

No. 165.

1750. *November 16.* WALLACE *against* CAMPBELL.

A debtor who possessed a tack of a house, conveyed the tack to his brother, along with the household plenishing, on condition, that the brother should relieve him of his debts, some of which he concealed from him. The brother again gave a sub-tack of the house to the debtor, for a moderate rent, for a certain number of years, during which time it was hoped that the debts might be cleared off. One of the creditors, for whose debt the brother had not become bound, raised an adjudication, and thereupon a process of mails and duties; and here the brother produced his interest, and insisted for a preference on his assignation to the tack. Objected for the adjudger, That the assignation was a private transference in fraud of creditors, and besides did not convey the right, not being clothed with possession. Answered, That the assignee possessed by his sub-tacksman, which certainly completed the transference; and that the assignation of a tack requires no public intimation, but is completed by the assignee's possession, or, which is the same thing, by his sub-setting it. The Court, however, preferred the adjudger to the assignee.

Fol. Dic. v. 4. p. 324. Rem. Dec. Kilkerran. D. Falconer.

. This case is No. 48. p. 2805. *voce* COMPETITION.

1770. *November 22.*

ARCHIBALD TROTTER, Merchant in Edinburgh, *against* ALEXANDER DENNIS, Tenant in Eastraw, and Others.

No. 166.
If, in a tack for 57 years, an exclusion of assignees excludes also sub-tenants?

Robert Mowbray, the pursuer's author in the estate of Castle-Law, granted a tack "to William Dennis and Elizabeth Burton his wife, and longest liver of them two; and failing both of them by decease, to the said Alexander Dennis, and to the heirs of the said Alexander, excluding the assignees of all and each of them," of the lands of Eastraw, for the space of fifty-seven years. Alexander Dennis having succeeded to the lease in the year 1757, found it convenient to sub-set some parts of the farm to different persons; upon which Mr. Trotter brought an action, "concluding for reduction of the principal tack, and of the assignations and sub-sets that may have been granted; at least to have it found that Alexander Dennis and his heirs have the only right to possess the said lands, and that they ought sufficiently to stock the same; and in case they should fail to enter to possession of the lands, stock and labour the same, &c. that the said tack is forfeited; and that the whole defenders ought to remove from their respective possessions."

Pleaded for the pursuer:

It was established law, that the seclusion of assignees rendered the right so personal to the tacksman and his heirs, that it even debarred creditors from affecting

the same by diligence for payment of just debts, Elliot against Duke of Buccleugh. No. 14. p. 10329. *voce* PERSONAL and TRANSMISSIBLE. If the express exclusion of assignees had this effect, *multo magis* ought it to prevent voluntary sub-sets granted by the tacksman. There was no difference betwixt an assignation and a total sub-set of the possession; so that whenever assignees were expressly excluded, as in the present instance, sub-tenants were also understood to be debarred.

Pleaded for the defender:

It was an incontrovertible principle, that a tack for fifty-seven years did, in its own nature, imply a power in the tenants both to assign and sub-set. In a tack for so long a period, the *delectus personæ* could have little weight; and it must therefore, from the nature of the right, in this case be presumed that there was a power to sub-set, unless it could be shewn that it was expressly prohibited. No such restraint could be fixed down upon the tenant by implication; on the contrary, when assignees were expressly excluded, it was a sufficient indication of the intention of parties that the tenant should have a power to sub-set. Parties often mean to exclude assignees, and to allow of sub-tenants, Crawford against Maxwell, Sect. 11. *infra*. so that notwithstanding the similarity betwixt an assignation and a sub-set, as the allowing the one did not imply an allowance of the other, neither could a similar prohibition be further extended. The precise question had been repeatedly determined.

The Judges were of opinion, that there was a clear distinction between assignees and sub-tenants; as, in the one case, the tenant was changed, in the other not; and that an exclusion of assignees did not comprehend an exclusion of sub-tenants. No positive decision was, however, given upon this occasion; for as some of the particular facts were controverted, a remit was made to the Lord Ordinary for further inquiry.

Lord Ordinary, *Elliock*.
Clerk, *Kirkpatrick*.

For Trotter, *Macquosen*.
For Dennis, *Sol. H. Dundas*.

Fac. Coll. No. 50. p. 140.

1773. *January 23.*

THOMAS JAMIESON-DURHAM of Duntarvie, *against* GEORGE HENDERSON and ALLAN LIVINGSTON.

By a tack, dated September 7, 1767, the pursuer let to Livingston, then baker in Canongate, his heirs and successors, excluding assignees and sub-tenants, the Mains of Duntarvie, for the space of 21 years, from Martinmas 1767, for the yearly rent of £.78 Sterling.

In August 1770, the landlord, upon the ground of the tenant's incumbered circumstances, and of his crop and stocking being poinded for debt, in an appli-

No. 167.

Whether the exclusion of assignees and sub-tenants in a tack bars even a temporary assignment in security?