of throwing up the tack, the defender showed the same *animus* by apprehending the possession. The Lords found, That the pursuer's relinquishing the possession, and not claiming the same for several years, is relevant to exclude her from being re-possessed. See APPENDIX. No. 193.

Fol. Dic. v. 2. p. 426.

1802. *December* 1. EARL of DALHOUSIE *against* WILSON.

No. 194.
A tenant whose lease excludes assignees and sub-tenants, forfeits it, if he leave the kingdom, and commit the management of his farm to another.

William Wilson possessed the farm of Millholm, under a missive of lease from the Earl of Dalhousie; to endure for nineteen years from Whitsunday 1788. He died in 1793, and was succeeded by his son Charles, a boy of fifteen years of age. In 1797, the missive was extended into a regular lease, by which Lord Dalhousie set " to the defender Charles Wilson, and his heirs, secluding assignees and sub-tenants, without the proprietor's consent in writing, all and whole the mill and mill-lands of Millholm."

Soon after, Wilson became in arrear; and the Earl having brought a process of removing before the Sheriff, Charles Wilson, senior, became cautioner, in terms of the act of sederunt The tenant afterwards assigned to John Wilson, son of Charles Wilson, senior, the crop and stock on the farm of Millholm; " and farther, I hereby nominate, constitute, and appoint the said John Wilson and his foresaids, in trust, as aforesaid, my stewarts, managers, or overseers of the said farm, and mill of Millholm." This deed of assignation contained a variety of provisions; that John Wilson was to give an account of his intromissions; that the proceeds of the farm should be applied in the first place, for payment of the rent and public burdens, afterwards for expense of management, and to discharge a debt due to the tenant's two sisters, and that the residue was to be paid to him, his heirs and successors.

About this time Charles Wilson joined a regiment of militia, and left the management of the farm to John Wilson, who did not reside on the lands, but employed a servant or manager. Wilson afterwards left the militia, and went to the Island of Jamaica; upon which the Earl brought an action of removing, concluding, that the lease to Charles Wilson was at an end, as he himself deserted the farm, and was not entitled to sub-set the lands, or to assign his lease.

The Lord Ordinary reported the cause. The Earl

Pleaded: A landlord's interest is not merely confined to the payment of rent. In every lease there is a *delectus personæ*; and as the rights of tenants are strictly interpreted, a lease cannot be assigned or conveyed in any shape by a tenant, unless an expres power for this purpose be granted by the landlord; Stair, B. 2. Tit. 9. § 26; Bankton, B. 2. Tit. 9. § 11; Erskine, B. 2. Tit. 6. § 31; Dirleton, p. 196. While such is the law, a tenant will not be allowed to defeat it, by mak-

No. 194. ing his sub-tenant assume a fictitious character. In this case, the assignation of the stock and crop to John Wilson, with the appointment of him as manager, is nothing but a device to evade the exclusion of assignees and sub-tenants in the lease; for, after a tenant has divested himself of the crop and stock, and has renounced the management, nothing remains of his original character. And as he has gone abroad, the landlord has, in this case, not only his farm managed by a stranger, but is also prevented from using personal diligence against his tenant. It makes no difference that John Wilson is bound to hold count and reckoning, and pay over the surplus to Charles. This surplus is in fact nothing more than the *extra* profit of the lease, after deducting the rent and the costs of management, which is what every cedent of a lease reserves to himself; and the "reasonable allowance" stipulated, is nothing else than the usual profit of an assignee. The circumstance, that part of the proceeds of the farm is to be applied to the discharge of a debt due by the tenant to his sisters, can make no difference in the obligations which subsist between him and his landlord; and it has been found in a lease exclusive of assignees that the creditors of a tenant cannot adjudge his right; Elliot against Duke of Buccleugh, No. 14. p. 10329. *voce* PERSONAL AND TRANSMISSIBLE; Durham against Henderson, No. 167. p. 15283.

Answered: A *delectus personæ* does not apply in the case of a lease granted to heirs, where the farm may eventually come into the management of a variety of persons. The Earl has no reasonable grounds of complaint; for the lands are cultivated in the manner prescribed by the lease, and the rent is regularly paid. There is no stipulation that the tenant should reside upon the farm; and as circumstances make that inconvenient, he has made provision for the cultivation, by appointing an overseer, who is qualified to manage it. He has not deserted the possession, in the legal sense, as understood in the act of sederunt 14th December 1756, because he has not left the farm "unlaboured at the usual time of labouring." The transaction complained of is not an assignation of the lease, nor does it imply a transference of all the profits of the farm; and the conveyance of the stock is merely a laudable expedient for payment of the tenant's debt to his sisters, which was otherwise secured upon these moveables. But even although it were held to be an assignation, the seclusion of assignees in the lease is not absolute, but only "without the proprietor's consent in writing." This consent he is not entitled arbitrarily to withhold, and he has not been able to state any reasonable objection to the person intrusted with the management; Duke of Roxburgh against Archibalds, No. 89. p. 10412. *voce* PERSONAL AND TRANSMISSIBLE; Hepburn against Burn, No. 88. p. 10409. IBIDEM; Laird against Grindlay, No. 172. p. 15294. The circumstance of the tenant being in such a situation that personal diligence against him would be unavailable, is not of itself sufficient to forfeit his lease; Crawfurd against Maxwell, No. 190. p. 15307.

The Lords decerned in the removing.

It seemed to be the opinion of the Court, that as the tenant had left the kingdom, and had thereby withdrawn himself from the jurisdiction of the Courts of

this country, he must be held as having abandoned his lease; and as the farm remained without a tenant, the landlord was entitled to enter to the possession. No. 194.

Lord Ordinary, *Dunsinnan.* Act. *Lord Advocate, Hope, Connell, Campbell, jun.*
Agent, *Ja. Davidson, W. S.* Alt. *Solicitor Blair, Wolfe-Murray.*
Agent, *Robertson & Ainslie, W. S.* Clerk, *Home.*

J. *Fac. Coll. No. 65. p. 147.*

SECT. XIII.

If the Tacksman is bound to produce his Tack in his Master's Court?

1570. *December 25.* BORTHWICK *against* LORD ST. JOHN.

No. 195.
The law relative to this does not apply to tacks.

In an action of ejection moved by Michael Borthwick against my Lord St. John, for ejection of him furth of certain lands, the said Michael having an year's tack to run; it was answered by the defender, that he did no wrong in ejecting of him, because he lawfully summoned the pursuer, at four lawful courts, to produce the assedation of the lands libelled, who would at none of the said courts produce the same; and therefore the pursuer's assedation was decerned to be null, and the lands to be in the Lord St. John's hands, to be disponed at his pleasure, according to the law and practice of this realm, whereby the superior may recognosce in his own court the lands of his vassal, if he produce not his holding at four courts. It was replied by the pursuer, That the law of the Majesty touching the production of evidents of free tenants cannot be extended to tacks, because it is a law penal, and otherwise therefore might not be extended; and where it was objected, that the defender having a decreet for him, could not be decerned to have done wrong before reduction of the decreet; it was answered, That the said decreet mistered no reduction, because it was given *non a suo judice;* for no superior may be Judge to reduce a nineteen years tack; and also, it was null *quia non erat conformis libello,* because the pursuer was never summoned to see his assedation cassed, and annulled, and albeit, the sentence cassed and annulled the same. The Lords found the defender to have done wrong in ejecting of the pursuer, and that the law touching the production of evidents of freeholders could not be extended to tacks, and the sentence given mistered no reduction, because it was null of the law; quia non a suo judice lata est et ultra libellata.

Fol. Dic. v. 2. p. 426. Maitland MS. p. 204.