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against one that is absolute. In the case of an adjudication the right is redeemable; but, in no case will the law allow a tenant, or set of tenants, to be obtruded upon the landlord, whom he has excluded. In the present case, there is not the least room to doubt that the tenant is changed. Livingston, the original tenant, has become bankrupt; all his effects have been pointed or sold; he wrought as a day labourer to Mr. Henderson, his creditor, whom he put into the possession of the farm; thereafter he grants him a missive, giving him full right to the possession, and obliges himself to sign any other deed that might be thought necessary; and, to crown all, he relinquishes the farm, retires to the Canongate, and there takes up his first business as a baker. If, after all this, Mr. Henderson shall not be accounted an assignee to the tack in question, it is inconceivable what writings, or what circumstances, are requisite to constitute that character.

"The Lords repelled the defenses, and decerned in the removing, both against Henderson and Livingston."

Act. *M'Laurin.* Alt. *Al. Bruce.* Clerk, *Ross.*

Fol. Dic. v. 4. *p.* 325. *Fac. Coll. No.* 48. *p.* 127.

*** See note relative to this case in the Appendix to this Title.

1775. *March* 9.

JOHN GILLON of Wallhouse, *against* KATHARINE MUIRHEAD, and ANDREW DICK her Husband.

No. 168.

Tack granted for a term of years to a man and his wife, and longest liver, and the heirs of the longest liver, secluding assignees, the wife surviving, and continuing the possession of the farm,—Whether does her subsequent marriage irritate the tack?

In March 1771, Mr. Gillon granted an eighteen years lease of certain lands to Alexander Thornton, and Katharine Muirhead his spouse, and the longest liver of them, and the heirs of the longest liver, expressly excluding assignees and subtenants; declaring, that, if any of them shall subset or assign, then the said tack should, *ipso facto*, become null and void.

In virtue of this tack, Thornton possessed during his life; and Katharine Muirhead, who continued to possess after his death, having entered into a second marriage with the other defender, Dick; the landlord understanding, that this event put an end to the tack itself, instituted an action of removing, before the Sheriff of Linlithgowshire, upon the act of sederunt 1756, concluding against the defenders to remove, in respect of Katharine Muirhead's second marriage, which imported a legal assignation to her husband, and consequently a forfeiture of the lease; but the Sheriff, upon advising the same, pronounced the following interlocutor: "Finds, That the said tack is not irritated by the defender Katharine Muirhead's marriage, and therefore assoilzies from the removing."

Mr. Gillon having brought the cause by advocation to this Court, and the Lord Ordinary having ordered informations, it was

Pleaded for the pursuer: That the point now to be determined is shortly, whether or not the marriage of a tacks-woman be a contravention sufficient to irritate her right, when, in the tack, assignees are expressly prohibited, under the penalty of an *ipso facto* forfeiture? That the pursuer is not singular in his opinion

upon this question, will appear from the following authorities, Craig. Lib. 2. Dieg. 10.; Spottiswood, Title TACK; Stair, B. 2. Tit. 9. § 26.; Bankton, B. 2. T. 9. § 13.; Erskine, Large Inst. B. 2. Tit. 6. § 31.; Small Inst. B. 2. Tit. 6. § 13.; all uniformly in favour of the pursuer on the point in dispute; and, conformably thereto, the solemn decision of this Court, Sir John Hume against Margaret Taylor and her husband, No. 81. p. 5700. by which it was found, that a tack granted to a widow was irritated by her second marriage. It has been, indeed, urged, that the decision here built upon, however applicable, yet stands alone, and therefore can have very little strength as a precedent; but, upon attention, the contrary appears to be a more just conclusion. For why has this point been but once decided? Surely because it hath been but once disputed: And why but once disputed, if the opinion of Craig, Spottiswood, and Stair, confirmed by our supreme civil Court, hath not been universally acknowledged as law? To which list of authorities, Bankton and Erskine fall also to be added. No. 168.

Argued for the defender: The question resolves into a neat point of law, viz. whether a tack, excluding assignees, becomes forfeited upon the marriage of the tenant who is a female; especially where the tack is originally let to a woman, and declared to be for her life, if she shall live for the space of years therein mentioned, and contains no exception whether she is married or not?

It may be true that such notion did anciently prevail with some lawyers, but which seems to have been founded upon an erroneous principle, and will now be considered by the Court as a remnant of rude and Gothic strictness, long ago exploded, and no way consistent with the manners or ideas of the present age.

