TACKS.

1775. *November* 23. SCRIMGEOUR *against* MITCHELL.

WHETHER an express exclusion of assignees in a tack excludes also the power of subsetting has been often doubted. As to this, a distinction has been made betwixt a total subset and a partial one: the first has been held equal to an assignation, and consequently void; the last not.

This point occurred in the case of Scrimgeour and his trustees *against* Mitchell; and the Lords seemed to regard the distinction. At the same time, how a tacksman, who is at liberty to subset his farm to three or four sub-tenants, holding distinct parts, but so as to exhaust the whole, should not be at liberty to subset the whole to one tenant, seems difficult to conceive.

See 28th June, 1758, *Ronald Crawford* against *Maxwell.*

Even as to the general point, by the law of Scotland a lease is a personal grant unless there be circumstances in it which show the contrary. From this principle it follows, that a tack to a man and his heirs cannot be assigned. This holds as to voluntary assignees; but if, over and above this exclusion from principle, assignees are excluded *per expressum*, then judicial assignees are excluded also.

As to sub-tenants, in a tack to a man and his heirs, they are excluded, and whether total or partial makes no difference; but then, from all this, it seems to follow, that an exclusion of assignees does not comprehend an exclusion of sub-tenants: these are different, and require different clauses.

In the case here mentioned, Scrimgeour *against* Mitchell, the Lords, by their interlocutor, reduced the sub-tack, which was a total one; but, on a reclaiming petition, the cause went off upon this specialty, That Mitchel, the original tenant, to whom the tack was granted, excluding assignees, and who, notwithstanding thereof, had subset the whole to Scrimgeour, was barred from quarrelling his own subset; neither was the master's concurrence, by letter, to be party in the process, held to be sufficient, unless he brought a proper action. The master's right to interfere is established, 1 *New Coll. No.* 117; but he must do it in a proper manner.

By the decision 1747, December 4, Elliot *against* Duke of Buccleugh, it is established, that a tack excluding assignees *per expressum* cannot be adjudged. Upon this principle, John Mosman and George Hepburn having both adjudged a tack granted by Lord Hoptoun to Christie, excluding assignees, and his Lordship having given his concurrence to Hepburn, he was preferred, and Mosman not allowed to come in *pari passu.*

A tack, though a personal grant, it is thought would go to heirs, though not mentioned in the tack. There is no printed decision where this has been found, but rather on the contrary. It was strongly contested in the case mentioned by Lord Kilkerran, p. 538, *Watson* against *Thomson*, in November 1750; and in these papers several cases are marked for the master, and none for the heir; yet it is probable that the heir would carry it upon the maxim, *Qui providet sibi, providet hæredibus.*

The COUNTESS of MORAY *against* TENANTS of GLENFINLAS.

In the case of the Countess Dowager of Moray *against* the Tenants of Glenfinlas, it was contended, that, where a wife stands infeft in lands by way of locality, it is not in the power of the husband, without her consent, to set tacks of the locality lands, available against her when the locality opens.—See Mack. Obs. p. 104; Craig, p. 276; Stewart's Ans. p. 193; Fount. V. I, p. 35; and 16th June 1688. The Lords, by interlocutor, 23d July 1772, found, "That the late Earl of Moray, notwithstanding of the prior liferent, by way of locality, granted to the Countess, and her infeftment thereon, had right to grant tacks of the lands, contained in said locality, effectual against the Countess.—Affirmed on an appeal. But find, That the tacks in question, not having been regularly executed by the Earl, are not effectual against the Countess.—Reversed on appeal. In this cause it was admitted in the argument, and understood, both in the Court of Session and House of Lords, That, as a husband has no power to disappoint the wife's locality in whole or in part, even by onerous deeds subsequent to her infeftment, far less by gratuitous or fraudulent deeds. So he cannot, under colour of a lease, give away part of her liferent locality by setting the lands out of the ordinary course of administration and at an under value.*

And, accordingly, when a case occurred,

MARGARET ROBERTSON, Widow of Peter of Crossbasket, *against* PETER,

IN which a tack had been set of locality lands by the father to the second son of a former marriage—in which it appeared to the Ordinary that it was not such a fair contract of location conduction as the husband had power to enter into, notwithstanding of the locality, but that it was a device to confer the possession of a great part of the locality lands upon the son at a rent below the just avail, and to diminish the yearly value and embarrass the widow's possession of the remaining part; (Fount. p. 35,)—he reduced the tack in a pursuit at the instance of the widow, and decerned the son to remove. And this day, 16th January 1777, the Lords adhered, and found expenses due.

* In this case the tacks were duly extended and signed by the tenants, agreeably to the Act 1681. They were delivered to Lord Moray, and kept by him in order to be subscribed, but bad