1773. *January* 23. THOMAS JAMIESON DURHAM, Esq. *against* GEORGE HENDERSON.

## TACK.

**The exclusion of assignees and sub-tenants in a tack found to bar even a temporary assignment in security.**

[*Fac. Coll. VI.* 127; *Dict.* 15,283.]

AUCHINLECK. Here there is plainly an assignation denuding the tenant. Unless a clause, *secluding assignees*, shall be found to import nothing, this assignation is ineffectual.

PITFOUR. The right here is no more than a temporary right of possession: it is no assignation.

[Before the Court sat down, Lord Pitfour spoke to me in favour of the tenant. I told him that my interlocutor had kept him right. Then, said he, *keep him right still.* I told the President of this extraordinary incident, being the first solicitation that I had ever received.]

GARDENSTON. I cannot reconcile this claim of the tenants with any principles of law. Parties, by giving the name of factory to an assignation, will not change the nature of the case. I do not approve of the conduct of the heritor. I would not act so were I in his circumstances: but we sit here to judge of the rights, not of the conduct of parties. My only difficulty is how we can remove the principal tenant. If he says he will go back to the possession, how can we hinder him.

KAIMES. The clauses bearing assignees and sub-tenants, were intended to prevent tacks from going from hand to hand in the way of bargain. The case of a bankruptcy was not adverted to, yet it has been found that a bankrupt tenant cannot assign. The deed in controversy is an assignation.

PRESIDENT. The exclusion of sub-tenants and assignees was a wise regulation: it was introduced when masters were liable for the delicts of tenants: besides, there is in tacks a *delectus personæ*. The deed here is an assignation.

On the 23d January 1773, the Lords found that the deed was an assignation in security, and therefore decerned in the removing.

*Act.* J. M'Laurin. *Alt.* Alex. Bruce. *Rep.* Stonefield.

10th February 1773, adhered, in respect that the judgment does not bar Livingston from entering into possession and stocking the farms.