

ced before his said intimation, yet seeing he was assigned long before, and had summoned the debtor assigned, which was his intimation, before the completing of the comprising, his prior intimation, before the comprising, and prior assignation, before the denunciation, ought to give him preference; even as if one had acquired an heritable disposition of his debtor's lands, if any other creditor had thereafter denounced these lands to be comprised, before he had perfected charter and sasine upon that prior disposition, the said denunciation and comprising following thereon, would never have preferred him to the said prior disposition, and charter and sasine perfected thereafter. THE LORDS preferred the prior assignee, being a lawful creditor, albeit a conjunct person, to the said posterior compriser; and found the denunciation made by the compriser before the intimation of the assignation, was no just cause to give the compriser preference to the assignee, but sustained the said assignation, although intimate after the denunciation, which denunciation, the Lords found did not affect the sum to the denouncer, nor made it to be so real, but that notwithstanding thereof, the assignee might perfect his intimation effectually thereafter; and yet an arrestment after assignation will be preferred to that assignation, if not intimate before.

Fol. Dic. v. 1. p. 180. Durie, p. 834.

1750. November 16. THOMAS WALLACE *against* CAMPBELL of Inveresragan.

ARCHIBALD CAMPBELL vintner in Inverary, having built a large inn for promoting his business, obtained from the Duke of Argyle a tack, commencing at Whitsunday 1740, to endure for three nineteen years, at the old tack-duty of 50 merks. Having contracted considerable debts, and being pressed with diligence, particularly at the instance of John Somervil, merchant in Renfrew; Campbell of Inveresragan, his brother, agreed to take off his debts upon getting a proper security; and the only one that could be given was a conveyance to the said tack, with the household plenishing. The plan concerted was, that Archibald should have a sub-tack for eleven years at a moderate rent, in which time, it was hoped, that the profits of his business might relieve him from his debts; and Somervil was brought into the concert, who consented to accept of L. 7 Sterling yearly from Archibald out of the rent to be paid by him to his brother for the sub-tack. This tripartite agreement was executed in the following manner: A disposition is granted by Archibald to his brother Inveresragan, dated 31st October 1741, which, after narrating the several debts above mentioned, extending to the sum of L. 324, 12s. Sterling, and subsuming that Inveresragan had agreed, upon getting the disposition, to relieve the disponent of the said sums, and for that effect to make payment thereof; 'therefore, for Inveresragan's further security, and better enabling him to make payment of the said sums, Archibald assigns to him his above mentioned tack

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tion of the assignation; because a denunciation does not affect the sum, nor make it so real, but that the assignee may effectually perfect his intimation thereafter.

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A person assigned a tack of a house to his brother, and his brother became bound to relieve him of his debts, some of which, however, he concealed. The brother granted him a sub-tack for a moderate rent. A creditor afterwards adjudged the tack. The brother pleaded preference on his assignation, alleging he was in possession by his sub-tacksman. The adjudger was preferred.

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‘ from the Duke of Argyle, with the whole insight and household plenishing ‘ within the same, all specially condescended on in an inventory subjoined to ‘ the disposition.’ Of even date, Inveresragan grants eleven years sub-tack to Archibald of the subjects contained in the disposition, at the yearly rent of L. 12 Sterling, whereof L. 7 to be paid to John Somervil. And Archibald, in order to make this rent effectual, became bound to relieve his brother of the tack-duty of 50 merks payable to the Duke. This transaction was not kept a secret ; it was publicly known to the whole town of Inverary ; and the assignment of the tack to Inveresragan was recorded in the sheriff-court books of Argyle, 19th November 1741.

In this transaction, Archibald dealt unfairly by his brother. Beside the said debts, which were reckoned the whole he owed, he was debtor to Thomas Wallace merchant, by bills, in no less than L. 100 Sterling, upon which adjudication was deduced in November 1742. In a mails and duties upon this adjudication, Inveresragan produced his interest. There was also produced a receipt by John Somervil to Archibald, of John’s part of the sub-tack duty ; and as for Inveresragan’s part, it appeared to be more than exhausted by an open account of furnishings which Archibald made to him. Inveresragan insisted for preference upon his assignment to the tack, which was completed according to the nature and intendment of the transaction.

