decisions mentioned in the Dictionary, title Tacks, folio 421, *7th March* 1604; *20th July* 1622;—and *Richards* against *Lindsay*, *January* 1725, where the Court sustained second tacks granted during the currency of the first, although the prorogation did not commence till after the right of the singular successor.

ARGUMENT FOR THE PURSUERS:—

After Sir John Douglas had contracted the debts above the value of his estate, after heritable bonds had been granted over such parts of the estate whereof he was the feudal proprietor, after inhibitions had been used and adjudications deduced, after a ranking of his creditors, and a sale of his estate had been brought, Sir John Douglas granted this new lease. Before possession could follow upon it, the estate was sequestrated. This state of the fact sufficiently answers the defender's argument: The Act 1449, in order to render a lease effectual against singular successors, requires possession on the lease; here there was no possession on the new lease, nor could be till after the estate was sequestrated. It does not vary the case that the right of the singular successor is redeemable, as being upon adjudication. If the right is redeemable, the tenant may, upon redemption, claim possession from the lesser or his heirs, but he cannot maintain possession upon a right which was personal at the date

of the singular successor's right. Besides, a ranking and sale is a common action for the behoof of all the creditors of the bankrupt, and, during that action, the bankrupt can do nothing which may diminish the value of his subjects to his creditors. The granting of a new lease, to take place at an after period, does certainly diminish the value to the creditors. Whatever may have been found in more ancient cases, this question has been twice determined, within these few years, against the tenant, in favour of the creditors,—*4th January* 1757, *Creditors of Lord Cranston* against *Scot*; and *2d July* 1757, *Creditors of Douglas of Dornock* against *Carlisle*. No special powers are necessary for authorising the Lords' factor to insist in such removing. Such powers are not usually given in the practice of the Court, and indeed it is not fit that they should. They could not be granted unless *causa cognita*; then the Court would, previous to the removing, take cognizance of the merits of the removing, or, in other words, determine a cause before the defender was cited. If a factor should bring such process of removing improperly, the Court would dismiss it. Here the defender confounds the title to pursue, with the merits of the action. The factor has a title to pursue, but still the question as to the merits of the action remains entire. That the creditors have a right to pursue is manifest: The sequestration is for their behoof, it does not diminish their right in the estate: and, accordingly, in the case *Lord Cranston's Creditors*, and in that of *Dornoch's Creditors*, action proceeded at the instance of the creditors only. That the adjudications produced are not completed by infeftment, will not vary the case. As the lease was not clothed with possession, it was but a personal right; and an adjudication without infeftment is a good title to reduce any personal right which may interfere with it. But further, it is now established in practice, that an adjudication without infeftment is a sufficient title for carrying on a reduction of any right affecting the lands adjudged, whether established by infeftment or not; and thus actions of this nature are daily sustained upon simple adjudications on trust-bonds. It is not an ordinary act of administration to grant a lease to take place at a distant period: Had the tenant reaped no benefit by this deed, he would not have struggled so much in maintaining it against the creditors.

On the 27th February 1766, "The Lords sustained the reasons of reduction, reduced, and decerned, and found that the defender must remove."

On the 18th July, they adhered, upon advising petition and answers.

Act. R. M'Queen. *Alt.* D. Armstrong. *Reporter*, Pitfour.

OPINIONS.

COALSTON. An adjudication alone does not prevent the proprietor from setting tacks: Here, the tack was during the currency of the former one, and sequestration was awarded before the new tack commenced: I think the sequestration has the effect of an infeftment, and so will stand in bar of the tack.

PITFOUR. In the case of *Cranston* there were infeftments; none here. Had the tenant entered into possession, the new lease would have been good; for

the grant of tacks is an ordinary act of administration, but it is no ordinary act of administration to superadd one lease to another.

1766. *July* 22. JANET WATSON, Relict of James Watson, Merchant in Edinburgh, *against* PATRICK JOHNSTON, Son of William Johnston, Smith in Edinburgh.

FIAR.

The fee of a subject proceeding from the wife, taken to the spouses in conjunct fee and liferent, and the heirs of the marriage in fee, found to be in the husband.

[*Faculty Collection, IV.* 268 ; *Dictionary,* 4288.]

ON the 6th October 1740, a postnuptial marriage-contract was entered into by William Johnston and Rebecca Muirhead. By it William Johnston became bound to provide 2800 merks of his own money, and to add to it 1000 merks assigned to him by Rebecca Muirhead, and 1800 merks as the value of a tenement mentioned in the marriage-contract, and to take the rights of the whole, amounting to 5600 merks, "to himself and his spouse, and the longest liver of them two in liferent, and the bairns of the marriage in fee." In the same form is the conquest during the marriage provided. The contract contains also the following clause: "That in case the said marriage shall dissolve, by the said Rebecca her predeceasing without children, that then she shall have it in her power to dispose of all or any part of the subjects, and sums above-mentioned, brought with her, in favours of whatsoever person she shall think fit, without advice or consent of the said William Johnston, he always being allowed to liferent the same." For these causes Rebecca Muirhead assigned the sum of L.60 sterling to William Johnston, his heirs and donatars; and she farther "sells, anailyies, and dispones in favour of her husband and herself, in conjunct-fee and liferent, and to the heirs of the marriage in fee," a tenement of houses in Musselburgh which was redeemable by James Muirhead, writer in Edinburgh, on payment of L.100 sterling; and which is the tenement above-mentioned in the husband's part of the marriage-contract. The contract contains precept of seasine in common form. On the 7th October 1740, seasine was taken upon the precept in this marriage-contract. William Johnston died before his wife, leaving issue, by her, Patrick Johnston. It does not appear that William Johnston ever performed the obligations incumbent on him by the marriage-contract. James Muirhead, the reverser in the tenement, was found liable, by decreet of the Court, 16th February 1762, to pay L.100 sterling, as the redemption-money of the tenement, to Patrick Johnston, executor of his mother Rebecca. Thus much having been premised, it is to be observed that, on the 15th June 1752, William Johnston granted a bill to Janet Watson, the pursuer, for L.27: 8s. sterling. She insisted, in an action for payment, against Patrick Johnston, as heir of William; and she arrested in the hands of James Muirhead that L.100 which