

caution in time coming, or remove; but where two years rents are owing, it is an irritancy of the tack, and competent for the master to declare the same void. Though even in that case, where there is no conventional irritancy, the Lords are in use to supersede extract till a time certain, between and which, if the tenant give bond, with a sufficient cautioner, to pay the by-gones at a term, with annual-rent thereafter till payment, and for payment of subsequent crops, &c. in that case, they stop extracting the decree; and they did so in this case.

*Fol. Dic. v. 4. p. 328. Kilkerran, No. 3. p. 533.*

No. 189.

1758. June 28.

RONALD CRAWFURD, Writer to the Signet, *against* ROBERT MAXWELL and his CREDITORS.

John Hay, writer to the signet, in 1745, granted a tack to Robert Maxwell, his heirs and subtenants, secluding his assignees, of two inclosures, part of his lands of Coatfield, *alias* Restalrig, for nineteen years, commencing at Christmas 1745, at the yearly rent of £.122 10s. Sterling; under a condition, that the lands let should be kept in grass, and used for pasture allenary, excepting the first three years, when he was allowed to cut them for hay.

Those lands became afterwards forfeited to his Majesty, by the attainder of John Hay; and were, in 1753, purchased from the Barons of Exchequer by Ronald Crawford.

Robert Maxwell, the tenant, soon after Mr. Crawford's entry, became insolvent. He was in arrear of rent to Mr. Crawford; and as he could hardly expect to find caution for so considerable a tack-duty, he was in danger of being removed. But, in January 1754, matters were accommodated between the master and tenant. Maxwell granted an obligation to Mr. Crawford, reciting, That his affairs had fallen into disorder, and that his corns and cattle had been sequestrated; but that "Mr. Crawford had allowed him to possess the said lands from Christmas 1753 to Christmas 1755, on his granting the security under-written; therefore he, and John Pringle, as cautioner for him, bound and obliged them to pay the rent for the said two years;" and also to sow up the ground with the crop, and lay it down in grass in a proper manner.

After these two years were elapsed, Maxwell continued in possession as formerly, till the end of the year 1757; when, being imprisoned for debt, he obtained a decret of *cessio bonorum*, after granting a disposition to his creditors of his whole effects; by which he, *inter alia*, "assigned from him and his heirs, &c. to and in favour of his creditors, the aforesaid tack granted to him by John Hay."

Afterwards, the creditors finding that Maxwell had no power to assign his tack, obtained from him, on the 16th of January 1758, a sub-tack to Alexander Macdougall, (a trustee for the creditors); whereby he subset to him, his heirs and

No. 190.

A bankrupt tenant having a tack to him and his subtenants, secluding assignees, may effectually subset his whole possession, if the subtenant find security for the rent payable to the master.

No. 190. subtenants, his whole possession during the remaining years of the principal tack, for payment to Maxwell of the yearly rent therein stipulated.

Upon Mr. Crawford's application, Maxwell's assignment of his tack to his creditors was ordered to be struck out of his judicial disposition *omnium bonorum*, in respect that, by the tenor of the tack, it was not assignable; but Mr. Crawford at the same time insisting in a removing against Maxwell, he, and his subtenant, Mr. Macdougall, and the other creditors, opposed the same, upon the ground of the sub-tack's being an effectual right to the possession of the lands.

Pleaded for Mr. Crawford, *1mo*, Maxwell having assigned the tack in favour of his creditors, together with his whole stocking, and they having accepted thereof, Maxwell was thereby denuded both of the right and possession; and as that assignment was contrary to the prohibition of the tack, and so found null and void, Maxwell's right in the tack was thereby at an end, and it was not in his power thereafter to grant a sub-tack; for if he was once denuded of the tack and possession by the assignation, the right thereto could not return to him upon the avoidance of that assignment, at the suit of his master; Balfour's Pract. p. 205. § 130. & 140.; Craig, Dieg. 10. § 3.

*2do*, Supposing no assignment had been granted by Maxwell to his creditors, yet the sub-tack is void, in respect of its being of the whole possession, and of Maxwell's utter bankruptcy. The contract of tack is strictly personal, being founded on the confidence which the master has in the tenant and his circumstances; a power of subsetting, therefore, could only be meant to enable the tacksman to subset little parts of his farm, he himself remaining the effective tenant; a total subset being equivalent to an assignation; which is prohibited.

*3tio*, Where a power of subsetting is exercised, the contract between the master and tacksman still subsists; and consequently the latter must still be in a condition to perform the prestations incumbent upon him by the tack; otherwise it must be dissolved; as, by the nature of all mutual contracts, the one party cannot continue bound, if the other party is unable to perform. Now, Maxwell is not only utterly incapable to perform, but having obtained a *cessio*, or decret of liberation, he is thereby exempted from all diligence and execution for implement of his obligations, except as to his future acquisitions; which is such a change upon the *status personæ* of the tacksman, as must necessarily dissolve the contract or tack.  
And,

*4to*, The agreement between Mr. Crawford and Maxwell, in January 1754, for two years possession, which is therein acknowledged by Maxwell to have been "an allowance" upon the part of Mr. Crawford, imported an implied renunciation of the former tack.

Answered for the defenders, *1mo*, The assignation granted by Maxwell to his creditors was not a voluntary deed, but what he was considered to be by law obliged to give, although it proved ineffectual in respect of the tenor of the tack. But as that assignment is now found to have been void, it follows, that the granter

was not thereby divested of the right; and consequently he might still exercise the powers competent to him by the tack. No. 190.

*2do*, The power of subsetting is unlimited by the tack itself; and therefore it cannot be restrained upon argument or implication.

*3tio*, Though the bankruptcy might be a ground of reducing a tack, or any other mutual contract, yet it does not void it *ipso facto*; and neither can it be relevant to reduce the tack, when the master is nevertheless sufficiently secured; which is the case here, as the defenders have stocked the farm, and are willing to find caution to the master for the payment of the rents. When that is done, the master will be absolutely secured; nor will there remain any ground in equity, more than in law, for depriving the lawful creditors of the tenant of a right, which was the most beneficial part of his estate and property. And,

*4to*, The obligation granted by Maxwell to Mr. Crawford, in 1754, contained no renunciation of the subsisting tack, but only respected a method of using the grounds, different from that stipulated in the tack. Maxwell's being allowed to continue several years in possession after the expiry of the two years mentioned in that obligation, shews, that the tack was still held to be subsisting by both parties.

“ The Lords sustained the sub-tack granted to Alexander Macdougall, he finding caution to Ronald Crawford for payment of the rent during the tack.”

Act. *D. Ross, T. Miller, J. Ferguson.*

Alt. *J. Montgomery.*

*R. D.*

*Fol. Dic. v. 4. p. 329. Fac. Coll. No. 112. p. 200.*

\* \* The like was found, 6th July, 1791, Ogilvie against Creditors of Fullarton; see APPENDIX.

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## SECT. XII.

### Tacksman deserting his Possession.

1628. February 7. L. BALVENY against L. INNES.

In an action betwixt Balveny and Innes, for payment of the duty of certain lands, set in tack by the Earl of Murray, heritor of the lands, to the pursuer, and for which the defender, as possessor of the lands, was convened for the crop 1623, and ever since; the Lords sustained this action against the defender, albeit

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No. 191.

Action sustained at the instance of a tacksman for the rent of lands, against