The chief, or rather sole objection to the assignee’s preference was, that to allow property to be transferred in this slight manner, without inverting the possession, would be hurtful to commerce ; that by such latent rights, creditors may be entrapped, and particularly, that Archibald might have given assignments to twenty different persons of this tack, in the same manner that he gave it to his brother, without affording opportunity to the assignees to know of one another.

In answer to this objection it was premised, that, by the original law of this land, derived probably from the Roman law, it is a maxim, that *nudo consensu rerum dominia non transferuntur* ; the property of a moveable is transferred by delivery *de manu in manum*, and of an immoveable by introducing the purchaser into possession. But after subaltern rights upon land came in use, such as real servitudes, securities for money, &c. few of which admitted of natural possession, symbolical possession came to be established with regard to property itself, as well as all other rights affecting land ; after which, nothing was more common than to establish real rights, without inverting the natural possession ; witness a disposition of property reserving the granter’s liferent, a wadset granted with a back-tack to the proprietor, a disposition in security, an heritable bond, &c. This, it is acknowledged, proved inconvenient for commerce ; and therefore, those who had real rights upon land were directed to put their sasines upon record, which is a great security to the lieges.

With regard to *nomina debitorum*, it is probable that, originally, they were transferred singly by assignment, without the necessity of any other step to

complete the transmission ; but this being found inconvenient to commerce, a hint was borrowed from symbolical possession in heritable rights, to make intimation to the debtor necessary in order to complete the right in the assignee's person.

As to tacks, there are two methods of completing them, applicable to their different kinds. A tack of land is made real and complete by apprehending the natural possession, until which it remains a personal right ; whereby a posterior tack upon which possession is first apprehended, will be preferable. But in a tack which admits not natural possession, such as a tack of mails and duties, intimation to the tenants is the only method for completing the right ; and therefore, the tack which is first intimated to the tenants will be preferred ; and the same holds in an assignment to such a tack.

The present question is, Whether the sub-tack granted by Inveresrigan to his brother Archibald, did complete his own assignment to the principal tack, so as *funditus* to denude Archibald the cedent, and to bar both his legal and voluntary assignees ? This assignment cannot be put upon the footing of a tack of land to be completed by possession ; for an obvious reason, that it was an express article in the agreement, to leave the cedent in possession. The apprehending possession then as a means to complete the transference being excluded, there remained no other means but to intimate the assignment to Archibald the sub-tenant, who, by the covenant, was to remain in possession. And that this was the natural way of completing the right, must be evident from considering, that the assignment was in effect no other than an assignment to a tack of mails and duties, at least for the eleven years that Archibald was to continue in the natural possession. Had Archibald, before he assigned to his brother, sub-set the tenement, there cannot be a doubt that an intimation to the sub-tenant was the proper form of completing the assignment. If so, must not an intimation to Archibald himself, who was the sub-tenant, be held sufficient ? It cannot make a difference, that Archibald, in this case, was both cedent and sub-tenant ; such coincidences are not unusual in law, and the case is always understood to be the same as if there were really two persons, instead of one, who sustains the part of both.

The only question that remains, is, Whether Archibald the tacksman's assignment to his brother, was not in all views equivalent to an intimation made to him as sub-tenant ? It would be ludicrous to use the form of intimation to the man who is himself the granter of the right.

