1788. *January* 17. BERTRAM and GARDINER *against* HUGH FINLAY.

BANKRUPT.

23d Geo. III. c. 18.—This Act provides, that a party desirous to be conjoined in a poinding, must *summon* the poinder within a limited time. The appearing in an action, and producing an interest, found equivalent.

[*Fac. Coll. X.* 27; *Dict.* 1250.]

JUSTICE-CLERK. It often happens in multiplepoindings that all parties having interest are not called, but that such persons appear, claim, and are preferred. In inferior courts, one arrestee pursues a forthcoming, and yet other creditors appear and compete: a summons, required by the statute, is still less than a judicial demand, which has been made here. After having made a judicial demand, a summons would have been superfluous.

ESKGROVE. The first clause in the statute, with regard to arrestments, allows the production of an interest in the forthcoming. In a poinding there is no occasion for a forthcoming; it is required that the debtor be called: creditors may produce their interests,—that is equivalent to a summons. In the Act 1662 the word *cite* is used; and yet it has been found that a creditor, named in the testament, may be received within six months, although never cited.

On the 17th January 1788, "The Lords repelled the objection."

For Bertram and Gardiner, Wm. Tait. *Alt.* Ed. M'Cormick.

*Reporter*, Stonefield.

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1788. *January* 22. PATRICK ALLISON *against* MARGARET PROUDFOOT and ADAM LITSTER.

TACK.

Lands let for Nineteen Years not to be subset without a special authority from the landlord.

[*Fac. Coll. X.* 29; *Dict.* 15,290.]

DREGHORN. I do not see that in a lease, or *locatio conductio*, there is a *delectus personæ*. In a lease of a house there is none, though there are plausible reasons for giving it; neither is there in lands: the *delectus* was, while a master was, in many instances, liable for his tenants' faults: that is not the case now; and it would be wrong to maintain a maxim, and continue a practice, after the reason of the one and of the other has ceased.

HAILES. Without entering into the question, I must say, that in tenants there is a *delectus personæ* in the feelings of landholders. A master, when he grants a lease to a farmer and his heirs, has his eye first on the original tenant, but he has also an eye to the persons who may probably be the tenant's heirs: he cannot keep the tenant alive, but he has a probability that the son of a farmer will be a farmer, and industrious and intelligent like his predecessor. Leave a tack to go to subtenants, and no man can guess who will come next. Since I sat on this bench I have, in processes, met with farmers to whom I would not have let my land at double rent. Quarrelsome and litigious tenants may pay their rent, but they are nuisances to the landlord and to the neighbourhood. Suppose a tenant of mine should have this implied power of subsetting, he subsets to an anabaptist or independent teacher, who may be a worthy man, and a skilful, and even opulent farmer. But his notions of order do not suit with mine: he estranges the commons from their parish church, forms a congregation, and turns my house into a conventicle: do I not wish to have a *delectus personæ* so as to be able to keep out such a subtenant? But that can only be done by secluding subtenants. Again, two great distillers take a subtack of my grounds; they erect great buildings, form roads, make such inclosures as suit them, and pay rent regularly. But an Act of Parliament comes, laying an additional duty on home-made spirits: the great distillers decamp, leaving me in possession of large edifices which I cannot use, of roads for which I have no occasion, and of inclosures calculated for a particular species of agriculture which a common farmer would not employ: is there no *delectus personæ* between such men and farmers and their natural heirs? [This imaginary case came to be too truly verified within a month, when the great distillers, the Steins and Haig, gave way, and, in their ruin, drew a number of little men along with them.]

SWINTON. Leases in general are for 19 or 21 years. If a lease be a *stricti juris* contract, that puts an end to the question. But suppose it to be a *bona fide* contract, and let us consider what are the objects of the parties: on the part of the landlord they are security, a good rent, and a good neighbour: on the part of the tenant, a comfortable living, and a good master. None of those things are so probably obtained in the case of sub-tenants as in that of principal tacksmen.

ESKGROVE. The arguments against the validity of this subtack go rather to show what a legislature should do than what judges must. In the Roman law there was a power of subsetting: in our law there was not. This is to be ascribed to the introduction of feudal principles; but, as those principles receded, that rigid rule was laid aside: hence, formerly heirs were excluded, but now are admitted: hence legal assignees have been admitted, though for what reason I know not. Voluntary assignees are excluded still. Now, the master's object is to get the best rent, and the tenant's to secure a convenient possession. Tacks are now set up to roup: does the master, on such occasion, show any *delectus personæ?* and can he say to the highest bidder, you shall not have the land, for I do not like your character, or your face, or your family. *Delectus personæ* is an old bugbear.

ROCKVILLE. I have always understood that tenants have no right to grant subtacks unless they are permitted. Stair and M'Kenzie are clear as to this: a *delectus personæ* still subsists. For instance, I wish to have an honest tenant,

and the tenant subsets to abandoned smugglers, the bane of trade and the ruin of the country.