By the conception of this very tack, it belongs not only to Katharine Muirhead during life, but to her heirs after her death, if she happens to die before the expiration of it; so that the forfeiture which is here demanded is not only for herself, but for the heirs of her body, which is a forfeiture of the most rigorous kind, and now generally disused, even in the case of entails. By the word "heirs," was certainly meant heirs of every kind, including those of the wife's body, as well as collateral heirs, as no distinction is made; and, indeed, any distinction to the prejudice of the heirs of her body would have been very unreasonable. Now, the defenders beg leave to ask, how this tack can possibly go to the heirs of her body, if she is not allowed to marry, and to have heirs; or, which is the same thing, if she incurs an irritancy of her lease as soon as she does marry? It may be expected that she will have children by her present husband, who certainly are not excluded; on the contrary, are called to succeed her in the tack, as heirs in general are called; and yet the tendency of this process is to exclude them. And, supposing there had been children of the first marriage, these would also have been forfeited, notwithstanding their being the heirs both of husband and wife; and though they are surely altogether innocent of this transgression, which their mother, it would seem, has been guilty of in marrying a second husband.

In short, if this irritancy is to take place, the very conception of this tack seems to be improper, and inconsistent with itself; for it evidently imports, that Katharine

No. 168. Muirhead is to hold the lease during her life, without any distinction whether she marries a second husband or not, and it further says, that her heirs are to succeed her in it, without any distinction of heirs, and without excluding the issue of a second marriage more than the first.

Besides, the forfeiture here contended for is against all reason and justice, and destitute of every principle, either of law, equity, or expediency. The defenders cannot place this argument in a clearer light than by appealing to a remark subjoined to one of Lord Kaims' remarkable decisions, Elliot *contra* Duke of Buccleugh, No. 14. p. 10329. *voce* PERSONAL AND TRANSMISSIBLE, where the question immediately at issue was, whether a tack excluding assignees was adjudgeable?

The defenders cannot find any case in which a tack, in the circumstances therein stated, was set aside, except that of Sir John Hume against Taylor. But the Court seems there to have been misled by the authority of Craig; and, in the after case of Elliot against the Duke of Buccleugh, a contrary opinion seems most justly to have prevailed. The idea of a virtual assignation cannot, upon any reasonable ground, be admitted. A married woman might as well be reckoned incapable of holding the property of land, because her husband must manage it; and this management is a virtual conveyance of the subject itself to the husband. The right, in both cases, clearly remains with herself; and she cannot be the worse of having a husband for her manager.

As to Mr. Erskine's authority, upon looking into the passage appealed to, it will be seen how much he has been at a loss to account for a doctrine, which he seems to have thought himself obliged to adopt, on account of Craig's authority, and the decision of Sir John Hume. He says, "That though a tack be deemed an heritable subject as to succession, yet as it is granted *propter curam et culturam*, and as the whole stock of ploughs, horses, oxen, wains, and other utensils of a farm, go by the marriage to the husband as moveable, the marriage also transfers to him the right of the tack, which cannot, in that view, be separated from the implements of tillage." And this argument seems to have been used in the case of Sir John Hume: But it is plain that the reasoning is inaccurate.

It is not necessary, nor does always happen, that the person who has right to the lease is proprietor of the stocking. In such cases, it may depend upon settlements whether the moveables belong to the husband or to the wife. The husband may, in his contract of marriage, discharge his *jus mariti* in them, and may renounce all management of the subject of the lease. And it is laid down by our lawyers, particularly by Lord Bankton, "That if, by the marriage articles, the tack is reserved to the wife, exclusive of the husband's *jus mariti*, or power of administration, the case would alter, since the reason for the tack's becoming void would then cease."

They shall only add, that the account given of this irritancy by Lord Stair makes it still more extraordinary, and more difficult to be explained, or extricated upon any rational ground. He says, B. 2. Tit. 9. § 26. "That though tacks granted to women fall by their marriage, yet they may revive by the husband's

death, being unexpired." At this rate, a tack may be constantly going backwards and forwards between the master and tenant. No. 168.

Neither is there any thing in the observation, That, by marriage, the wife is withdrawn from personal diligence; for, as the husband is something more than a common administrator, being entitled to the profits of his wife's estate which accrue during the marriage, so he is also liable for the yearly burdens affecting it, and may be attached by personal diligence for payment of the rents due by her, which will answer the master's purpose just as well as personal diligence against the wife; and he has his hypothec entire, besides being entitled to adjudge the tack, or to declare an irritancy for not payment of rents, or to exact caution upon the act of sederunt, if he shall find it proper so to do; so that he has every remedy which a landlord can possibly have in any case, nor can the pursuer be under the least difficulty of recovering his rents.

