

ing there is no such thing provided by the tack ; and as the extract cannot satisfy the production in the improbation, so neither can the register satisfy the same unless the principal were produced, seeing the register can make no more faith than the extract. The Lords found the defender liable not only for the year's tack-duty since his decret of preference, by which, in the competition amongst the tacksman's creditors, the defender was preferred by virtue of his apprising ; but also for these years tack-duties preceding his decret of preference to which he was preferred, and whereof he has got payment ; and reduced the tack for not payment of the by-gone duties, superseding extract till a certain day, betwixt and which time allowed the defender to purge by payment of the said by-gone tack-duties or prices thereof, according to the fiars of the grain which grows upon the lands ; and found that the defender was liable to perform the services mentioned in the tack personally upon his expenses, and that he cannot do the same by a substitute ; but assoilzied from the conclusion of the declarator, that the tack should be null for the defender's not performing the by-gone services, and decerned against the defender for the penalties incurred by him through not performing of the by-gone services to which he was required, conform to the instruments produced, extending to £.100 Scots ; and refused to grant certification for not production of the principal tack ; and sustained the extract of the tack produced by the defender, in respect the same was adminiculated by the book wherein it was registrated.

Sir P. Home MS.

No. 162.

1743. February 24.

GRANT *against* LORD BRACO.

Upon advising a bill against an Ordinary's interlocutor, finding an assignation to a tack null, in respect the tack was only to the tacksman and his sub-tenants, the Lords were divided upon the question, What the difference was between a tack given to the tacksman and his sub-tenants, and a tack to him and his assignees?

Some were of opinion, that in either case he might assign, and that the difference lay only in this, that where a tack is to assignees, the tacksman is after assignation no more liable for the rent than a feuer is for the feu-duty after a sale of the lands ; whereas, where the tack is to the tacksman and his sub-tenants, the principal tacksman, notwithstanding of an assignation, remains still bound to the settér.

But the more general opinion was, that where a tack is to the tacksman and his assignees, the tacksman remains bound, even after assignation, just as in any other contract, *e. g.* a contract of victual. The assignation to that contract does not liberate the cedent ; and that the difference lay in this, that a power to sub-set did only imply a power to give off a part, but not the whole ; and that therefore, where a tack is granted only to the tacksman and his sub-tenants, an assignation would be null.

No. 163.

Import of a tack to the tacksman and his assignees, and of a tack to the tacksman and his sub-tenants.

No. 163. But the Lords came to no resolution ; for the petition being appointed to be seen, the matter was taken up by the parties.

Kilkerran, No. 2. p. 532.

1748. June 22.

BOWACK against CROLL.

No. 164.

An assignee to a tack preferred to one who had obtained a sub-tack previous to the intimation of the assignation, he being proved to have been in the knowledge of the assignation.

Import of a tack let to a man and his sub-tenants.

The deceased Garden of Troop, in 1732, set a tack for nineteen years to Thomas Jamie during his life, and after his death, to John Beaty his son-in-law, their heirs, sub-tenants, and helps, of no higher degree than themselves. Thomas Jamie died in 1743, and John Beaty, on whom the right devolved, allowed John Croll, who had been servant to Jamie, and had married one of his daughters, to continue in the possession, but without any sub-tack or assignation ; and upon the 14th December that year, Beaty granted an assignation of the tack to James Bowack, which, upon the 29th February thereafter, he intimated to John Croll, who was in the natural possession in the manner that has been said.

Notwithstanding this assignation, Beaty, on the 23d February, 1744, granted a sub-tack to John Croll of the whole subject, and therein declared his possession to have been and begun from the Whitsunday 1743 preceding ; and in the action of removing pursued by Bowack the assignee, against Croll, before the Sheriff of Forfar, Croll having founded upon his sub-tack as the preferable right, the Sheriff, by his interlocutor of the 29th May, 1744, found, “ That Croll, being in possession, was *in bona fide* to take the sub-tack from Beaty before the intimation of the assignation, Beaty the cedent not being then denuded ; and assoilzied from the removing.”

Bowack having advocated his own cause, the Ordinary, at discussing the advocacy, “ repelled the reasons of advocacy, and remitted the cause.” Against which, Bowack reclaimed on the following grounds :

1mo, That Croll was *in mala fide* to take the sub-tack, having been at the time in the actual knowlegde of the prior assignation to him, which he offered to prove. *2do*, Supposing the sub-tack to have been taken *bona fide*, and attaining the first possession to be preferable to the prior assignation, yet the Sheriff had erroneously taken in the circumstance of Croll’s being in possession, as if thereby his sub-tack had been clothed with possession ; for that although he was in the natural possession, yet it was not such as could clothe the sub-tack with possession, having begun upon a different title, which, during the currency of the term, he could not change to the prejudice of a third party who had acquired an anterior right, and that nothing could clothe the sub-tack with possession but an overt act of possession upon the sub-tack itself ; and as that could not be alleged, it necessarily followed, that both were *in pari casu* in that respect, neither of them having obtained possession in virtue of the titles under which they claim. And farther, *3dly*, In order to obviate an objection that had been made for Croll the sub-tacksman,