

No. 12. series of many years; and it would be impossible, by such means, accurately to ascertain their amount. The acquiescence of the landlord is the best proof that he had altered his views with regard to the management of the farm; and his trustees, after his death, cannot enforce what he himself did not think proper to insist upon. A tenant ought always to be informed when the stipulations of his lease are to be rigorously insisted upon; and, if damage is to be claimed, it ought to be done immediately after the breach of contract which gives occasion thereto. When this is not done, he is entitled to presume that his landlord is pleased with his mode of management, and consequently that he may continue it till he obtain some intimation to the contrary.

The Court adhered.

Lord Ordinary, *Bannatyne.* Act. *W. Erskine.* Agent, *Ro. Ayton, W. S.*
 Alt. *Gillies.* Agent, *Tho. Scotland. W. S.* Clerk, *Pringle.*

F.

Fac. Coll. No. 239. p. 538.

1806. *May 23.*

SIME'S TRUSTEE, Petitioner.

No. 13.

Where a farm under lease had been subset, an assignation to the lease may be made to another, which will be effectual if he possesses by levying the subrents.

WALTER SIME, merchant in Aberdeen, obtained a lease from Lord Arbuthnot of certain subjects, for fifty-seven years from Whitsunday 1786. These subjects (20th March 1793) he subset to Robert Davidson, for the remaining years from Whitsunday 1792, for payment of the original rent to Lord Arbuthnot, and for £100 of surplus-rent payable to Mr. Sime himself.

Mr. Sime having borrowed a sum of money from William Fiddler residing in Aberdeen, granted (20th June 1797) his bond for it, payable 20th June 1798; and in further security, he subset to him the whole subjects contained in the original lease granted by Lord Arbuthnot, but under the burden of Mr. Davidson's lease, and that for thirty-three years from Whitsunday 1796: ' Declaring hereby, that the said William Fiddler, by his entering to the possession of the lands hereby subset, or uplifting the rents payable by the said Robert Davidson or others, he shall be obliged, first, to pay out thereof the hypothec rent payable yearly to Lord Arbuthnot, the proprietor of the said lands, in terms of the original lease thereon; and to apply the surplus-rent, first, for payment of the interest of the foresaid sum of £1000 Sterling, and the balance to be imputed in part payment of said principal sum: And in regard the said Robert Davidson stands bound by the foresaid sub tack in his favour, not only to pay said hypothec rent, but also the sum of £100 Sterling of additional surplus-rent to me, my heirs and successors: Therefore I, for me and my foresaids, make, constitute and ordain the said William Fiddler, his heirs and successors, my lawful cessioners and assignees, in and to the whole clauses, and obligations and conditions contained in my favour, by the

‘ original lease granted to me on the premises, and in and to the subtack granted by me to Robert Davidson, whole clauses and obligations therein contained ; and to the foresaid sum of £100 Sterling of additional rent, payable to me yearly by the said Robert Davidson, during the subsistence of the sublease.’

In virtue of this bond and assignation, Mr. Fiddler uplifted the surplus-rent of £100 from the subtenant, who continued to pay the rent due to the landlord, and to discharge all the services imposed by the principal tack upon the possessor.

In 1803, Mr. Sime became bankrupt ; his estate was sequestrated, and vested in the person of a trustee, who, in collecting the funds, sold the lease ; and a claim was made by Mr. Fiddler for payment of £612. 11s. 6d. the balance of his debt, as a preferable debt, out of the price.

To establish this right, an action was raised. The Lord Ordinary (27th June 1805) ‘ finds the pursuer has a preferable right to the tack in question, and proceeds thereof, to the extent of the balance of the debt due him.’

The trustee reclaimed, and

Pleaded : The deed under which the preference is claimed, is, first of all, a bond for borrowed money : So far all is well. It next becomes a subset by the granter, in the character of principal tenant, of a subject he had already subset for the term of his own possession : It is also an assignment of the principal lease, in virtue of which the cedent had, in the same instant, granted a subtack : Then it is an assignation to a surplus-rent payable by the subtenant in possession. Now, whether it be good or not as a sublease, it will be recollected, that the whole was already subset, and for the whole period of the original lease, to a tenant in possession. There was no room for another subset ; the granter’s power of subsetting was exhausted ; and it was impossible for him to affect the state of possession during the period of the original lease. The only interest the tenant retained in the subject was the right of receiving £100 of surplus-rent. This right he might transfer ; but the proper mode was by assignation, and not by sublease of the lands out of which it arose. In fact, the deed is nothing but an assignation to the surplus-rent ; for the creditor pays no rent in his alleged character of subtenant ; he is merely taken bound to apply the surplus-rent in extinction of the debt. But such an assignation to the surplus-rent cannot compete with the real right vested in the trustee, in virtue of the sequestration.

As an assignation to the principal lease it is inept, never having been completed by intimation to the landlord ; and as to the payments made by the subtenant, which are said to supply the want of intimation, they cannot be equivalent to intimation of the assignation to the surplus-rents. Besides, there could be no possession under this assignation to the lease. The lands were possessed by another ; and an assignation *retenta possessione* gives no preference to the

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The Court refused the petition, without answers.

Observed on the Bench: There have been many questions as to the mode of completing an assignation to a lease. But there can be none more effectual than possession; see 6th June 1794, Hardie Douglas. No. 46. p. 2802. Here there is all the possession that the case admits of,—the possession of the subrents, which implielso intimation to thé subtenants.

Lord Ordinary, *Glenlee*.
Clerk, *Home*.

For Petitioner, *Jeffrey*.

Agent, *Arch. Dunbar*, W. S.

F.

Fac. Coll. No. 247. p. 554.

1806. *December 5.* EARL OF CASSILLIS, *against* MACADAM and Others.

No, 14.
Tack for
twenty-one
years does not
imply a power
to subset.

THE Earl of Cassillis granted a lease of the farm of Turnberry to Quintin Macadam and his heirs for twenty-one years. It was totally silent as to the powers of the tenant to subset. Upon the death of Macadam, his brother succeeded to this lease, and granted a sublease to John Dunlop at an advanced rent. Upon this the Earl instituted an action before the Court of Session, to have it found and declared, that this lease did not confer upon the tenant any right to assign or subset, and, therefore, concluding, that the assignee or subtenant should be removed from the farm.

The Lord Ordinary, after ascertaining the facts in a condescendence and answers, took the cause to report upon memorials, when the pursuers

Pleaded: In all leases of land, a *delectus personæ* is implied. Consequently, tacks which are not expressly granted to assignees, are held to be personal to the tenant, unless the term of endurance exceed the ordinary period of human life. Erskine, B. 2. Tit. 6. § 31; Dirleton, *voce* Tacks, p. 196; Stair, B. 2. Tit. 9. § 22.; Bankton, B. 2. Tit. 9. § 11. It has been fixed, that a lease for nineteen years does not empower the tenant to subset; Allison, January 22, 1788, No. 170. p. 15290; Earl of Peterborough, March 8, 1791, No. 171. p. 15293; and as the lease in question is granted only for twenty-one years, which is a term of endurance not uncommon in that part of the country. there is no reason for holding that any extraordinary powers were understood to be conferred upon the tenant.

Answered:—It is a general rule of law, that every right competent to a party may be assigned by him at pleasure, unless there be some express limitation in the nature of the right. In leases of short endurance, indeed, there has been introduced an exception to this rule; but wherever the period of the lease exceeds nineteen years, by which the tenant is placed in a state of considerable independence, the rule of common law prevails, and the tenant is al-