

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?

No. 167. cation to the Sheriff, insisted, that he should be ordained instantly to find caution properly to labour, plough, and sow the farm possessed by him, or otherwise be decerned to remove. On this occasion, George Henderson, one of Livingston's creditors, having, at the desire of the rest, judicially offered to become surety for implement of the tack to the landlord ; who pleaded, on the other hand, that, from a letter which Henderson had sent him, in name of the creditors, it was plainly meant to introduce another tenant upon him, contrary to the terms of the tack ; the Sheriff, on considering the tendency of his own application, and the sufficiency of the caution offered, found that the tenant was not obliged to remove from the farm. Which judgment, upon an advocacy, was affirmed in this Court, it being then understood and expressed, as a *ratio* in the decision, that the defender had not removed from the farm in question, and that he was presently residing upon it.

But, about this period, Livingston had gone back to Edinburgh, and resumed his former business, after putting Henderson in possession of the farm ; wherefore the landlord brought an action, both against Livingston and Henderson, concluding, that the tack was now become void and null, and that the same reverted to the pursuer ; and, in consequence, that Livingston and Henderson should be decerned to remove.

The special grounds of this action were, the bankruptcy of Livingston, and his relinquishing the possession ; and that it was not in the power of him, or his creditors, to subset the same to Henderson, or to authorise him, in any shape, to possess it, contrary to the express terms of the tack. And Henderson having been at length compelled to exhibit the title of his possession, he produced the following writing : “ *December 29, 1770.*—Sir, As you have, at my earnest desire, become caution for me to Mr. Jamieson of Duntarvie, for the rent of the farm I there possess, and, as you have also agreed to advance to me, and for my creditors, certain sums of money, to the amount of £.300, and, as I am at present unable, from the situation of my affairs, to stock or manage the said farm myself, but, desirous to give you any security I can for your safety, I therefore desire you to take the management thereof, in order to relieve yourself, not only of the cautionry above mentioned, but of the money advanced by you for me, in manner foresaid ; with full power to you to plough, sow, labour, and manure the same, as you shall think proper, and to dispose of the whole produce thereof at your pleasre ; reserving for myself the two cot-houses and yards now possessed by John Young and Henry Marshall ; and I being obliged to uphold the same, and to pay to the laird yearly four hens therefor, in part of the kain payable by the tack, you being to manage and possess the whole remaining part of the farm, until such time as I shall be able to repay you the monies advanced, or to be advanced by you, or for me, and also such sums as you shall lay out in inclosing, or other meliorations, on the farm, in implement of the tack, and also of all such grass seeds as you shall sow on the farm, of which you shall not have reaped two crops ; but you, by your acceptance hereof, being always obliged to

relieve me of all rent during your possession, and I being at full liberty to resume my possession at any term of Martinmas, eight months after repaying to you the sums advanced, or to be advanced, by you, to and for me, with interest from the time of the advance; and also of such expenses as you may be led into, in defending your possession; and I promise, when required, to sign any factory, commission, or other deed, that may be thought necessary, for securing you in the management and possession of the farm, for the purposes aforesaid, and to do no deed in prejudice hereof. I am, Sir, your humble servant,"(signed) ALLAN LIVINGSTON." Addressed, "To Mr. George Henderson at Craigtoun."

Pleaded in defence: The possession acquired by a tenant, in consequence of his tack, is his property. All restraints upon property ought to be strictly interpreted; and, therefore, the right granted by Livingston to Mr. Henderson ought not to be held to fall under the excluding clause of the tack in question; for that clause only excluded subtenants and assignees, but not factors. Now, the right under challenge was no more than a factory and power of managing the farm, not an assignation, which implies a total conveyance of the lease; whereas Mr. Henderson's right was redeemable and extinguishable.—Livingston himself is now in much better circumstances. He has transacted with most of his creditors, and is carrying on the baker business in the same manner as when he got the tack. He did not intend to reside when he got it. He came under no obligation to reside; and it is well known many people have now a variety of different farms, on none of which they ever reside, but carry on the business by servants and managers. Why, then, should not Livingston be indulged in the same manner, and allowed to carry on his farm under the management of whatever person he pleases?—Hitherto the rent has been regularly paid; nor does he, at this moment, owe Mr. Jamieson one farthing.

