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existence, has a right to the tack, precluded only by the right of his father or predecessor; and whenever the father thinks proper to yield that preference to the heir, no person is injured, or entitled to complain. Whether the heir is old or young, can be of no consequence; for by the conception of the tack, the heir is called to the possession, though he was but just born, or was even *in utero* at the time of his father's death. The landlord has no right or privilege after he has granted a tack, but to receive or secure his tack-duty. The possession of the farm is as much the right and privilege of the tenant, by virtue of his tack, as the landlord's property is by his charter. And as the son, in this case, has new-stocked the farm, cultivated it properly, and hitherto paid his rent punctually, the landlord has no title to ask more, or to turn him out of a beneficial farm, of which he is lawfully in possession.

To the *second*, It is clear from the proof adduced, that the son entered to possession of the farm many months prior to the renunciation, and has publicly possessed the same ever since; being assisted with money for stocking, and in the management thereof, by his friends, solely for his own behoof. Nor is there the least ground for alleging fraud against the son, in whom it was natural and proper to accept of this assignation of a profitable tack. And with regard to the onerous cause said to be given to the father for granting the posterior renunciation, there is no evidence produced of the fact; and, at any rate, a person once divested, even by a gratuitous deed, has no right to make any posterior conveyance, either gratuitous or onerous.

“ THE LORDS refused the bill of advocacion.”

*Act. Garden.*

*Alt. And. Pringle.*

G. C.

*Fol. Dic. v. 4. p. 74. Fac. Col. No 171. p. 304.*

1770. November 21.

JOHN and WILLIAM CUNINGHAM & Co. JAMES HOTCHKIS & Co. and JAMES GRAHAM, for themselves, and as Trustees of William M'Gregor, *against* ROBERT HAMILTON, Esq. of Wishaw.

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A tack for 57 years, secluding assignees and sub-tenants, found not adjudicable.

CHARLES HAMILTON, late of Wishaw, granted a tack to William M'Gregor and his heirs, secluding subtenants and assignees, of the lands of Easter-park and Birkenhill, for 57 years, from Martinmas 1761. Prior to the year 1767, M'Gregor became debtor to Wishaw in considerable sums, as also to the other parties in this competition. Wishaw adjudged the debtor's lands; and the other creditors having done the same within year and day, a multiple-pounding was brought in name of the tenants, calling Wishaw and the other creditors to dispute their preference. The several adjudications of M'Gregor's subjects being produced, it was objected on the part of Wishaw, that the tack of 12th

August 1761, excluding assignees and subtenants, was not adjudicable by the creditors; and, on the other hand, it was contended, that however effectual such clause might be to exclude a voluntary assignation, it could not bar the diligence of lawful creditors.

THE LORD ORDINARY found, "That when a proprietor sets his lands in lease to a tenant and his heirs, excluding assignees and sub-tenants, this shews that he had in view, which is known to be common and natural, to favour a particular person and his family, and not to expose himself to the hardship of having a tenant forced in upon him, who, upon many accounts, might be disagreeable; and therefore finds this seclusion is effectual, not only against voluntary assignees, but also against legal assignees by adjudication; consequently, that the creditors of M'Gregor the tenant, by their adjudication of the tack of Easter-park and Birkenhill, can take nothing, and have no title to compete with Mr Hamilton the proprietor."

In a reclaiming petition, the creditors *pleaded*,

It was adverse to the first principles of law and justice, that any beneficial estate should be so established in the person of a debtor as to secure him therein, and exclude the diligence of his lawful creditors. If the exclusion of assignees in the tack in question was to bar the diligence of creditors by adjudication, that consequence would follow; and the apparent injustice of this proposition had introduced a distinction in the construction of clauses of this nature, between a voluntary assignation and an attachment of the right by legal diligence. 3d February 1619, Bruce *contra* Buckie, No 91, p. 10435.; 30th July 1680, Bruce *contra* Vassals of Loch Leven, No 92. p. 10435.