One of two things must necessarily follow ; either the assignment thus known to the debtor, must be a complete right *in suo genere* ; or such a transaction, however honest and fair, is ineffectual in law. The latter proposition cannot be maintained, if it be the purpose of law, which it undeniably is, to support and carry into execution every honest and fair transaction. Nothing therefore remains but to acknowledge the truth of the former proposition, viz. that the as-

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Supposing a danger to commerce by such private transactions, it is however the province of this Court, to square their decisions by principles of law, leaving consequences to the legislature. At the same time, the danger to commerce is but a bugbear, especially in the case of a tack of an urban tenement, which is merely a personal contract, and not a real right of the lowest kind. Suppose Archibald Campbell had sublet his house at L. 20 Sterling yearly, a higher rent than it will bear, an assignment to his brother of the tack intimated to the subtenant, would be a complete conveyance; and yet all this might be kept secret from Archibald's creditors. Nor is there any thing here but what occurs daily in the transmission of personal bonds. Creditors, it is true, may be entrapped; but the law must have its course till records be established for personal as well as real rights, if ever such a regulation be found convenient. It is true, that two persons are concerned in these transmissions, the debtor as well as the creditor; which affords greater opportunity of discovering the truth. But if this consideration weigh with the Court, another case shall be put, precisely similar to the present. An heritor, who is in the natural possession of his own estate, has a long tack of his teinds for an elusory tack-duty, which he assigns to a third party for an onerous cause. In the *first* place, this assignment needs no intimation, because the only person to whom it can be intimated is the granter himself. In the *next* place, here is a transaction in which as few persons are engaged as in the present. Tacks of teinds may be extreme lucrative rights, and yet whatever danger there may be to commerce, the supposed assignment is a complete right the moment it is delivered. Another example is a wadset, with a back-tack to the heritor, by which a man may be denuded of his estate, and yet matters remain, *quoad* possession, *in statu quo*. The records do not alter the law in this particular, but only put the lieges upon their guard. It is then no principle, that the inverting of possession is necessary for establishing a complete right, whether of property or of tack; and if so, the introduction of records, which are not extended to tacks, cannot vary the argument. The principle of law must stand as it did; and, if any argument can be drawn from the records, it can only be, that the records are imperfect, by not comprehending tacks.

Mr Wallace endeavoured to apply the law regarding base infeftments to this case; and it was asserted, that where lands are disposed, reserving the granter's liferent, the granter's possession, though a quality in the right, is not sufficient to complete the disponee's base infeftment. But it must be extremely obvious, that base infeftments regulated by the act 105, Parl. 1540, have no analogy to the present case, which falls not under the statute, in whatever view it be taken. At the same time, the statute gives no authority for maintaining, that the granter's possession, where his liferent is reserved, is not sufficient to complete the disponee's base infeftment; which, in effect, would be maintaining, that a base

infertment, however onerous or honest, is not capable to be made a complete right, where the granter's liferent is reserved. The statute concerns only base infertments so constituted as that possession may be apprehended; and establishes a presumption of collusion from the forbearing to apprehend possession. But it would be absurd to infer collusion from forbearing to apprehend possession, when, by the tenor of the transaction, the disponee is barred from the possession. And for this very reason it was found, that a base infertment is sufficiently completed by the granter's possession, where the liferent is reserved, 16th January 1730, Barclay of Busbie *contra* Gemmil, No 49. p. 1316.

'THE COURT notwithstanding preferred the adjudger to the assignee.'

Fol. Dic. v. 3. p. 154. Rem. Dec. No 116. p. 235.

. Kilkerran reports the same case :

THOMAS WALLACE merchant in Glasgow, being creditor to Archibald Campbell vintner in Inverary in certain bills, whereon he had done diligence by horning and caption in July 1741, did thereafter, in November 1742 obtain an adjudication of a beneficial tack his debtor had of some tenements in Inverary from the Duke of Argyle, for the space of three 19 years, for payment of 50 merks of tack-duty; and having thereon pursued an action of mails and duties, compearance was made for Colin Campbell of Inverasragan, who produced a disposition from the said Archibald his brother, bearing date in October 1741, whereon he craved to be preferred.

