

No 28.

provision, that in case assignation or disposition were granted or made of them, without consent of the setter, the rentals should be null ; and true it is, that sundry of the defenders had made assignation to their bairns, and put them in possession.—THE LORDS found, that such dispositions and assignations, made to mens' own bairns, could infer no nullity.

Auchinleck, MS. p. 204.

1632. February 21. L. JOHNSTON against Captain JOHNSTON.

No 29.

A rentaller assigned his rental, and the assignee entered to possession. The irritancy being thus incurred, it was found, that a posterior sub-tack could not support the assignee in possession.

IN a removing, the defender alleging that he had a sub-tack of the lands libelled, set to him by ———, who was liferent rentaller, and who was yet living ; and which rental was set to the rentaller, his heirs, executors, and assignees, and by virtue of the sub-tack in possession ; the pursuer *replying*, That the rentaller, before the setting of this sub-tack, had disposed this rental to the same defender, by virtue of the which disposition he became in possession of the lands, and was possessor thereof, and of the profits and duties, a whole year before he acquired the sub-tack, by the which disposition the rental became extinct and null, and so can neither defend the rentaller nor acquirer of the right thereof ; and, consequently, the same being null, there could no valid sub-tack be made thereafter, which could defend ; even as after the acquiring of an infestment of the lands of ward-holdings, whereby the benefit of recognition was acquired to the superior, the receiver of the ward-right could never thereafter take a feu-infestment, which could validly maintain him against the superior ; and the defender *duplying*, That the disposition could not prejudice him to take a sub-tack, after that he knew that the disposition would not be effectual to him, specially seeing he clothes not himself with the disposition, but with the sub-tack, and which he alleges he might lawfully take before ever he was called in question for the right of these lands, or that the nullity of the rental was obtruded ; for before the rental was quarrelled as null, by reason of the alleged disposing thereof, he might lawfully renounce that right, and take a better right, viz. the sub-tack, and which he having taken *debito tempore*, as said is, before any question was moved for these lands, the same should defend him in this judgment possessory ; and he cannot be so summarily removed, except the rental were reduced for that cause ; THE LORDS repelled the said allegation and *duply*, and admitted the reply, to take away the rental in this same judgment, without reduction ; for the LORDS found this disposition made before the sub-tack, albeit not quarrelled before the sub-tack, having taken effect by one year's possession before the sub-tack, was sufficient to make the rental become null, and consequently that the rentaller could not validly set thereafter a sub-tack thereof.

Act. *Stuart et Cunninghame.*

Alt. *Nicolson et Burnet.*

Clerk, *Scot.*

Fol. Dic. v. 1. p. 484. Durie, p. 622.

* * * Spottiswood reports this case :

No 29.

IN a removing pursued by the Laird of Johnston against Captain Johnston and others; *excepted* upon a rental granted by the Lord Harris, the pursuer's author, to N. to whom the defender was tacksman. *Replied*, The rental was void, in respect he offered to prove that the rentaller had made a disposition thereof to the defender, and that before the alleged tack, by virtue of which disposition the defender was in possession two or three years, at least one year before the tack. *Duplied*, Not relevant to take away his standing tack, to which he ascribed his possession; for, granting he had taken first such a disposition, thinking he might by law take it, and afterwards being advised by his advocates to take a tack in place of it, his first oversight should not prejudice him, being a countryman unacquainted with the law, especially he having gotten the tack, and possessing by virtue thereof many years before it was challenged. *Triplied*, The rental once being forfeited, the rentaller had no more right to set a tack. THE LORDS repelled the exception in respect of the reply.

Spottiswood, (RENTAL.) p. 290.

1633. January 31. L. CLEGHORN against CRAWFURD.

IN a removing, the defender *alleging*, that she had a rental; the pursuer *replying*, That she had tint the same, in so far as she had set the lands therein to sub-tenants, which was against the nature of the rental, and made the same thereby to expire; THE LORDS sustained the exception, notwithstanding of this answer; for they found, that the in-putting of a sub-tenant to labour the land, was not of that force to make her tine her rental, where there was neither sub-tack, nor any other disposition or deed done by her in writ, alleged by the pursuer.

Act. *Mowat.*

Alt. ———

Clerk, *Gibson.*

Fol. Dic. v. I. p. 484. Durie, p. 667.

No 30.
Found in conformity with
Ayton against Tenants, No 24.
P. 7191.

1734. January.

SIR JOHN HOME of Manderston against MARGARET TAYLOR, and her Husband.

No 31.

THE question occurred, whether a tack set to a woman, secluding assignees, is void upon her marriage? For the affirmative, the authority of Craig was given, L. 2. Dieg. 10. § 6.; Stair, L. 2. T. 9. § 26. On the other hand, it was *pleaded*, That here there is no assignation, because a tack secluding assignees falls not under the *jus mariti*. *2do*, *Esto* there were, the assignation could only be annulled, but not the tack. See Stair, *eadem titulo*, § 16. *in fine*. *Answer*—