In short leases, a *delectus personarum* might be presumed, but not where a lease was granted for a long term of years, and to the lessee and his heirs. In the present instance, the excluding clause in the tack was qualified thus, 'Except by the special consent of the proprietor;' and hence it might be presumed, no more was thereby intended than a reserved faculty to the granter to refuse his consent to a voluntary assignment upon reasonable grounds, but not to comprehend the diligence of lawful creditors adjudging for their just debts. The decision referred to, Kilkerran, 4th December 1747, Elliot *contra* Duke of Buccleuch, No 14. p. 10329., was imperfectly stated by the collector, was but a single case, and repugnant to the former judgment of the Court.

Mr Hamilton *answered*; It was a fixed principle in the law of Scotland, that tacks granted to a tenant, or to a tenant and his heirs, without mentioning assignees, were personal to the tenant and his heirs, and unassignable. This had been carried so far, that tacks, not mentioning assignees, not only excluded voluntary assignees chosen by the tenant, but legal assignees. Craig, lib. 2. Dieg. 11. § 6. Spottiswood, tit. Tacks. Lord Stair, B. 2. T. 9. § 26. Jan. 1734, Home of Manderston *contra* Taylor, No 31. p. 7199. The foundation of this principle was the admitted *delectus personarum*, and which was not varied by the tack's being granted for a longer time than usual. For though

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there might not be a particular person in view for the whole period, the landlord might still have a predilection for a particular family; and as, upon that ground, an heritor was entitled to exclude the voluntary assignees chosen by the tenant, he appeared to have a still stronger right to reject his tenant's creditor adjudging; more especially, as adjudgers within year and day now came in *pari passu*, so that he might be obliged to receive any number whatever, as tenants under that description.

An heritor might qualify a lease with any lawful condition he should think proper. The exclusion of assignees was unquestionably such a condition. This very question was decided, Kilk. 4th Dec. 1747, Elliot *contra* Duke of Buccleuch, No 14. p. 10329.; and the reason why no other decision had occurred was, that the point was held to be fixed. If an assignation, either voluntary or judicial, was to take place contrary to an express prohibition in the lease, it would irritate the right, so that the creditors would have nothing to lay hold of; nor could they pretend that they had lent their money upon the faith of the lease, when they could not but know the limitation with which it was qualified.

It was separately *argued* for the creditors, That as Mr Hamilton had adjudged the lease himself, he had dispensed with the clause secluding assignees, and could not therefore lay hold of it to exclude the diligence of the other creditors. But to this it was *answered*, That this was done *sub modo*, in the event that, by a subsequent deed granted by M'Gregor, all the leases were superseded and adjudgeable; and even in leading the adjudication, Mr Hamilton had protested that his doing so should nowise infer an acknowledgment that the tacks, &c. were adjudgeable by the creditors.

The Judges were unanimously of opinion, that the decision in 1747, Elliot *contra* the Duke of Buccleuch, No 14. p. 10329, was a proper judgment, and had decidedly fixed the point. One Judge threw out a doubt, and maintained, that as the landlord by the tack could consent to receive assignees, he had, by adjudging himself, done so, as the other adjudgers within year and day would necessarily come in *pari passu*; but as that adjudication had been qualified by a declaration and protest that it should not prejudice the prior right, this special objection was not regarded.

THE LORDS accordingly adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Aubinleck*.  
For Hamilton, *Macqueen*.

For Cuningham, &c. *Lockhart*.  
Clerk, *Tait*.

*Fac. Col. No 48. p. 136.*

\* \* \* It was found in a case, Duke of Roxburgh against Archibald, 5th March 1785, not reported, that where the heritor's consent was necessary to the assignation of a lease, he was not entitled arbitrarily, or out of mere caprice, to withhold it, where the proposed assignee was in good circumstances, and otherwise unexceptionable. See APPENDIX.