For understanding the grounds on which Wallace repeated a reduction of this disposition, it is necessary to know, that it proceeded upon a recital of several debts due by Archibald Campbell to sundry persons, to the amount of L. 324 Sterling, whereof only L. 61 Sterling was due to Inverasragan himself, and subsuming, that Inverasragan had become bound, by his acceptation of the disposition, to relieve his brother thereof, and that the said sum of L. 324 was agreed upon to be the adequate value of the subjects thereby disposed, therefore Archibald disposed the tack of the tenements possessed by him, with his whole household plenishing, to Inverasragan, for his security and relief. The disposition bore delivery of the tack, and of certain pieces of the household furniture as symbols of the whole. With that same breath Inverasragan, without taking any possession himself, grants a sub-tack back to Archibald of both house and furniture for eleven years, at the rate of L. 12 Sterling yearly, L. 7 whereof was to be paid to one of the creditors, whose debt made part of the L. 324 which Inverasragan had undertaken, and L. 5 to Inverasragan himself, with an obligation over and above, to relieve Inverasragan of the 50 merks of tack-duty payable to the Duke of Argyle.

This being the fact, the reasons of reduction of this disposition insisted on by Wallace were, *imo*, On the second alternative of the act 1621, as a partial

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preference to his brother and the other creditors, in prejudice of his ultimate diligence done some months before its date. *2do*, Upon the common law, as being a disposition *omnium bonorum* to his other creditors, in prejudice of the pursuer. *3tio*, Supposing the disposition not reducible on either of these grounds, he insisted to be preferred thereto upon his adjudication as being the first complete right in so far as his adjudication had supervened before any possession had been obtained by Inverasragan upon his assignation.

To the *1st*, it was *answered*, That the case did not fall under either of the alternatives of the act 1621; not the first, as the disposition is fully onerous; not the 2d, because upon most of the debts which Inverasragan had undertaken, and particularly that due to himself, ultimate diligence had proceeded prior to the pursuer's diligence, nay, before his debt was contracted, and therefore the pursuer could not say, in terms of the act of Parliament, that the disposition was granted in prejudice of his more timely diligence. And as to such of the debts, on which more timely diligence had not been done, it was *answered*, That as these debts not previously due to Inverasragan, but debts which he at that time undertook, the security given for relief of these no more fell under the act of Parliament, than if it had been a security for money borrowed at the time. To the *2d*, it was *pleaded* as a speciality in this case, which distinguishes it from the common case of dispositions *omnium bonorum*, when the granter is thereby rendered *insolvent*, that here the very purpose of the disposition was to prevent his insolvency, as it gave him an opportunity to carry on his trade. And to the *3d*, That as Archibald the disponer was in the natural possession of the tenement disposed, the sub-tack granted back to him by the disponee did complete the disponee's own right, so as to bar all posterior assignees of the disponer voluntary or legal.

The Ordinary having reported this case, THE LORDS, without taking any notice of the first two points, took it up upon the third; but as the fact had not been so fully stated upon it as it ought to have been, remitted to the Ordinary to enquire, Whether there had been any rent paid by Archibald the sub-tacksman, either to Inverasragan the disponee, or to the creditor, who, by the disposition, was to get L. 7 of it, or what evidence Inverasragan could give, that any part of the yearly rent payable to the Duke of Argyle had been paid on his account, as assignee to the tack, or that he was enrolled as tacksman in the Duke's rental.

But, upon the Ordinary's again reporting, that no evidence could be brought of any of these particulars prior to the pursuer's adjudication, THE LORDS, of this date, 'preferred the adjudger to the assignee, and remitted to the Ordinary to proceed accordingly;' and afterwards, on advising petition and answers, 4th. January 1751, 'adhered.'

This transaction was considered as fully onerous, and the project fair and generous on the part of Inverasragan, in order to enable his brother to carry on his business; but the decision went upon the abstract principle in law, and

whereof the pursuer was even in equity entitled to take the advantage, his debtor having omitted to take in his debt in the list, though Inverasragan may have been ignorant thereof. Transmissions of every subject of whatever kind must be completed by some public act that may come to the knowledge of third parties, and without which the transmission will be incomplete, be it ever so fair and honestly intended. The transmission of the property of moveables is completed by delivery, of lands by infestment, of *nomina* by intimation, of tacks and other rights which require no infestment by possession; and therefore between two tacks, or between two assignations to a tack, or between two sub-tacks, it is the first possession that determines the preference.