Replied: The amount of the defender's reasoning is, that if the pursuer's claim be legal, it is nevertheless unjust, and should therefore be discountenanced by the Court. In answer to this, it might be maintained, that it can never be equity for the judicial power in any country to condemn the inhabitants, because they direct their behaviour by the law of the land, however iniquitous that law may appear to persons interested against its enforcement. Much likewise might be said to shew the impropriety of altering so well an established principle of our municipal law, even supposing it were in some degree contrary to the primary law of nature, or unaffected by the situation and customs of a particular people.

With respect to the rights of landlord and tenant, the advantage of the tack never can be conveyed by the tenant, without the heritor's consent, because it is presumed to be a personal favour. In the present case, it was really such; and, as a particular regard is always had to the qualifications of the tenant, no other person but he can be admitted to the management of the farm, contrary to the inclination of the proprietor.

The tack now in dispute, if it were assignable, would be assigned, and is therefore forfeited by the prohibitory and irritant clause which it contains. The husband is absolute administrator, and enjoys all the benefit of the tack. In what respects then is he inferior to an assignee? If the wife be still called tenant, what is her right? It is scarcely an idea, whatever be her name. It was found, 4th December, 1747, Elliot *contra* Duke of Buccleugh, No. 14. p. 10329. that a tack which had no such strong prohibition of assignees as the present, could not be adjudged to creditors; but, surely, neither the pursuer nor the Court ever thought that an empty title was then all the ground of dispute; and, what else could it be, if, without an assignation either voluntary or judicial, a right equal to the *jus mariti* could have been conveyed from the tacksman?

Supposing, what by the way might be disputed, that a tack, though carried by a simple assignation, continues nevertheless unassigned by the marriage; yet, during the marriage, this does not prevent the powers of the husband being as great as those of an absolute assignee; and surely a temporary assignation is a

No. 168. forfeiture of the right, which may not continue so long as the assignation. In fine, it would seem somewhat different from equity, if the Court sustained a virtual assignation, (which is scarcely disputed in the present case) where any ordinary assignation differing in nothing but the form, could not be pleaded for by the most sanguine lawyers.—A Court of Justice can never, upon its own authority, violate the agreements of private parties, so as to do a wrong to the one, in order to favour the other, from considerations of public utility. And if, from the contract itself, and from the interpretation of the law, it is evident, that the rights of the husband are inconsistent with those of the landlord, there can be no dispute which should yield.

The Court, upon advising informations, ordered a hearing, and afterwards determined the point by the following judgment :

" The Lords remit the cause back to the Sheriff *simpliciter*."

Act. *J. Dickson.* Alt. *Ilay Campbell.* Clerk, *Ross.* Reporter, *L. Probationer Covington.*

Fol. Dic. v. 4. *p.* 325. *Fac. Coll. No* 170. *p.* 79.

1786. *February* 5. WILLIAM ROSS *against* JAMES MONTEITH.

No. 169.
Bygone rents unpaid, an inseparable burden on an assignment to a lease.

A tacksman of lands assigned his lease to certain persons, as trustees for his creditors. These trustees having entered into the possession, were sued for payment of the rents of two years antecedent to the assignment in their favour.

The Lord Ordinary found, That by accepting the assignation the defenders had subjected themselves to payment of the arrears of rent then due.

A reclaiming petition being presented to the Court, it was held to be perfectly clear, that those arrears were a burden inseparable from the right to the lease; and therefore,

The petition was refused without answers.

Lord Ordinary, *Alva.* For Petitioners, *Cullen.*

S. *Fol. Dic. v.* 4. *p.* 328. *Fac. Coll. No.* 155. *p.* 390.

1788. *January* 22.

PATRICK ALISON *against* MARGARET PROUDFOOT and ADAM LITSTER.

No. 170.
Lands let for 19 years, not to be subset, without a special authority from the landlord.

Patrick Alison let part of the lands of Newhall, for nineteen years, to James Wilson, " secluding his heirs, executors, adjudgers, and assignees, except in the event of his wife's surviving him, in that case he shall have power to assign to her what years of the tack shall be then to run."

James Wilson assigned the lease to Margaret Proudfoot his wife, who immediately after his death subset the lands to Adam Litster. An action was brought by Mr. Alison, the landlord, for setting aside this sub-lease, when it was