

No 79.

only set to himself, without heirs or assignees, and so he being dead, it was only personal and expired.—*Replied*, They had continued in possession since his death, and had paid mail and duty, which explains sufficiently the meaning of parties.—*Duplied*, This possession was no homologation of the tack, it being not by virtue of the tack, but mere tolerance and tacit relocation; and the accepting mail and duty hath been found no homologation where the tack was null. THE LORDS found the tack expired, and decerned the defenders to remove.

Fountainball, MS.

1687. March. SIR JAMES ROCHEAD against JOHN MOODIE.

No 70.

A tack let for 19 years to a man and his wife, and their heirs, secluding assignees, may be subset, an exclusion of assignees being no exclusion of sub-tacksmen.

THE Laird of Innerleith having set a tack for 19 years to James Halyburton and his wife, and to their heirs male or female, secluding assignees, except that James did assign to some of his bairns; and after James and wife's decease, their son and heir, who succeeded to the right of the tack, having granted a sub-tack to his sister's husband, the heritor raised a process for declaring the tack void as being assigned, contrary to the provision therein, not to assign.

Answered, The tack was assignable to James Halyburton's bairns, and the defender's wife is a bairn; *2do*, The defender hath not an assignation but a sub-tack, whereby the master hath no prejudice, seeing the tacksman continues also liable to him for the rent.

Replied, The power of assigning to bairns is only conceived in favours of James the father, and not in favours of his heirs; and here the assignation is made by the heir; *2do*, Though a tack granted to one and his heirs, with a power to out-put and in-put tenants, or without seclusion of assignees, might be assigned, yet such a thing cannot be allowed of here, except bairns *ut supra*, are expressly excluded. And to grant sub-tacks is *fraudem facere legi*, seeing oft times *industria personæ*, and the good humour of the tacksman, is considered.

Duplied, The clause allowing the father to assign is not taxative, and the heir is *eadem persona*; and the daughter's husband is the same with herself, seeing a tack in her favours would fall under her husband's *jus mariti*.

THE LORDS found, That the clause secluding assignees did not hinder to grant sub-tacks; which was thereafter adhered to.

Fol. Dic. v. 2. p. 76. Harcarse, (TACKS and RENTALS.) No 955. p. 268.

* * * It is mentioned here by Harcarse, that in the month preceding, a similar decision had been given in the case of Madder of Langton against Lord Tarras.