So far may be true, that in some cases, when a tack is assigned, the assignee cannot attain the natural possession, as, for example, when a proprietor assigns a tack, whereof years are still to run; but in that case, the civil possession, by uplifting the rents, comes in its place, or, if such assignee shall be considered only as an assignee to the mails and duties during the currency of the tenant's tack, it must, as other assignations, be completed by intimation to the tenant; but, in no case can a transmission be deemed complete, where no act intervenes other than what passes between the granter and receiver, and is known to no body but themselves, which was the present case. And it was thought no good answer, which for Inverasragan was chiefly insisted on, That as it was the very purpose of the disposition, that he was not to have the natural possession, and that consequently he was in effect no other than an assignee to the mails and duties, at least, during the currency of the sub-tack; so the sub-tack being to the granter himself, who was in the possession, there was no other to whom intimation could be made, and therefore, either the transmission ought to be considered as complete, or it must be said, which none would say, that such sort of agreement, however in itself fair and honest, was reprobated in law: For still, as has been said, the civil possession was what completed the right; for, as the remit to the Ordinary supposes payment might have been made of the Duke's rent by the disponee, or he might have been enrolled as the tenant, which ought to have served for intimation.

Kilkerran, (COMPETITION.) No 6. p. 143.

* * * D. Falconer reports the same case:

ARCHIBALD CAMPBELL vintner in Inverary, assigned 31st October 1741, to Colin Campbell of Inverasragan his brother, a tack for three 19 years, from the Duke of Argyle, of a tenement in that town, whereon were some old houses, and a new house built by himself; and disposed his household furniture, in payment of his debts to Inverasragan himself and others, of which he undertook to relieve him; and Inverasragan sub-set the same to him for 11 years, for pay-

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ment of the rent to the Duke, and of L. 12 advanced rent to be paid, L. 7 to John Sommerville one of the creditors, and L. 5 to himself.

Archibald Campbell continued to possess; and Thomas Wallace merchant in Glasgow, upon a further debt, of which Inverasragan had not become bound to relieve him, adjudged his tack, 23d November 1742, and pursued a mails and duties, wherein appearance was made for Inverasragan; and in the competition it appeared that the old rent was raised by the Duke's factors, from the possessors of the old houses; that the tenement was entered in the rent-roll by its name, without mention of either of the brothers; that Archibald had made one year's payment to John Sommerville, and some subsequent partial payments, the date of the first receipt being posterior to the adjudication; but it did not appear he had made any payment to his brother, only it was said his children had boarded with him.

Pleaded for the adjudger, This assignation did not transfer the tack, not being clothed with possession: *Traditionibus & usucapionibus, non nudis pactis, dominia rerum transferuntur.*

Pleaded for the assignee, His right was completed by possession, as his sub-tacksman possess in his name; so that he was in the civil possession: This could not have been doubted, if he had sub-set to a third person who had entered upon it; and it ought to make no difference that the sub-set was to the original tacksman: The rent was paid to the Duke by the sub-tenants; and there was no fraud in this case, the assignation being registered in the Sheriff's books, 19th November 1741.

Replied, The competitor mistakes the argument, which is not fraud, but the incompleteness of the right; there having no inversion been made of the possession; and so was the law with regard to base real rights, when possession was necessary to their completion. A base wadset was not completed by the granter's continuing to possess on a back tack, Stair, p. 209, 11th January 1678, Laurie against Irvine: Lands being disposed, reserving the liferent, the liferenter's possession did not cloath the disposition, 26th June 1739, Bruce against Dury; nor did a disposition from a father to children, while he continued to possess by a factory from them, 10th July 1669, Gardner against Colvill.

THE LORDS preferred the adjudger; and, on bill and answers, adhered.

Act. *Ferguson.*

Alt. *H. Home.*

Clerk, *Pringle.*

D. Falconer, v. 2. No: 176. p. 210.