out-town multures. There must be a proof of such payment of multures as to show that the coming to the mill was *necessitatis*, not *voluntatis*: and so it was found in the case of *Bathgate*. It is necessary to establish that the multure paid was higher than what the malt could have been grinded for at another mill, with equal conveniency in point of distance.

HAILES. I doubt of the thirlage being established in this case, except as to those feuars who are expressly astricted by their charters: out-town and in-town multures are relative terms. It is admitted that every one who goes to this mill, pays the precise same multure. How then can any argument thence arise? or, how can there be any in-town multure more than out-town? I lay no great stress on the acts of court: they are not formal: the latest is in 1702. It does not appear that execution ever passed upon them: they are but four in number, and two of them relate to wheat, not malt. As to the steel mills, they are but a late invention at Alloa; and, consequently, the prohibiting the use of them, or exacting multure from the users of them, must also be a late practice. The first steel mill at Alloa appears to have belonged to the proprietor of the mill; and, when he allowed any one to use it, it was natural for him to require some consideration to be paid to his miller, who would otherwise have had reason to complain that his master withdrew customers from the mill.

KENNET. There is no mill so convenient for the people of the barony as this mill. It can have no custom from without; for all the neighbouring estates have mills of their own.

KAIMES. If the mill is more ancient than the feus, (which is admitted to be the case,) this would afford a great circumstance of presumption in favour of the thirlage.

On the 10th March 1769, "the Lords found the defenders astricted."

5th July 1769, adhered.

15th February 1770, "found defenders liable in abstracted multure for three years preceding citation;" altering Lord Monboddo's interlocutor.

Act. R. M'Queen. *Alt.* A. Lockhart.

Rep. Monboddo.

Diss. Monboddo, Hailes, President.

1769. *March* 10. ARCHIBALD DUFF of Drummuir *against* JAMES DAY.

TACK.

Power of Subsetting implied in a Lease of Nineteen Years.

THE defender possessed a farm belonging to the pursuer, on a lease for nineteen years, in which no mention was made of a power of assigning or subsetting. The defender having subset a part of the lands, an action of removing was raised by the pursuer against him and his subtenant. In defence, it was stated that, as the lease did not debar subtenants, the power of subsetting was implied; and it was so found by Lord Strichen, Ordinary. In a petition, it was—

PLEADED by the Pursuer,—That the doctrine of the defender was opposed to

the authority of Stair, *lib. 2, tit. 9, sec. 22* and 26; M'Kenzie, *lib. 2, tit. 6, sec. 8*; and Bankton, vol. 2, p. 97; and that the opinion of these writers was supported by the understanding and practice of the country.

ANSWERED,—When these authors wrote, tacks did not receive so liberal an interpretation as is now put upon them. Moreover, their opinions are not supported by any decision, while there is a series of decisions on the other side: *Earl of Morton* against *Tenants*, *14th July* 1625,—*Howe* against *Craw*, *25th February* 1687,—*Mather* against *Lord Tarras*, *February* 1687,—*Rochead* against *Mudie*, *March* 1687.

The following opinions were delivered:

MONBODDO. I am of the opinion of the two decisions mentioned by Harcarse. This is agreeable to the Roman law, where the *conductor* might use the subject as he pleased. I can account very well for the opinion of the lawyers who doubted as to the power of subsetting. This was from feudal principles, where not land, nor money, but men were considered; and it was of moment what sort of persons were introduced into the estate of the lord: but these ideas are now obsolete.

HAILES. I doubt whether the lawyers of the last age meant that a lease for so long a term as nineteen years could not be subset, when subtenants were not excluded. Lord Stair considers a lease of nineteen years as approaching to a perpetuity; and, although this is erroneous, yet it shows that a tenant with nineteen years' lease was considered as having a great interest in the subject let. When a lease is granted for such a term, there can be no great *delectus personæ*, because no man's life is worth so many years' purchase.

KAIMES. I never doubted, since I was a lawyer, that a tack for nineteen years allowed subsetting, if not prohibited.

On the 10th March 1769, "The Lords found that the defender, in virtue of his minute of tack, accepted by the pursuer, is entitled to possess the lands libelled; and, as he is not thereby debarred from subsetting the same, therefore assoilyied the defender;" adhering to Lord Strichen's interlocutor.

Act. A. Lockhart. *Alt.* Cosmo Gordon.

1769. *March* 11. AYTON and COMPANY *against* HARRY CHEAP and OTHERS.

SOCIETY.

Copartnery, not bound by a commission executed after dissolution, by death of one of the partners, or given by one partner while ignorant of the death of the other.

[*Faculty Collection, IV.* 170; *Dictionary*, 14,573.]

HAILES. If the first part of the Ordinary's interlocutor is altered, it will fol-