BRAXFIELD, JUSTICE-CLERK. Tacks are *stricti juris* to a certain extent; but, in some particulars, they are *bonæ fidei;* being *bonæ fidei*, they are to be interpreted *secundum bonum et equum.* They are *stricti juris* in our law, because there is a *delectus personæ*, not relinquished unless so expressed. I should not have required the opinion of Lord Stair, &c. to satisfy me that a landholder is entitled to direct the management of a farm which is his property, and to choose the tenant whom he considers as the fittest man for that purpose: all my plans are blown up at once by the introduction of a troublesome or ignorant subtenant. It is very true that *consuetudo facit legem*: it may even abrogate statutes, and, consequently, any former use and custom; but here there is no such consuetudinary law. It is said that the *delectus personæ* was introduced in feudal times for the purpose of war, and that is now over. But tenants never were meant to be soldiers; feuars were meant for soldiers, tenants for cultivating the ground. *Delectus personæ* has more place now than formerly; for now farming has become a science, whereas, two centuries ago, all farmers were equally ignorant. Besides, leases have become longer: formerly, a nineteen years' lease was considered as an alienation; now almost every lease is of that endurance, and many of them are of a longer. The decision in Harcarse is against my opinion. It is very probable that that decision induced landholders to insert the clause *secluding subtenants*, which has now become almost general. It is said, "if there were a *delectus personæ*, tacks would not go to heirs." *Answer*, "Formerly they did not; but, from conveniency, this was altered, because a tenant could not improve upon an uncertainty." Liferent tacks were assignable; because they were understood to be somewhat like the constitution of a freehold, in which the tenant had a greater right than that of one for a term of years. As to the case of *Mr Gillon*, the decision was wrong, and good lawyers were against it.

MONBODDO. Words, according to the Roman law, ought to be interpreted so as to have some meaning. If subtenants were implied, there would be no occasion for saying any thing about them. The landlord is in a worse condition by a subtack than by an assignation; so if he excludes assignees, he must mean to exclude subtenants. The subtenant is not liable for bygones preceding the date of his right; even the stocking on the ground, or the fruits, are not hypothecated beyond the rent payable by the subtenants: so that, in effect, a partial subtack diminishes the right of the landlord. It is said that there is no *delectus personæ* in tenants; it might as well have been said that there was none in servants. An improper tenant, though with a good stocking, will ruin himself and his farm.

HENDERLAND. I think that the lessee is not entitled to introduce a subtenant. With respect to lands, there is *personæ industria electa.* A lease is a species of society, in which there is certainly a choice: when rent is paid in grain, the industry of the tenant, in raising good grain, affects the *quantum* of the rent paid. It is laid down in the Roman law that a tenant may subset; but it is difficult to argue from the practice of one state to that of another. It has been found with us, that assignees are not admitted unless mentioned. The

case, 1747, was a favourable one for behoof of creditors. A total subset is equivalent to an assignation.

PRESIDENT. When this case came before me as Ordinary, I went more upon the circumstances of the case than upon the general point. Had it not been for those circumstances I should have taken the case to report. When we look back into the former state of leases in this country, we must be satisfied that there is now a species of property in leases which, during the more ancient, and, I may say, barbarous state of the country, was unknown. Before the Act 1449, brief of distress for the landlord's debt went against the tenants; then their right, by another act, was made real: still tacks did not go to heirs. This was altered without hesitation: by later practice a liferent-tack may be assigned, and yet a tack for twenty-one years is of more value than a liferent of any one life. [This proceeds on a very common error, the comparative estimation of a term of years.] Suppose 21, when opposed to a life, respects not one life, but, perhaps, 20,000 or 30,000 past lives. Were an individual, at the age of twenty-five or thirty, asked whether he chose to have a pension of £100 per annum, for his life, or for 21 years, if he was not deeply skilled in calculation, he would answer "for life;" though, in truth, by so doing, he took the odds. A hundred years is said to be nearly equal to a perpetuity, and yet no man but a calculator, when buying a lease even of two hundred years' endurance, would consider his purchase as being nearly equal to a perpetuity. A lease devolving on a woman was forfeited by the old law when she married; this also was altered, and, I think, upon sound principles. Some of your Lordships seem to hold it to have been a bad decision, but I cannot view it in that light. [The President rested much on the decision in Harcarse; and he admitted, what the Justice-Clerk supposed, that the landlords in Scotland, in order to prevent the consequences of that decision, introduced the clause excluding subtenants.] When landlords mean to exclude subtenants, they take care to say so. In the present state of the country, the Court ought to encourage tenants who are bestowing their all in improving the lands let to them. Whenever you admit *heirs*, all notion of a *delectus personæ* ceases.

On the 22d January 1788, "The Lords found the tenants barred from subsetting;" altering the interlocutor of the Lord Justice-Clerk; [now Lord President.]

*Act.* A. Roland. *Alt.* R. Craigie.

*Diss.* Eskgrove, Ankerville, Dreghorn, President.