

No. 9. 'serving all other questions which may arise upon the terms or effect of the 'agreement referred to in the said petition.'

And, in the conjoined actions, a similar interlocutor was pronounced, and the defenders assoilzied on the same grounds.

*Fac. Coll. (APPENDIX,) p. 7.*

1805. November 21

LOWDEN against ADAM.

No. 10.

In a lease to a tenant, his heirs and executors, including assignees and subtenants, the right of the heir-at-law cannot be defeated by the tenant.

JOHN BROWN of Glasswell, on the 16th November 1771, 'sets, and in 'tack and assedation lets to the said Andrew Adam, *his heirs and executors*, 'cluding assignees and subtenants, all and hail,' &c. for the full space of thirty-eight years complete, and for the lifetime of the said Andrew Adam, after the expiry of the said thirty-eight years, if then in life, or in case he be dead, for the lifetime of his nearest heir or executor then in possession of the farm.

Andrew Adam entered into possession, but died, leaving an only son Andrew, who also died without issue, leaving a settlement in favour of his mother Jean Lowden, her heirs and successors, of 'all lands, tenements, tacks, 'heritable bonds, and infeftments of annualrent, and in general all heritable 'subjects whatsoever.' It contains also a particular disposition of the tack which had been granted to his father; and it also contains a general disposition in favour of Jean Lowden, of all his personal property, and nominates her his executrix, thus excluding his heir-at-law.

Jean Lowden entered into possession in 1795, on the death of her son. She died in 1802, and was succeeded by John Lowden, her brother and heir-at-law.

A summary action of removing was brought against him before the Sheriff of Forfar, at the instance of Peter Adam, as the heir-at-law of Andrew Adam, the original tacksman, with the consent of the trustees of the landlord.

The Sheriff decerned in the removing.

A bill of advocation having been passed and discussed, the Lord Ordinary (10th June 1803) repelled the reasons of advocation, and remitted the cause *simpliciter*.

The Court (12th June 1804) upon advising a petition, with answers, 'ad- 'hered.'

Lowden again reclaimed, and

Pleaded: When a tack excludes *assignees*, the parties can only have intended to exclude assignees *inter vivos*; but by it the tenant cannot be supposed to prevent himself from nominating his heir in this subject, as in every other which belongs to him. The *delectus personæ* might have induced the landlord to prevent the tenant he had selected from putting in another who was not of his choice; but it is not for the landlord's interest that it should descend to

the heir-at-law, whether an heir-male or an heir-female, or a number of heirs-female; whether wealthy or indigent; whether skilled or unskilled in the business of husbandry; whether fatuous or not; a minor, or of age. When a tacksman dies, the right to the tack is one of the subjects *in hæreditate jacente*, and it is taken up by his successor, in the same way as he does every thing else which belonged to him. In all such other subjects, there may be an heir *provisione hominis*; and it would be singular, if, in a tack, there is to be no such thing as an heir except *ab intestato*. But here the tack was in favour of the tenant, *his heirs and executors*; which last expression excludes any *delectus personæ*; for any person whom the defunct chooses to name, or failing him, the consistorial court, will be his executor. There is no appearance that these words were introduced by the conveyancer; but as he had admitted the exclusion of assignees, they shew that the intention was not to extend it to the tenant's heirs and *mortis causâ* successors.

Answered: As a lease is a mutual contract, the terms of limitation, or destination, are to be interpreted strictly according to the plain meaning of the parties; more particularly where the landlord is himself in some degree a substitute in the destination, and where any part of the term of endurance is of an eventual and liferent nature. A destination to heirs can mean only legal heirs. There is no room for supposing that the landlord intended to introduce a power of alienation by the appointment of an executor: If this had been so, it would have been specially provided. The term *executor*, has been added by the ignorance of the conveyancer; for, in regard to the legal succession, it is plain it could have no effect, as the heir would always be preferable; and it cannot be supposed, that it was the intention of the parties to make this lease a testable subject, and the subject of confirmation, so as to change entirely the ordinary and legal mode of completing titles to it, and to take it out of the law of death-bed; for this is contrary to law; Stair, B. 3. Tit. 8. § 29.

The Court, upon advising a petition, with answers, 'adhered' to their former interlocutor.

It was conceived, that this case was virtually the same as that of Cunningham against Grieve, as it was very clear that the addition of 'executors' was a mere blunder, and must be held *pro non scripto*, in the same way as if it had occurred in the settlement of a landed estate. For if executors be admitted, the anxious seclusion of assignees is unavailing.

Lord Ordinary, *Methven*.  
Alt. *Cathcart*.

Act. *G. J. Bell*.  
Agent, *Wm. Inglis*, W. S.

Agent, *Ro. Proctor*, W. S.  
Clerk, *Ferrier*.

F.

*Fac. Coll. No. 223. p. 506.*