1780. *February* 16,

WALPOLE and ALISON *against* JOHN MONTGOMERY-BEAUMONT.

No. 124.
Retention competent to a tenant.

By a contract of lease entered into between Mr. Alexander, proprietor of the coal of Blackhouse, and Mr. Montgomery-Beaumont, the latter became bound to furnish 30,000 tons of great coal annually, at the rate of 3*s.* per ton, and the whole panwood, under certain restrictions, at the rate of 2*s.* per ton. Mr. Alexander, on the other hand, obliged himself to make payment at the end of every fourteen days for the quantities of coal delivered during that period.

Mr. Alexander run in arrear to a considerable extent, and some time afterwards became insolvent. His estates in Scotland, including that of Blackhouse, were attached by adjudication at the suit of Messrs. Walpole and Alison, who, by virtue of this diligence, insisted against Mr. Beaumont for delivery of the quantities of coal stipulated in the lease.

Mr. Beaumont again contended, That he had a right of retention until the arrears already mentioned should be made up to him.

Pleaded for Walpole and Alison: Rights of retention in favour of tenants are ineffectual against singular successors; Erskine, B. 2. Tit. 6. § 39.

Answered: Clauses of retention being inconsistent with the nature of leases and the utility of the public records are not preserved by the statute 1449. That principle however is not applicable to the present case. Here the pursuers, by insisting on the contract made by Mr. Alexander, must subject themselves to the prestations incumbent on him. As he could not require the promised quantities of coal before satisfying Mr. Beaumont for what he had already received, the pursuers must be in the same situation.

The Lords found, "That Mr. Montgomery-Beaumont is entitled to retain the coals deliverable by him, and produce thereof, in time coming, ay and until the sums due to him are satisfied and paid."

Lord Ordinary, *Elliock.* Act. *Ilay Campbell, Solicitor-General Murray.*
Alt. *Buchan Hepburn.* Clerk, *Tait.*

Fol. Dic. v. 4. *p.* 323. *Fac. Coll. No.* 104. *p.* 198.

SECT. VII.

Rights of the Tenant.

1583. *July.* HOME *against* HOME.

No. 125.
He who is rentalled a

William Home of Prenderguest, having obtained a rental of five years tack of certain lands of the K. Highness's property, warned one Patrick Home, and certain others,

No. 125.
tacksman, or kindly tenant, in the King's property, has power to warn and remove, altho' it be not expresssed in the rental.

possessors, to flit and remove from the same. It was answered, That the tack gave him no sufficient title, because it was not expressed in the same, that he had power to in-put and out-put tenants. To the which it was answered, That he libelled the promise to be kindly to him, and his predecessors had been in the peaceable possession of the labouring and occupying of the same. The Lords repelled the exception, and found, That the King's rental in tack was sufficient in itself to warn by, and give action to remove tenants, and the person obtainer of the same to be kindly possessor.

Fol. Dic. v. 2. p. 423. Colvil MS. p. 371.

1586. *February.* KINCRAIGY *against* TENANTS.

No. 126.
An assignee to a life-rent tack was found to have power to out-put and in-put tenants, although the same was not expressed in the tack.

There was a woman called Kincraigy that had a life-rent tack set to her and her umquhile first husband, called Lindsay, of a piece of land of the patrimony of Skoon. Thereafter she made and set another tack of the same lands to her eldest daughter, who, by virtue of the tack, warned the possessors of the ground to flit and remove. It was alleged by the possessors, That the second tack could give no action, because it bore not in it power to out and in-put, nor yet was the acquirer of the tack in possession. *2dly*, Alleged, That the first tack was set to the mother and her husband, and their sub-tenants and cottars, *nam ita canebat*, and so the mother had no power, by reason of her first tack, to set tacks, but to her own sub-tenants. To all this was answered, That as to the first, the tack that was set in life-rent to the wife and her husband, albeit there was not expressed into it power to in-put or out-put, and as the first acquirer of the tack, that was the woman, might not set to others than her sub-tenants, *ut canebat assedatio*, it could not militate in this case, nor take away the tack set to her own daughter, *quia non fuit extrema persona*, but behoved to be presupposed, in like manner as her own sub-tenant that laboured the ground. The Lords repelled the exception, and found, That the second tackswoman had power, by virtue of the same, to warn the tenants, and to in-put and out-put.

Into the same action, and betwixt the same parties, it was alleged, That the woman had no power to set the said tack to her daughter, because the defenders offered them to prove, that the said woman, being married to another husband, Alexander Blair, took another tack of the place of the Skoon, and containing in it a greater duty, and after the decease of her husband, Blair, her sub-tenants, in her name, paid the duties of the same to the Lords of Skeen; and so, consequently, she had *tacite* passed from her tack of life-rent, that she had first, *nam fuerunt hæc incompatabilia* to take a tack of a smaller duty, and thereafter another of a greater duty. To this was answered, presently, at the Bar, partly by reasoning among the Lords, That the pursuer, being once in conjunct tack with her husband, that, after his decease, she could not be denuded, in any manner of