Answered: Restraints upon property ought no doubt to be strictly interpreted; and that position strikes against the defenders; for tacks are grants, by which a man is divested of the possession and administration of his property, and therefore are *stricti juris*. They likewise imply a *delectus personae*; on which account a tenant cannot assign his tack, without an express power. The only question here is, whether the giving the name of a factory to the conveyance the tenant has made to Henderson will elude the law?

Though in the form of a letter, it is in reality, and to all intents and purposes, an assignation; so that it signifies nothing what name it gets, as *plus valet quod agitur, quam quod simulate concipitur*.—By this deed Henderson has as full a right to the possession of the farm, till his debt be paid, as Livingston had. Whether Henderson's intromissions may, before expiry of the tack, extinguish the sums due to him by Livingston, the pursuer cannot say. It is by no means essential to an assignation, that it be for all the years of the original tack. The exclusion of assignees strikes as much against an assignee for one year, as an assignee for the whole years of the tack; against an assignation that is redeemable, as well as

No. 167. against one that is absolute. In the case of an adjudication the right is redeemable; but, in no case will the law allow a tenant, or set of tenants, to be obtruded upon the landlord, whom he has excluded. In the present case, there is not the least room to doubt that the tenant is changed. Livingston, the original tenant, has become bankrupt; all his effects have been pointed or sold; he wrought as a day labourer to Mr. Henderson, his creditor, whom he put into the possession of the farm; thereafter he grants him a missive, giving him full right to the possession, and obliges himself to sign any other deed that might be thought necessary; and, to crown all, he relinquishes the farm, retires to the Canongate, and there takes up his first business as a baker. If, after all this, Mr. Henderson shall not be accounted an assignee to the tack in question, it is inconceivable what writings, or what circumstances, are requisite to constitute that character.

“The Lords repelled the defenses, and decerned in the removing, both against Henderson and Livingston.”

Act. *M'Laurin.*

Alt. *Al. Bruce.*

Clerk, *Ross.*

Fol. Dic. v. 4. p. 325. Fac. Coll. No. 48. p. 127.

* * See note relative to this case in the Appendix to this Title.

1775. *March 9.*

JOHN GILLON of Wallhouse, *against* KATHARINE MUIRHEAD, and ANDREW DICK her Husband.

No. 168.

Tack granted for a term of years to a man and his wife, and longest liver, and the heirs of the longest liver, including assignees, the wife surviving, and continuing the possession of the farm,—Whether does her subsequent marriage irritate the tack?

In March 1771, Mr. Gillon granted an eighteen years lease of certain lands to Alexander Thornton, and Katharine Muirhead his spouse, and the longest liver of them, and the heirs of the longest liver, expressly excluding assignees and subtenants; declaring, that, if any of them shall subset or assign, then the said tack should, *ipso facto*, become null and void.

In virtue of this tack, Thornton possessed during his life; and Katharine Muirhead, who continued to possess after his death, having entered into a second marriage with the other defender, Dick; the landlord understanding, that this event put an end to the tack itself, instituted an action of removing, before the Sheriff of Linlithgowshire, upon the act of sederunt 1756, concluding against the defenders to remove, in respect of Katharine Muirhead's second marriage, which imported a legal assignation to her husband, and consequently a forfeiture of the lease; but the Sheriff, upon advising the same, pronounced the following interlocutor: “Finds, That the said tack is not irritated by the defender Katharine Muirhead's marriage, and therefore assoilzies from the removing.”

Mr. Gillon having brought the cause by advocacy to this Court, and the Lord Ordinary having ordered informations, it was

Pleaded for the pursuer: That the point now to be determined is shortly, whether or not the marriage of a tacks-woman be a contravention sufficient to irritate her right, when, in the tack, assignees are expressly prohibited, under the penalty of an *ipso facto* forfeiture? That the pursuer is not singular in his opinion